IN THE
SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI

No.: 2009-CA-00301

WILLIAM ALIAS, JR. — APPELLANT

v.

THE CITY OF OXFORD, MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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I. The Lower Court Appeal Was Timely Filed—It Was Filed Within 10 Days of the Decision Being Final and the City Waived This Argument Below

The City of Oxford raises an issue for the first time in this entire case in its Brief of Appellee: That the notice of appeal in this case was not timely filed. Brief of Appellee at 6-8. In the court below, the City of Oxford noted that Alias had filed its brief "once the minutes were approved...." Record at 89. The City argued that Alias's appeal should be dismissed due to delays in addressing the city's objection to Alias's bill of exceptions. Record at 99-100. There was no hint of a problem with the timeliness of the notice of appeal. The trial court ruled in its opinion: "The Court is of the opinion that the Appellant's appeal was timely perfected. ***Miss. Code Ann., Sec. 11-51-75; Bowen v. DeSoto County Board of Supervisors,*** 852 So.2d 21 (Miss. 2003)." Record at 123. From this ruling, the City of Oxford did not file a cross-appeal.

The primary reason that this Court should reject this argument is that it has been waived—it was not raised in any way in the court below—and issues about the time for an appeal to the circuit court are waived if not made. While subject matter jurisdiction cannot be waived, it is clear that other jurisdictional questions can be waived. ***See Duvall v. Duvall,*** 80 So.2d 752, 753-54 (Miss. 1955) ("If there was any lack of jurisdiction, it was that the court did not have jurisdiction of the subject matter. Other jurisdictional questions may be waived."). That the time period for an appeal to circuit court can be waived is established by ***City of Jackson v. Calcote***, 910 So.2d 1103 (Miss. App. 2005). Calcote filed a suit in County Court accusing police officers of the City of Jackson of using excessive force. He was awarded a judgment on April 16th, and the City of Jackson did not file a notice of appeal until May 30th, "obviously after expiration of the 30 day period mandated by our rules...." *Id.* at 1108. Although the record did not reflect that the city had filed an appropriate

motion for extension for time within which to appeal, the Court of Appeals rejected Chad Calcote's effort to argue about the timeliness of the appeal because he had not raised the issue in the lower court:

> Our hesitancy to agree with Chad stems from the fact that Chad did not attack the timeliness of the appeal after the circuit court granted the City of Jackson's motion for extension of time to appeal. ...
>
> Although Chad challenged the City's motion for extension of time to file their appeal, Chad did not advance any argument or challenge the circuit court's decision to extend the time for appeal in any other way until Chad raised his argument in his reply brief. ***Chad should have challenged the timeliness of the appeal before he submitted his reply to the City's brief.*** ...Chad did not file a motion to dismiss the City's appeal. Chad did not cross-appeal.... [W]e hold it insufficient to challenge the timeliness of an appeal after the appeal is otherwise proper and before this Court.

Id. at 1109 (emphasis added). ***Calcote*** stands squarely for the proposition that a party can waive the timely filing of a notice of appeal to circuit court. Calcote even raised the issue in the Circuit Court while the appeal was pending, but, because he did not raise it in a timely manner, he was held to have waived the issue.

A comparison of the procedural posture in this case to the procedural posture in ***Calcote*** demonstrates how thoroughly this issue had been waived. The City of Oxford here concedes waiver in a footnote in its brief: "The city did not raise the timeliness issue below." Brief of Appellee at 7 n.2. The city then goes on to cite two cases—***Duvall,*** quoted above, which holds that subject matter jurisdiction, unlike other jurisdictional questions, cannot be waived, and ***Esco v. Scott,*** 735 So.2d 1002, 1006 (Miss. 1999), which makes the same general comment about subject matter jurisdiction in the context of an argument about whether a party had properly raised a challenge to the eligibility of certifying attorneys in an election contest. Neither case involves the question directly addressed in ***Calcote***—that a party ***can*** waive the timeliness of an appeal to circuit court, which the city conceded it "did not raise" below.

This question of timeliness is not a question of subject matter jurisdiction. "The subject matter means the nature of the cause of action and the relief sought." ***Duvall,*** 80 So.2d at 754. Subject matter jurisdiction "is the right or power to deal with the general abstract question, to hear the facts in a particular case relating to this question, and determine whether they are sufficient to invoke the exercise of that power." ***Id.; see American Fidelity Fire Ins. v. Athens Stoves Works, Inc.,*** 481 So.2d 292, 296 (Miss. 1985) (subject matter jurisdiction is "the authority to hear a given type of case at all."). There is no question that the Circuit Court had the power to hear cases of the general nature raised by the appeal below. The "subject matter" of this case was in its exclusive jurisdiction.

The failure of the city to file a cross-appeal also bars the city from raising its argument. In ***Gale v. Thomas,*** 759 So.2d 1150 (Miss. 1999), a driver sued the City of Jackson and a police officer for injuries in an automobile accident. The trial court granted summary judgment that the officer and city were immune from suit. The driver appealed, and, in addition to seeking affirmance of the summary judgment, the defendants sought to raise for the first time on appeal that there had not been compliance with the notice requirements of the state torts claims act. The city cited ***Mississippi Dep't of Pub. Safety v. Stringer,*** 748 So.2d 662, 664 (Miss. 1999) ("timely filing of notice is a jurisdictional issue"). The Supreme Court held that the issue was waived by not being raised in the court below:

> This Court has not addressed the issue of whether the question of compliance with the notice provisions of the MTCA may be raised for the first time on appeal. Despite this Court's statements that compliance with the notice requirements is a jurisdictional issue, and in light of this Court's statements in ***Thornburg,*** it is the conclusion of this Court that the City and Thomas are precluded from raising this issue for the first time on appeal. As this Court has stated, time and again, an issue not raised before the lower court is deemed waived and is procedurally barred. See, e.g. ***Davis v. State,*** 684 So.2d 643, 658 (Miss. 1996); ***Cole v. State,*** 525 So.2d 365, 369 (Miss. 1987).

Gale, 759 So.2d at 1159. Just as in ***Gale,*** the city here is attempting to raise an argument it never raised in the court below, never filing a cross-appeal, waiting to first mention it in the Brief of Appellee. It is procedurally barred from doing so.

That timeliness under Miss. Code Ann. §11-51-75 can be waived is strongly suggested by the absence of this issue in ***Garrard v. City of Ocean Springs,*** 672 So.2d 736 (Miss. 1996), in which Garrard appealed from a circuit court order that the court had no jurisdiction to review a decision of the city. The city had made a final decision with minutes that "were approved at a City Council meeting held March 6, 1990." ***Garrard***, 672 So.2d at 737. A notice of appeal was filed on October 22nd in the circuit court, and from a circuit court order that it had no jurisdiction, Garrard appealed. In reversing, the Mississippi Supreme Court did not hint at the timeliness issue the elements of which were plainly visible in its opinion. Obviously, the issue can be waived. A second significance is that the Mississippi Supreme Court saw as the key date in ***Garrard***: the date of approval of the minutes.

Gale and ***Calcote*** both make clear that this issue can be waived, and ***Garrard*** is only sensible if it can be waived. The cases cited by the city in its brief are not contrary; they either involve purely subject matter jurisdiction and not the time for appeals to circuit court (***Duvall*** and ***Esco***, discussed above), or are cases where the issue of timeliness was actually raised in the lower court (***Newell v. Jones County,*** 731 So.2d 580 (Miss. 1999)). No case is cited where the appellee entirely failed to raise this issue.

The second reason beyond waiver that this argument should be rejected is that it is based upon a recent Court of Appeals decision that is wrongly decided, ***Rankin Group, Inc. v. City of Richland,*** 8 So.3d 9 (Miss. App. 2009). This opinion is contrary to the long held principle that a board's actions are not final (and therefore not appealable) until the

minutes reflecting the decision are approved. The Mississippi Supreme Court has consistently viewed finality of a decision as dating from when the minutes are approved. ***See City of Oxford v. Innman,*** 405 So.2d 111, 114 (Miss. 1981) (date for filing bill of exceptions runs from when rezoning ordinance becomes effective by being written, signed and formally adopted, not when the meeting occurred); ***South Cent. Turf. Inc. v. City of Jackson,*** 526 So.2d 558, 563 (Miss. 1988) (holding decision became final and beyond power to reconsider when the Mayor signed the minutes from the April 1 meeting, not at meeting itself); ***Gatlin v. Cook,*** 380 So.2d 236, 237 (Miss. 1980) (minutes of meeting became final and therefore gave effect to council decision when mayor signed the minutes, not when board acted at meeting); ***see also City of Madison v. Shanks,*** 793 So.2d 576, 580-81 (Miss. 2000) (mayoral veto not final for purpose of ten-day period when rendered but rather on the date of later board meeting where veto was accepted by board not overriding it); ***J.H. Parker Construction Co. v. Board of Aldermen of the City of Natchez,*** 721 So.2d 671, 673-74 (Miss. 1998) (city decision awarding contract final and appealable when contract signed, not when city approved contract at board meeting). There is a long review of cases holding that appeal time runs not from the board vote but from when the board vote becomes final in ***Ball v. Mayor and Board of Aldermen of Natchez,*** 983 So.2d 295, 298-99 (Miss. 2008), which concludes in a wide variety of contexts that the time for appeal does not run from the board vote but rather from when the board vote becomes final. The Court of Appeals wholly disregarded these longstanding and controlling Mississippi Supreme Court cases as to when a city's decisions become final and appealable. The rule advanced by the Court of Appeals in ***Rankin*** makes no sense because no minutes for an appeal will even exist on which an appeal could be based until just prior to the next meeting.

Because of the city's waiver, this argument need not be reached. The question is when a board's minutes are final and therefore appealable. Finality of a board's minutes is governed by Miss. Code Ann. §21-15-33, which provides that minutes must be adopted at the next regular meeting or within thirty days, and that at the approval at the next meeting, they "have the legal effect of being valid from and after the date of the meeting." A board's actions are subject to reconsideration by the board and not final until that later approval at the next regular meeting. What the city is essentially arguing (for the first time in its brief) is that its decisions must be appealed (within 10 days) before they are final (within thirty days).

While in the court below, counsel for both the City of Oxford and Alias understood that the effect of the interaction of these statutes was that the time for appeal ran from approval of the minutes. Alias was operating under clear precedent that the actions of a government board are not final or complete until the minutes are approved and signed. ***Board of Supervisors v. Dawson,*** 208 Miss. 666, 45 So.2d 253 (1950). As the Attorney General has stated in a formal opinion, a Board of Supervisor's actions are not final until the minutes are approved: "A person dealing with a board of supervisors, including a board clerk, may only rely upon minutes which have been duly approved..." Opinion No. 97-0674 (October 31, 1997) by Cofer (1997 WL 693769).

II. *De Novo* Review Is The Appropriate Standard Of Review For Legal Questions Such As The Meaning Of An Ordinance

The City of Oxford is essentially making two substantive arguments: That the *only* scope of review for zoning cases is the arbitrary and capricious standard, and, because the city itself gets to say what its zoning ordinance means, its ruling is necessarily "fairly debatable." The city's position that it's own reading of the law control is a familiar one: "When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I

choose it to mean—neither more or less.'"[1] As with Humpty Dumpty, the city conceives itself the sole and complete authority, apparently of the view "We are correct because we get to say what the law is, without reference to the opinions of the Mississippi Supreme Court, or, where there is no precedent there, the persuasive opinions of courts elsewhere, or the plain meaning of our own ordinance." This is the heart of the city's argument, and the reason why it cites no cases in support of its argument about what the Land Development Code means—if the city is the lone arbiter of law, it does not have to pay regard to the likes of the Mississippi appellate courts.

The City argues that where there is no suggestion "that the City failed to follow the procedures set forth in the Land Development Code" then the City's decision must be shown to be arbitrary and capricious. Brief of Appellee at 9. The City's argument misstates the standard of review in zoning cases. On questions of fact, where the facts suggest more than one resolution, the city's decision is "fairly debatable" and is entitled to deference. On issues of law—the question *what does the ordinance mean*--however, review is *de novo.*

> The standard of review in zoning cases is whether the action of the board or commission was arbitrary or capricious and whether it was supported by substantial evidence. ***Perez v. Garden Isle Community Ass'n***, 882 So.2d 217, 219 (Miss. 2004) (citing ***Broadacres, Inc. v. City of Hattiesburg***, 489 So.2d 501, 503 (Miss. 1986)). ... Where the point at issue is "fairly debatable," we will not disturb the zoning authority's action. ***Perez***, 8282 So.2d at 219; ***Carpenter***, 699 So.2d. at 932.
>
> The standard of review for questions of law is de novo. ***Duncan v. Duncan,*** 774 So.2d 418, 419 (Miss. 2000).

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[1] Lewis Carroll, ***Through the Looking Glass*** at 72 (1872). The quote goes on: "The question is,' said Alice, 'whether you *can* make words mean so many different things.''The question is,' said Humpty Dumpty, 'which is to be master – that's all.'"

Drews v. City of Hattiesburg, 904 So.2d 138, 140 (Miss. 2005) (citing ***Carpenter v. City of Petal,*** 699 So.2d 928 (Miss. 1997).

The city's argument also fails to take into account what the Mississippi Supreme Court actually does in zoning cases. The deferential standard of review does not go so far as to defer to mistaken legal analysis. The city "may not ignore but must abide by the restrictions of all applicable zoning ordinances." ***Noble v. Scheffler,*** 429 So.2d 902, 907 (Miss. 1988); ***see Caver v. Jackson County Board of Supervisors***, 947 So.2d 351, 353 (Miss App. 2007) (quoting this language). The way the duty to abide by the law is enforced is through appellate review. That is why appellate review of legal issues is *de novo.* Appellate review means applying the standards expressed in zoning laws to the facts; this requires interpretation of the zoning laws. If appellate review meant acquiescence to the city's view of the law, appellate review would not exist.

One case cited by the city, ***Fondren v. City of Jackson,*** 749 So.2d 974, 978 (Miss. 1999), involved an ordinance that had more than one legitimate interpretation. In that instance, the Mississippi Supreme Court deferred to the city's interpretation. That principle does not completely insulate the city's ordinance from appellate review in the way the city suggests. For it to apply, the city must first show that there is more than one possible reasonable interpretation and that the city chose one, for that is what happened in ***Fondren.*** Nothing like that is present here. On the issues on which the city asserts it can decide for itself what the ordinance means, the ordinance contains clear definitions and the persuasive authority points in one direction, rejecting the city's position.

The Mississippi Supreme Court has consistently viewed its review in zoning cases as requiring it to interpret and apply the law to the facts. In affirming the granting of a conditional use exception in ***Beasley v. Neely***, the court explicitly found that "balanced

evidentiary considerations were afforded each of the aforementioned criterion" from the city's zoning law, and then the court went on to discuss each element of the code and the facts that related to each element. ***Beaseley v. Neely***, 911 So.2d 603, 608-09 (Miss 2005). Because the facts pointed in more than one direction, the court affirmed the decision as fairly debatable.

There is no case support for the notion that an argument over the correct legal standard makes the city's position "fairly debatable." The fairly debatable analysis by the Mississippi Courts has always been in terms of whether there was a view of the particular facts in the record that support findings on the elements required by the particular zoning law.

III. The Standard of Review Revisited: Are There Facts That Make the Decision Fairly Debatable?

Before turning to the specific elements required to obtain a variance, it is important to remember the standard of review. "'Fairly debatable' is the antithesis of arbitrary and capricious. ***Saunders v. City of Jackson,*** 511 So.2d 902, 906 (Miss. 1987). "If a decision could be considered fairly debatable then it could not be considered arbitrary or capricious." ***Fondren v. City of Jackson,*** 749 So.2d 974, 978 (Miss. 1999). Put another way, they are opposite sides of the same coin. The "fairly debatable" standard is in turn determined by whether there is substantial evidence for the city's position; if a decision is supported by substantial evidence, it is fairly debatable. ***Id.*** at 979-80. The analysis requires the reviewing court to determine whether the applicant proved all conditions required for the requested use. ***Beasley***, 911 So.2d at 607.

It logically follows from the standard that, if there are no facts to support a finding, this court must reverse. "Absent a record showing sufficient evidence to support the

findings, it is inevitable that reversal will follow." ***Faircloth v. Lyles,*** 592 So.2d 941, 945 (Miss. 1991).

A corollary to the rule that the city may not ignore but must abide by the restrictions of all applicable zoning ordinances is the rule that a decision is arbitrary and capricious where an agency "entirely failed to consider an important aspect of the problem..." ***Mississippi Dep't of Envtl. Quality v. Weems,*** 653 So.2d 266, 281 (Miss. 1995).[2] Thus, where there are elements in its land development code that the city utterly ignored, such as whether the variance granted was the minimum that could be granted-- that shows that the decision was arbitrary and capricious.

Carpenter shows how closely the court will review the question of whether the record is fairly debatable. The City of Pearl had a zoning ordinance under which mobile homes were barred in all areas except designated mobile home parks. Carpenter challenged this, arguing that it was arbitrary to refuse to allow mobile homes in areas zoned Rural Fringe District. The city answered that it wished to limit mobile homes to protect residential home values, for esthetic reasons, and to assure that mobile homes were developed in areas where they were sited in safe and sanitary lots or parcels. The Supreme Court rejected this argument, noting that chicken coops and hog pens were allowed in areas zoned Rural Fringe District. ***Carpenter,*** at 699 So.2d at 932-33.

IV. There Is No Showing of Hardship As Defined In Oxford's Land Development Code or the Mississippi Cases

The City's argument that it gets to say what the ordinance means focuses on the language from the ordinance about hardship; the city contends that, because the ordinance

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[2] As noted in our major brief at 11, the holding in ***Weems*** is in an appeal of an agency ruling, where the same standard applies—whether the decision was arbitrary and capricious.

does not define hardship, it gets to say what a "hardship" would be. But yet, a careful reading of the city's brief leaves a complete mystery as to the meaning of hardship. The city's argument pretends away the actual language of the City of Oxford Land Development code, which provides explicitly: "[A] true hardship exists only when the literal interpretation of the requirements of the Code would place an individual in an unusual circumstances ***and would deny the right to use property for any purpose,*** or create an unnecessary burden, unless relief is granted." Land Development Code §117.89 (emphasis added). The City dismisses the notion that the highlighted passage might make clear what a hardship is or is not, Brief of Apellant at 11-12. The City's construction of the term hardship renders the highlighted language pointless. The City is contending for a reading of its ordinance that makes it so broad as to cover anything the city might choose to do.

That the Mississippi appellate courts takes seriously the element of hardship is demonstrated by ***Caver v. Jackson County Board of Supervisors***, 947 So.2d 351, 354 (Miss App. 2007), in which a finding of hardship was reversed as arbitrary and capricious. The court reversed a variance because it was for the owner's convenience, explicitly rejecting the city's interpretation of hardship:

> The zoning ordinance established a standard for a variance. A variance merely for convenience of a landowner is not sufficient. ... [T]he decision to grant a variance was for McKelvain's convenience. The variance would allow McKelvain to move the location of his house as he desires and not because of undue hardship. The Board must uphold the ordinance and may not ignore its requirements.
>
> ***Noble,*** 529 So.2d at 907.

The city had granted a variance to a homeowner who was rebuilding a house after a fire; the owner wished to center the house on his small lot, which would have violated the ordinance's setback requirements because of the small size of the lot, which predated the zoning law. In rejecting the city's view of hardship, the ***Noble*** court cited the definition of

hardship in ***Westminster Presbyterian Church v. City of Jackson***, 253 Miss. 495, 176 So.2d 267 (1965), a definition the City of Oxford ignores. The court's citation to ***Westminster*** and its reversal make no sense if the City of Oxford is correct that its own view of what the hardship requirement means controls; if that were the case, the Mississippi Court of Appeals would not have conducted a review of whether the hardship test was met in ***Caver*** and could not have reversed in that case. In fact, where there is a failure to show undue hardship or unique circumstances, the Mississippi appellate courts have not hesitated to reverse. ***See e.g. Drews,*** 904 So.2d at 141-42.

The question here is what exactly is Mr. Elam's hardship. What is it that he cannot do with his property? The City's own characterization of what Elam wanted was "to screen Alias's driveway area from Elam's view" as Elam drove down his driveway. R. 98 (Brief of City of Oxford at 12). The city argues that the fact that Alias could build a fence of this height on Alias's aide of the property raises the issue of whether Elam can have "full utilization of his property...." and whether Elam is deprived of rights enjoyed by others. Brief of Appellee at 12-13. These problems somehow amount to "true hardship" under the city's land development code, argues the city's brief.

The Mississippi appellate courts will reverse a zoning decision that finds hardship based on the mere desires or convenience of the landowners. That is the holding of ***Caver.*** There is no evidence in the record that the screen fence sought by Elam will have any impact whatever on Elam's use of the property beyond the sort of convenience and desires that were inadequate to support a finding of hardship in ***Caver.*** The Land Development Code definition of hardship bears repeating here. Hardship is

> An unusual situation... that will not permit the full utilization of their property as is allowed others within the community. ... [A] true hardship exists only when the literal interpretation of the requirements of the Code would place an individual in an unusual circumstances and would deny the

> right to use property for any purpose, or create an unnecessary burden, unless relief is granted.

Land Development Code §117.89. The key here to the city's argument is (as noted above) that the city forgets in its discussion of hardship to mention half of the last sentence—that hardship means something that "would deny the right to use the property for any purpose, or create an unnecessary burden..." In the definitional sentence "deny the right to use property for any purpose" and "create an unnecessary burden" are phrases of equivalent weight. If a desire as frivolous as Rick Elam's wish to not look at William Alias's driveway is "an unnecessary burden," then the requirement to show hardship involves virtually no hardship at all. This language in the ordinance is also in accord with out-of-state authority cited in Alias's brief as persuasive and dismissed by the city out-of-hand.

The city's brief unintentionally emphasizes how much Elam's problem is his own creation. The city argues that in addition to having a lot of unusual size and shape, Elam placed his house on the lot in a way that makes the front-line of his house not quite parallel to the street, complicating the effort to determine where he can build a side-yard fence. Brief of Appellee at 12; ***see*** R. 95-96 (Brief of City of Oxford at 9-10). If that is the source of his hardship, it is clearly self-created, and cannot be hardship under the Land Development Code.

Beyond the decision to place the house on the lot, the design of the lot itself is self-created. Elam's predecessor in title made a decision to create the flag lot; it is not a product of factors such as the terrain that is inherent in the land itself or something occurring on adjoining properties. Thus, by definition, it is not a hardship because the Land Development Code prohibits finding a hardship where the hardship is self-created. In response on this point, the city returns to the theme that the Land Development Code is whatever the city deems it to be, arguing that Alias cannot show the board's interpretation of

the code was arbitrary or unreasonable. Lack of precedent does not mean there is no law. This court must reason through to what the law is, not defer to a possibly mistaken view of the law. As noted in Alias's opening brief, the courts that have faced this issue have uniformly ruled that a problem is self-created when created by a party's predecessor in title.

Another out-of-state case shows how other courts have uniformly resolved questions of hardship with regard to conditions created by predecessors in title. In ***Baker v. Connel,*** 488 A.2d 1303 (Del. 1988), a lot along the boardwalk had been subdivided on two sides, leaving only a tract zoned as "open space." A successor in title argued hardship, that they could build nothing on the remaining land. Following cases from New Jersey and Connecticut and a leading treatise on municipal law, the court rejected a finding of hardship:

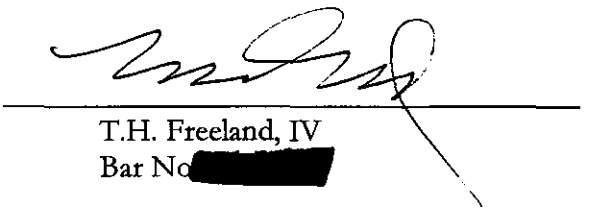
> However, one who conveys a portion of his land may well be precluded from claiming hardship with respect to the part remaining. *See Leimann v. Board of Adjustment of Cranford Township,* N.J.Supr., 9 N.J. 336, 88 A.2d 337, 340 (1952); *Ardolino v. Board of Adjustment of the Borough of Florham Park,* N.J.Super., 41 N.J.Super. 582, 125 A.2d 543, 547-48 (1956); 8 McQuillin § 25.168. Moreover, if a predecessor in interest would be barred from obtaining a variance by his voluntary acts, then his successor would face a similar disqualification. *See Pollard v. Zoning Board of Appeals of the City of Norwalk,* Conn.Supr., 186 Conn. 32, 438 A.2d 1186, 1190 (1982).

Baker, 488 A.2d at 1308 (citing 8 McQcuillin, ***Municipal Corporations*** § 25.168 (3d Ed. 1983); footnote omitted. The city's response to these cases (that there is no Mississippi authority) is a reason to look to the law of other jurisdictions. The city's response to that well-reasoned authority is to say nothing more than "we get to say what our code means."

CONCLUSION

For the reasons stated in this and the Brief of Appellant, this case should be reversed, setting aside the improperly granted variance.

Respectfully submitted, this 21st the day of December, 2009.



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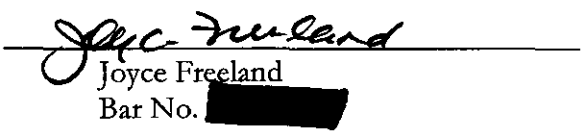

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CERTIFICATE OF SERVICE

I, T.H. Freeland, IV, attorney for appellant, William Alias, Jr., certify that I have this day f served a copy of the above and foregoing by United States Mail with postage prepaid on the following persons at these addresses:

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This the 21st day of December, 2009.

T.H. Freeland, IV