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

APPELLANT'S BRIEF

T.H. FREELAND, IV MBN [redacted]
JOYCE FREELAND MBN
FREELAND & FREELAND, LAWYERS
1013 JACKSON AVE
P.O. Box 269
OXFORD, MS 38655
(662) 234-3414

ATTORNEYS FOR THE APPELLANT

CERTIFICATE OF INTERESTED PERSONS

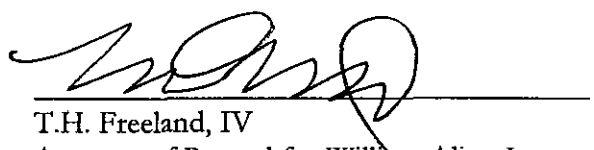
William Alias, Jr. vs. The City of Oxford, Mississippi
No.: 2009-TS-00301

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 may evaluate possible disqualification or recusal:

William Alias, Jr.

The City of Oxford, Mississippi

Richard and Karen Elam



T.H. Freeland, IV
Attorney of Record for William Alias, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Treatises

I. ISSUES

1. Do Mississippi Appellate Courts grant *de novo* review of legal issues in an appeal from a decision to grant a zoning variance?

2. Can a zoning variance be based on hardship where the alleged hardship was created by the property owner's predecessor in title?

3. Where a landowner is fully able to use his property for any purpose connected to its zoning, can he be said to suffer a hardship—an interference with his use of his property—supporting a zoning variance?

4. Can a city's decision to grant a variance be affirmed where the city failed to find that this was the minimum that would make possible a reasonable use of the land?

5. Is the city's decision to grant a variance justifiable on the theory that neighbors could build a similar fence?

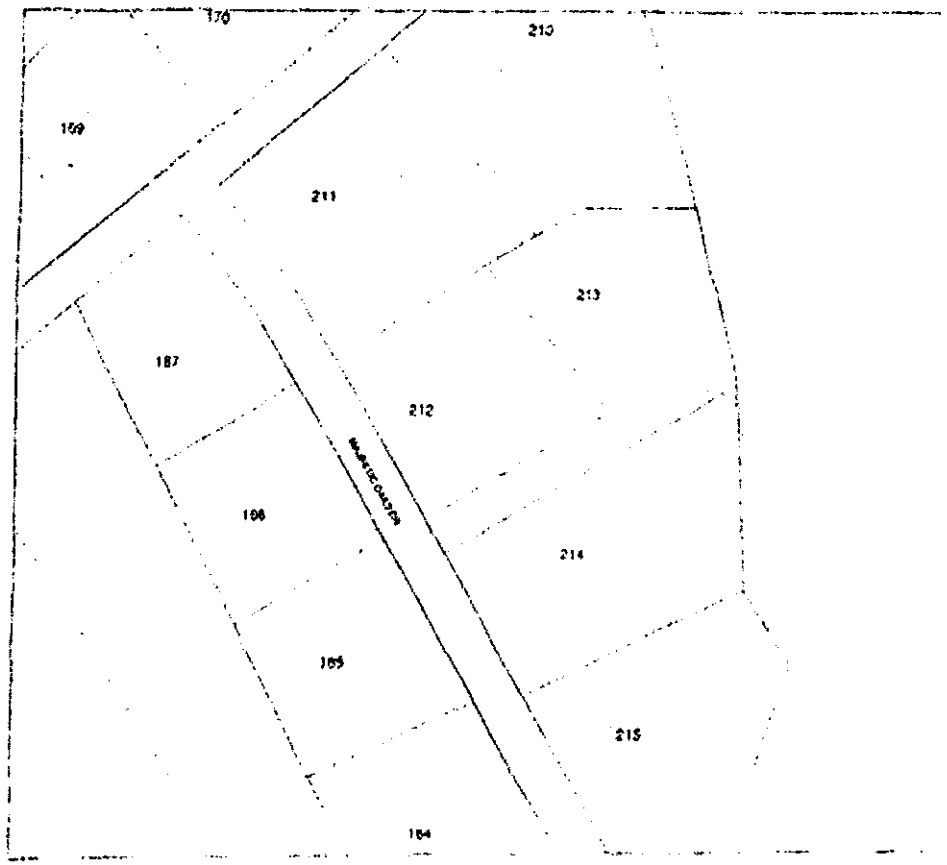
II. COURSE OF PROCEEDINGS BELOW

In the lower court, this commenced as an appeal from a decision of the City of Oxford through its Planning Commission, which made a decision over the objection of appellant William Alias to grant a zoning variance to Richard Elam. The decision of the city was reflected in the planning commission minutes for May 14, 2007. (R. 16, 22) (Record Excerpts Tab 4). On June 14, 2007, William Alias filed a notice of appeal and bill of exceptions from this decision in the Circuit Court of Lafayette County. (R. 1, R. 3). After the city objected to certain parts of the original bill of exceptions, an amended bill of exceptions was filed. R. 69. After briefing by William Allias (R. 75-86, 103-114) and the City of Oxford (R. 87-102), the Circuit Court rendered an opinion on March 11, 2008. (R. 116-

124) (Record Excerpts Tab 2). A notice of appeal was filed on April 4, 2008 (R. 125), from which this appeal has followed.

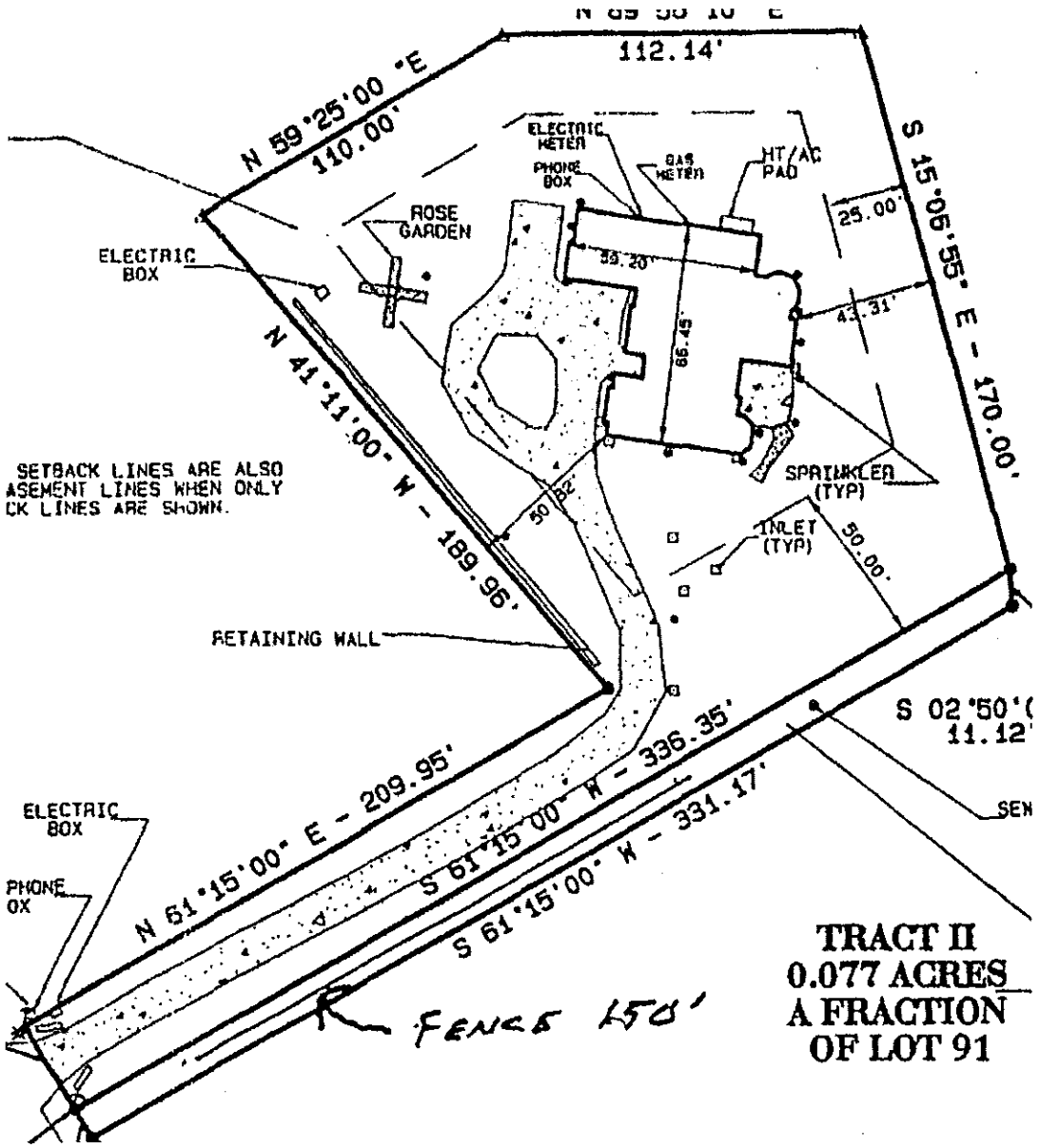
III. STATEMENT OF FACTS

This is a suit in which William Alias objected to a variance that was granted to allow his neighbor, Richard Elam, to build a fence along Elam's driveway that exceeded the height allowances in the Land Development Code of the City of Oxford. To understand the facts, it is important to understand the nature of the Elam lot, because it is the nature of the lot itself that produced the dispute in this case. Mr. Elam's lot is a "flag lot." This is probably best explained through a picture, showing, first Mr. Elam's lot in context (surrounded by other lots and the street, Majestic Oaks Drive). The Elam lot is lot number 213, and the Alias lot is lot number 214.



This picture is excerpted from Exhibit K to the Bill of Exceptions and is found at R. 39 in the record below. The main part of Elam's lot ("the flag") is effectively in the back yard of lot 212, with the driveway ("the pole") out to Majestic Oaks Drive between lot 212 and lot

214, the Alias lot.



This picture is excerpted from Exhibit A to the Bill of Exceptions in the record below and is found at R. 9. Note the line labeled "Fence 150'"—this is the fence in the variance that is the subject of this appeal.

It is in the nature of the "flag lot" that the entire "pole" part of the driveway is in front of the front line of a building on the lot, as it is in this case. The City of Oxford Land Development Code describes the front line of a building as "A line intersecting the foremost

portion of a building and parallel and/or concentric to the right of way line." City of Oxford Land Development Code §17.23. Elsewhere, the land development code provides that "no fence... located in front of any front building line shall exceed 30 inches in height...." City of Oxford Land Development Code §157.

What Mr. Elam sought is a variance from this height requirement so that he could build a fence along the "pole" portion of his flag lot. By the layout of Mr. Elam's lot and the positioning of his house, the entire driveway is by definition in front of the front line of his house. (R. 9). (plat showing Elam house). R. 6-7 (Record Excerpts Tab 3) (Recommendation of City Planning Director describing the conditions at Elam's lot). Obviously, the decisions about the shape of his lot and the location of his house were both choices made by either Mr. Elam or his predecessors in title, who would include the developer who platted the subdivision.

Among the evidence before the City were two affidavits. One, an affidavit by Rick Elam, describes in detail the circumstances that led him to begin building the fence without a variance. None of these facts relate to the issues of whether a variance should be granted. *See* Affidavit of Rick Elam at ¶¶ 1-10 (Exhibit D to Bill of Exceptions) (R. 25). In paragraph 11, he states that the city planner "recommended the requested variance be granted because the hardship created by the unique shape of my lot is not of my doing and because a literal interpretation of the Ordinance would deprive me of rights commonly enjoyed by my neighbors (for example, Mr. Alias could build the exact same fence on his side of the property line without requesting a variance)." Mr. Alias's affidavit (R. 42) goes into far more factual detail relating to the standards for granting a variance. Some facts related to the question of the impact of the variance on the neighborhood and the relative impact on Mr. Alias and Mr. Elam of allowing the fence:

a. Because the proposed fence is on a hill, at the ground its base ranges from over four feet higher than Mr. Alias's back yard to over a foot-and-a-half higher. Because of this, the fence will have the effect of being as much as 12 feet over Mr. Alias's yard for most of his yard, from the front to the rear of his lot. Thus the site itself makes the fence even more obtrusive than an eight-foot fence.

b. Additionally, the fence is almost entirely invisible from Mr. Elam's front yard. The entire impact of the fence will be borne by Mr. Alias's lot. It is immediately next to Mr. Alias's driveway. Only a small part of the fence can be seen from a small part of Mr. Elam's yard. Furthermore, it "screens" very little—it is not possible to see the Alias driveway or garage from Mr. Elam's house or the yard immediately around it due to topography and vegetation. This "screen" fence only "screens" part of Mr. Elam's driveway from the Alias yard.

c. This negative impact is enhanced by the scale of the fence. Mr. Elam states in describing his plans that there will be light fixtures. While these lights are mentioned, they are not shown on the drawing applying for the building permit. Further, the lights are on posts already designated as being 7 ½ feet to 8 feet in height.

Affidavit of William Alias, Jr. at ¶¶ 4-8 (Exhibit F to Bill of Exceptions) (R 42-43).

Other facts related to whether a lesser variance or other means would accomplish the purpose: "Strategic plantings of five to seven shrubs or trees would accomplish Mr. Elam's goal in full compliance with the zoning ordinance. I would have no objection to a screen that involved planting trees or shrubs as opposed to an obtrusive fence." *Id.* at ¶ 9 (R. 43).

In making his recommendations about the variance, the city's planning director commented that the lot was a flag lot and that the variance requested a five foot six inch variance. The planning director stated his version of the standard and then said: "The unique shape of the subject property (flag lot) creates a hardship that is not the result of the applicant and due to the lot's shape, without relief from the ordinance the applicant could not erect a southern property line privacy fence, a right commonly enjoyed by other property owners within the PUD." (R. 6). He then recommended findings, which were ultimately adopted verbatim by the planning commission:

> based on the following findings: the unique shape of the subject property (flag lot) is not the result of applicant and the literal interpretation of the Ordinance would deprive the applicant of rights commonly enjoyed by other property owners within the PUD.

Recommendation at 2 (Exhibit A to Bill of Exceptions) (R. 6-7) (Record Excerpts Tab 3). It is this recommendation that the Planning Commission adopted, verbatim, in granting the variance. Minutes of May 15, 2007 Planning Commission Meeting (Exhibit B to Bill of Exceptions) (R. 16, 22) (Record Excerpts Tab 4). These facts, some photographs, and a copy of a plat or survey of Mr. Elam's lot, along with a drawing of the fence, were the only facts before the board that bore on whether a variance should be granted.

IV. SUMMARY OF THE ARGUMENT

This case was an appeal in the court below from a decision under the City of Oxford's Land Development Code to grant a variance. It is unusual in that one of the contentious issues is scope of review—the city in the court below argued that, even on legal issues (such as "what does this ordinance provision mean?"), the city's decisions are entitled to deference and only reversible if arbitrary and capricious. The lower court effectively

accepted this analysis, taking the view that the city was entitled to deference on every single issue.

The notion that the deferential review is to be applied to issues of law is error. Mississippi appeals courts have held that legal issues in zoning appeals are accorded *de novo* review both explicitly (by so stating) and implicitly (by providing *de novo* review to legal issues). An additional scope of review question involves issues where the facts are not in dispute—for instance, where the sole evidence was that there was a less obtrusive variance that could have been granted instead, can the variance here be said to be the "minimum variance" as required by the Land Development code?

There are a number of substantive issues that each are requirements for the variance, and, if they were not met, the appeals court must reverse the granting of the variance. First, it is required that the property owner suffer a "hardship" unless the variance is granted—it cannot be for mere convenience. Second, the hardship must not be created by the owner asking for the variance or his predecessor in title. Here, the variance was a fence that was in no sense necessary for the use of the property, and the reason it was sought was self-created when the owner's predecessor platted the lot as a "flag lot." These, the minimum variance issue (for which the evidence points only one way), and the mistaken analysis of whether other property owners could make the use sought all call for reversal in this case.

V. ARGUMENT

A. This Court Applies *De Novo* Review To Legal Issues Such As What Constitutes A Hardship for A Zoning Variance— In Resolving An Appeal from A Decision To Grant A Zoning Variance, The Circuit Court Applied The Wrong Scope of Review.

The principle that must be kept in mind to understand the circuit court's errors is that there is more than one scope of review applicable to a zoning appeal. While an appeals

court reviewing a zoning decision accepts factual conclusions and findings that are "fairly debatable" and therefore not arbitrary and capricious, the appeals court reviews legal issues *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).

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

Thus, on a question such as "what are the conditions at the property," there is a deferential standard of review. On the other hand, as with any legal issues, such as where the question is "what does this ordinance mean," the standard of review is *de novo.* Having adopted a zoning ordinance, a municipality is bound by its terms. The questions of what those terms mean—such as "what constitutes a hardship under the ordinance" are legal questions, and are not entitled to deferential review. Put another way, the deferential standard of review does not allow an appeals court 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,*** 529 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. There is

no case support for the notion that an argument over the correct legal standard makes the city's position "fairly debatable."

Additionally, 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. ***Beasley 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. Thus, even in according that part of the review where the city's decision is arbitrary and capricious the appeals court still examines the record to see if there are facts supporting each element the code requires. This is how the appeals court resolves whether a decision was "fairly debatable." "'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). The city's decision must be supported by substantial evidence. "

> Substantial evidence, according to the Mississippi Supreme Court, is defined as relevant evidence that reasonable minds might accept as satisfactory to support a conclusion or, stated otherwise, that which constitutes "more than a 'mere scintilla' of evidence." ***Hooks v. George County,*** 748 So.2d 678, 680 (Miss. 1999) (quoting ***Johnson v. Ferguson,*** 435 So. 1191, 1195 (Miss. 1983).

Beaseley v. Neely, 911 So.2d at 607n . In ***Beaseley***, the court emphasized the detailed factual investigation by planning commission staff into the factors required by the ordinance—that specific facts relating to general welfare or public health of the community, harmony with the neighborhood, whether the new building was hidden or mitigated, and the use of a landscape buffer to minimize impact were all considered by the city—all provided a factual basis for the elements the city was required to find to allow the variance.

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).[1] 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 decision was 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

---

[1]The holding in ***Weems*** is in an appeal of an agency ruling, where the same standard applies—whether the decision was arbitrary and capricious.

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 their sites would be safe and sanitary. 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. Thus, the Supreme Court did not view the city's resolution as "fairly debatable."

In this case, the first error the lower court made was in applying only one standard of review; rather than reviewing legal issues ***de novo*** and the findings of the board under the arbitrary and capricious standard, the lower court applied one standard of review for all issues. The lower court described "the" standard of review: "The standard of review in zoning cases is whether the action of the board was arbitrary or capricious and whether it was supported by substantial evidence." Opinion at 5 (Record Excerpts Tab 2, R. 120). The opinion then went through the issues raised and took the view that the sole analysis was whether the city's position was "fairly debatable." First, the opinion analyzed hardship or inconvenience and stated the city's position: That other lot owners could build an identical fence, without a variance, made "[t]he issue of hardship or inconvenience ... fairly debatable." Opinion at 6-7 (Record Excerpts Tab 2, R. 121-122).

In so holding, the lower court implicitly accepted the view advanced by the City of Oxford in its brief: That the appeals court had to accept the city's view of its ordinance. ***See*** Brief of City of Oxford at 5 (R. 91) (arguing that deference had to be accorded city's interpretation of its ordinance if it was not arbitrary and capricious). The trial court did not consider the legal question of what constituted a hardship or the legal question of whether

being unable to make this particular use amounted to a hardship—it just accepted the city's view of hardship.

The court then went on to hold that "[t]he question of whether the hardship was self-created by Elam because of actions of his predecessor in title is also fairly debatable, particularly taking into account the unusual criteria for construction of a fence around a flag lot." Opinion at 7 (Record Excerpts Tab 2, R. 122). This holding completely skips over a legal issue of whether a condition created by one's predecessor in title is self-created. The court next held that an issue the city did not even consider—whether this variance was the minimum variance—was fairly debatable. ***Id.*** The lower court concluded by stating that the city was in a better position to evaluate the evidence, and "All issues presented in this matter are fairly debatable...." ***Id.*** **at 8.** By applying the arbitrary and capricious standard to "all issues presented," the lower court was entirely failing to recognize the legal issues that were before it.

In working through the issues on this appeal, the required analysis is as follows: First, is the issue a question of law? If so, it is accorded *de novo* review. Second, is the question whether a finding by the city was in error? If so, the question is whether it was supported by substantial evidence.

The city found that a condition of Richard and Karen Elam's property created a hardship. The first issue is a legal one: Can a condition created by one's predecessor in title be said to be a hardship? This issue is to be reviewed *de novo.* The second issue, whether the condition at Elam's property--being unable to build the fence he sought to build—meets the definition of a hardship (which requires a showing that the condition "would deny the right to use the property for any purpose, or create an unnecessary burden," City of Oxford Land Development Code §117.89), is, first a legal question: What is constitutes a hardship? There

follows the question whether what is present here meets the definition of hardship. The facts in this record, as a matter of law, do not amount to a hardship. The language of the ordinance requires that a hardship "deny the right to use the property for any purpose, or create an unnecessary burden." The desire to have a privacy fence along one's driveway cannot be said to interfere with the use of one's property in a way that denies its use or creates a similar burden. There is no dispute (or "debate") as to what those facts are; the question is a legal one—reviewed *de novo* of whether those facts can be said to meet the definition of hardship.

The final issue is whether there are facts that support a finding that this was the minimum variance—the least obtrusive alternative. Neither the recommendation from the city planner nor anything in the record dealt with this issue. Nevertheless, the lower court found that the question of "minimum variance" was fairly debatable, rejecting that an alternative proposed by William Alias—a screen of plantings—was less obtrusive. The only facts in the record were that this alternative would be less obtrusive.

B. The Sort of Issue Elam Raised—At Most An Inconvenience—Is Not A Hardship Because He Is Able To Fully Use His Property

The lower court described the standard for a granting a variance for an unnecessary hardship:

> To authorize upon appeal in specific cases such variance from the terms of this Ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of this Ordinance would result in unnecessary hardship. It must also be demonstrated that: (a) special conditions and circumstances exist which are peculiar to the land and which would not be applicable to other lands in Grand Oaks (PUD); (b) a literal interpretation of the provisions of the ordinance would deprive Elam of rights commonly enjoyed by other property owners in Grand Oaks; (c) the special conditions and circumstances did not result from the actions of Elam; and (d) the granting of the Ordinance would not confer on Elam any special privilege that is denied by this Ordinance to other lots in Grand Oaks (PUD).

Opinion at 4 (R. 119)(Record Excerpts Tab 2). The opinion went on to note that the Board had to "find that 'the variance is a minimum that will make possible the reasonable use of the land, building or structure.'" *Id.* at 5 (R. 120)(Record Excerpts Tab 2). The opinion went on to quote the definition of "hardship" in the Land Development Code:

> An unusual situation on the part of an individual property owner that will not permit the full utilization of their property as is allowed others within the community. ***A hardship exists only when it is not self-created*** or when it is not economic in nature. In other words, a true hardship exists only when the literal interpretation of the requirements of the Code would place an individual in an unusual circumstance ***and would deny the right to use the property for any purpose, or create an unnecessary burden,*** unless relief is granted.

Opinion at 5 (R. 120)(Record Excerpts Tab 2) (quoting City of Oxford Land Development Code §117.89) (emphasis added herein). Beyond the core element of undue hardship, the Land Development Code requires the following to establish the basis for a variance:

a. That the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building, or structure. Oxford Land Development Code § 216.07.5.

b. That the granting of the variance will be in harmony with the general purpose and intent of this Ordinance, and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare. Oxford Land Development Code § 216.07.6.

c. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures or buildings in the same District. Oxford Land Development Code § 216.07.1.

d. That literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same District under the terms of this Ordinance. Oxford Land Development Code § 216.07.1.

e. That the special conditions and circumstances do not result from the actions of the applicants. Oxford Land Development Code § 216.07.1.

Four distinct parts of the standards for finding a hardship and granting a variance arise in this appeal. First, the hardship must not be self-created. Here, the hardship was quite literally self-created: A decision was made to subdivide the lot so as to create a "flag lot," and it is the lot's shape—certainly self-created—that makes Elam want a fence in a place where a fence would otherwise not be allowed. Second, the hardship must "deny the right to use the property for any purpose, or create an unnecessary burden." Here, there is no hint of evidence that this would interfere with Elam's use of his property for any purpose at all, which certainly means that the use cannot be said to create an unnecessary burden. Third, the variance has to be the minimum that would make possible a reasonable use of the land. Of course, Elam can "reasonably use his land" without the variance, but the key here is that the city did not consider other variances that would have been less obtrusive. Finally, the lower court and the city evaluated an required element—that Elam be unable to use the property as other property owners of similarly zoned land—using a misunderstanding of what this element requires.

The key part of the required findings is that Mr. Elam must have shown that the Land Development Code works an undue hardship on him. The Mississippi courts have reversed the granting of a variance where the landowner has failed to show undue hardship. As noted above, Section 216.07 Subsection 1 of the Oxford Land Development Code

requires a showing that "a literal enforcement of the provisions of this Ordinance would result in unnecessary hardship." In ***Caver v. Jackson County Board of Supervisors***, a landowner's house predated zoning setback requirements. When the house burned down, the landowner asked for a variance. The Court of Appeals held that the deferential standard of review simply does not insulate a city's decision when there is no factual basis for the decision. The landowner could have built on his original footprint without a variance only after spending $530 to redraw plans and with changes in dimensions. The Court of Appeals reversed the granting of the variance, rejecting the claim of hardship. ***Caver***, 947 So.2d at 354. "A variance for the convenience of a landowner is not sufficient. From the record before us, there is no evidence that McKelvain will suffer an undue hardship if the variance is denied. Indeed, the decision to grant a variance was for McKaelvain's convenience." And therefore, absent undue hardship, the court found "this issue was not fairly debatable, and the decision to grant the variance was arbitrary and capricious." ***Id.*** (cite omitted).

Previously, the Mississippi Supreme Court had stated the standard for finding undue hardship in ***Westminster Presbyterian Church v. City of Jackson***, 253 Miss. 495, 176 So.2d 267, 271 (1965)(also quoted in ***Dicks v. City of Natchez***, 319 So.2d 214, 218 (Miss. 1975):

> A variance to construct or operate a service station or garage should not be granted merely because such use of the property will be more convenient or profitable to the owner, or because he will suffer some financial disadvantage or hardship if denied such use; it is essential that applicant should suffer some unusual hardship from the literal enforcement of the regulation different from, and greater than, that suffered by other property owners in the district. The variance or exception should not be granted unless the proposed use of the property is within the spirit of the zoning regulations.

Specifically, a "hardship" means that the landowner quite simply is denied a reasonable use of his property. "Variances were conceived initially as a means for granting relief from height, bulk and location restrictions in the ordinances which rendered use of the property

impossible or impractical." ***Drews v. City of Hattiesburg,*** 904 So.2d at 141, quoting Robert C. Khayat & David Reynolds, "Zoning Law in Mississippi," 45 Miss. L.J. 365, 383 (1974). The court went on to note that "Bulk variances afford relief to the landowner who proves unnecessary and unique hardship..." ***Id.*** (also quoting Khayat & Reynolds). The court went on to reverse as arbitrary and capricious the granting of a variance that amounted to spot zoning.

One example of what is required to show hardship is in ***Taquino v. City of Ocean Springs***, 253 So.2d 854 (Miss. 1971), in which the variance sought related to the requirement of a city street of a width of fifty feet. The city found that the construction of a road there "would not be possible due to lowness," and therefore granted the variance. This was the only evidence in the record; the parties objecting to the variance had done nothing before the city. The fact that a road was not possible where the ordinance required there to be a road justified the granting of a variance from the road requirement.

This view of hardship—that the applicant to show hardship must show that the restrictions make any use of the property impossible or impractical—is the law generally. In demonstrating the sort of hardship that must be proven, a standard land-use treatise notes that all zoning imposes some degree of hardship because of the restrictions implicit in limiting the use to which property may be put. The hardship required for a variance is a restriction "that deprives [the landowner] of all beneficial or reasonable use." Rathkopf's ***The Law of Zoning and Planning*** §58:5 (4th Ed.). Rathkopf goes on to note that "it is evidence that the proof of facts necessary to prove hardship in the case of a variance, particularly a use variance, is much the same as that necessary to prove a restriction confiscatory." Thus, courts have held: "[A] hardship may not be found unless no reasonable use... can be made of the property. ... [T]he hardship must be such that it

renders it virtually impossible to use the land for the purpose for which it is zoned." ***Town of Indiatlantic v. Nance,*** 485 So.2d 1318 (Fla. App. 1986).

What exactly did Mr. Elam prove was his "undue hardship": Nothing more than that he could not build a (spite) fence along the property line of his driveway. This has literally nothing to do with whether he is being allowed the reasonable use of his property. He can use his property for exactly what it is zoned for—as a single family residence—regardless of whether or not he builds the fence he sought to build. There is no evidence whatsoever in this record to support a finding of hardship.

That the Mississippi appellate courts takes seriously the element of hardship is demonstrated by ***Caver***, 947 So.2d at 354, 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 landlowner 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 court cited the definition of hardship in ***Westminster***, a definition the City of Oxford entirely 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 has 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. Brief of City of Oxford at 12 (R. 99). The city argued 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 City of Oxford at 10-12 (R. 97-99). The city argued that these problems somehow amount to "true hardship" under the city's land development code.

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.

City of Oxford 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.

C. As A Matter of Law, Where A Property Owner or His or Her Predecessor In Title Created A Condition On The Property, That Condition Cannot Be A Hardship

There is a legal requirement established by the Land Development Code that a hardship must not be self-created. Oxford's Land Development Code requires a finding that the special conditions and circumstances do not result from the actions of the applicants. City of Oxford Land Development Code §216.07. This is an independent element that must be present for the granting of a variance—in other words, there must be a hardship *and* the hardship must not be self-created. There are two purely legal questions here: Is a condition created by one's predecessor in title "self-created," and can this condition created the platting of Elam's land—that it is a flag lot—be anything other than 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 are inherent in the land itself or a condition on adjoining properties that interferes with his use of his property. The predecessor in title platted the lot, and, when Elam bought the lot, that condition was present. Neither nature nor some condition on adjoining property created this condition; the owner of the land created it. This, by definition, is not a hardship because the Land Development Code prohibits finding a hardship where the hardship is self-created.

Courts that have faced this issue have uniformly ruled that a problem is self-created when created by a landowner's predecessor in title. Consistently with these decisions, the City of Oxford Land Development Code specifically requires that, to receive a variance, the applicant must show: "[T]he special conditions and circumstances do not result from the

actions of the applicants." City of Oxford Land Development Code §216.07.1. Courts have uniformly found that a need for a variance created by a predecessor in title is still "self-created" and therefore the variance should be denied. Examples of these decisions include ***King v. Zoning Hearing Board of Towamencin Township,*** 154 Pa.Cmwlth. 109, 622 A.2d 435, 438 (1993), a variance was sought to build a single-family residence on an undersized lot. The court held that the landowner stood in the position of his predecessor in title who subdivided the lot, and that this meant that the need for a variance was self-created. Another court has held: "[I]f 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,*** 186 Conn. 32, 438 A.2d 1186, 1190 (1982)." ***Baker v. Connell,*** 488 A.2d 1303 (Del. 1985). In ***Baker,*** 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 McQuillin, ***Municipal Corporations*** § 25.168 (3d Ed. 1983) (footnote omitted).

The requirement that a "hardship" cannot be self-created, and its corollary that a hardship created by a predecessor in title is self-created both logically follow from the nature

of zoning law. Self-imposed conditions are not hardships. Here, it is undisputed that what Elam and the city called a "hardship" was a creature of the plat created by Elam's predecessor in title. The hardship was therefore self-created as a matter of law, and so Elam's request for a variance should have failed.

D. The City Failed To Consider One Essential Element: Whether This Was The Minimum Variance Making Possible The Use of the Land

Another essential element the city must resolve is that the requested variance is the minimum variance making possible the use of the land. The Oxford ordinance requires that the variance being granted be the minimum variance that will make possible the reasonable use of the land, building, or structure. City of Oxford Land Development Code §216.07 . Here, the city entirely failed to consider this factor. Its planning director did not mention this factor in recommending a granting of the variance:

> based on the following findings: the unique shape of the subject property (flag lot) is not the result of applicant and the literal interpretation of the Ordinance would deprive the applicant of rights commonly enjoyed by other property owners within the PUD.

Recommendation at 2 (Exhibit A to Bill of Exceptions). It is this recommendation that the Planning Commission adopted, verbatim, in granting the variance. Minutes of May 15, 2007 Planning Commission Meeting (Exhibit B to Bill of Exceptions) (Record Excerpts Tab 4). The city entirely failed to consider the issue of whether this was the minimum variance. In a related context—review of decisions by administrative agencies—the court has noted 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).

In the court below, the city's argument attempted to paper over this lack of a finding with a tautology: The city's response is, first, a tautology, arguing "Mr. Elam wants a fence,

and only a fence would accomplish that!" The city's second response is that plantings would require a variance, too. Brief of City of Oxford at 12. That is the point: There is a less-obtrusive alternative variance that would accomplish the goal of creating a screen for Mr. Elam. What the city does not answer is the point based on the language of the ordinance itself. "the variance is a minimum that will make possible the reasonable use of the land, building, or structure." City of Oxford Land Development Code §216.07(5). The first problem is that Mr. Elam can make reasonable use of his land without the variance. The second is that there is another, less obtrusive alternative.

In spite of the fact that the city had not considered this issue at all, the lower court found it "fairly debatable," arguing that either a shrub screen or a fence screen would require a variance and "could be construed as a different variance rather than a minimum variance." Opinion at 7 (Record Excerpts Tab 2, R. 122). Yet the evidence about whether the fence would have been the "minimum variance" points in only one direction: The only evidence demonstrated that this is not the minimum variance making possible the use of the land.

The first thing to note is how the "lesser variance" analysis relates to the "undue hardship" issue. If a different design would not require the variance, then there is no undue hardship. ***See Spinner v. Kenosha County Bd. Of Adjustment,*** 223 Wis.2d 99, 588 N.W.2d 662 (1998) (reversing granting of a variance because no undue hardship in the sense of no denial of use of the land where a different design would not have required a variance). The resolution in this case simply falls back on the problem with which we started: There is no evidence that Mr. Elam cannot make use of his land without a variance. Thus, there is no hardship. But taking it one step further, even if there was record support to conclude he cannot use his property without some sort of screen, the uncontradicted evidence is that the

variance granted is not the "minimum variance" required for such a screen. Mr. Alias's affidavit stated with no contradiction: "Strategic plantings of five to seven shrubs or trees would accomplish Mr. Elam's goal in full compliance with the zoning ordinance. I would have no objection to a screen that involved planting trees or shrubs as opposed to an obtrusive fence." Affidavit of William Alias, Jr. at ¶¶ 9 (Exhibit F to Bill of Exceptions).

The record is uncontradicted that a screen of shrubbery would obviously be less obtrusive than a fence of the height involved here. Further, the city entirely failed to consider this issue. Even given deferential review of this issues, because there is no factual support on this point and the city entirely failed to consider this important issue (which requires for reversal under *Weems*), that this is not the minimum variance available calls for reversal.

E. The City's "Neighbors Could Do It" Argument Does Not Justify The Variance

The planning director's recommendation misapplies one of the elements required for granting a variance, which requires that "literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same District under the terms of this Ordinance." City of Oxford Land Development Code § 216.07.1. The planning director's recommendation seems premised on the notion that others could build a fence like this. That is wrong: Put simply, no one can build a fence in front of the front-line of their house. Period. This applies to all properties in the district. And the spite fence Elam built—a single screen along one side of a driveway—bears no resemblance to the sort of enclosure contemplated by the ordinance provision for fences in side and back yards.

Courts have rejected arguments identical to the city's effort to justify the variance based on the fact that neighbors without flag lots could build a fence on the opposite side of

the property line where Mr. Elam's fence is to be built. For instance, in ***Chacona v. Zoning Bd. Of Adjustment,*** 143 Pa.Cmwlth. 408, 599 A.2d 255 (1991), a landowner argued that he should get a height variance because the other houses in the neighborhood had built to the height he was requesting. The Pennsylvania court rejected this argument, holding that the question of undue hardship turned on whether, without the requested variance, the owner was prevented from using the land, and that the use of neighboring lands had nothing to do with undue hardship. This analysis is only logical. The question is whether the landowner is denied reasonable use of his own land, not some abstract notion of "fairness" in what Mr. Elam can do in comparison to what his neighbors could do.

CONCLUSION

There are a number of independent reasons why the lower court erred in affirming the granting of the variance in this case. Each of these independently calls for reversal; for this court to affirm, it must reach and resolve each of these issues for the city. First, there is no evidence that, absent the variance, Rick Elam will suffer undue hardship in that he will be denied a reasonable use of his property. Second, it is clear that the problem is a result of both the action of Mr. Elam and his predecessor in title, and, as a result, is "self created" as a matter of law. Third, the undisputed evidence is that there are less intrusive screening alternatives, and, therefore, this is not the minimum variance making possible use of the land. Fourth, there is no showing that the Land Development Code denies Mr. Elam rights commonly enjoyed by others.

Each of these four independent elements are required findings in order to grant a variance under Oxford's Land Development Code. For each of these reasons, the granting of the variance must be reversed.

Respectfully submitted, this 16th the day of September, 2009.

T.H. Freeland, IV
Bar No. [redacted]

Joyce Freeland
Bar No. [redacted]

FREELAND & FREELAND, LAWYERS
1013 Jackson Avenue
P.O. Box 269
Oxford, Mississippi 38655
Telephone: (601) 234-3414
Facsimile: (662) 234-0604
Email: tom@freelandlawfirm.com

ATTORNEYS FOR WILLIAM ALIAS, JR.

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:

Paul B. Watkins, Jr., Esq.
Pope S. Mallette, Esq.
Mayo Mallette, PLLC
2094 Old Taylor Road
P.O. Box 1456
Oxford, MS 38655

This the 16th day of September, 2009.

T.H. Freeland, IV