IN THE MISSISSIPPI COURT OF APPEALS
APPEAL NO. 2009-CA-00347

LENT E. THOMAS, JR. **APPELLANT**

V.
BOARD OF SUPERVISORS
OF PANOLA COUNTY, MISSISSIPPI **APPELLEE**

APPEAL FROM THE CIRCUIT COURT
OF PANOLA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

Oral Argument Is Requested By Appellant

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OF PANOLA COUNTY, MISSISSIPPI **APPELLEE**

I. CERTIFICATE OF INTERESTED PERSONS.

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

1. Chris Aldridge; Panola County, Mississippi;

2. Lent E. Thomas, Jr., Panola County, Mississippi;

3. Board of Supervisors of Panola County, Mississippi;

   (i) James Birge, Panola County, Mississippi;
   (ii) Vernice Avant, Panola County, Mississippi;
   (iii) Gary Thompson, Panola County, Mississippi;
   (iv) Kelly Morris, Panola County, Mississippi;
   (v) William (Bubba) Waldrup, Panola County, Mississippi;

4. Panola County, Mississippi;

5. Jay Westfaul, The Westfaul Law Firm, Batesville, Mississippi, Attorney for Board of Supervisors of Panola County, Mississippi;

6. Larry O. Lewis, Lewis & Miller, Marks, Mississippi, Attorney for Chris Aldridge;

7. Michael K. Graves, Walker, Brown, Brown & Graves, P. A., Hernando, Mississippi, Attorney for Appellant Lent E. Thomas, Jr.

THIS the 17th day of July, 2009.

MICHAEL K. GRAVES, MSB NO. [redacted]
Attorney of Record for
Appellant Lent E. Thomas, Jr.

II. TABLE OF CONTENTS.

III. TABLE OF CASES AND AUTHORITIES.

CASES

ORDINANCES AND REGULATIONS

OTHER AUTHORITIES

IV. STATEMENT OF THE ISSUES.

A. **THE LOWER COURT ERRED IN AFFIRMING THE ORDER OF THE BOARD OF SUPERVISORS REZONING ALDRIDGE'S PROPERTY FROM "AGRICULTURAL" TO "INDUSTRIAL" AS THE ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS.**

B. **THE LOWER COURT ERRED IN AFFIRMING THE ORDER OF THE BOARD OF SUPERVISORS REZONING ALDRIDGE'S PROPERTY FROM "AGRICULTURAL" TO "INDUSTRIAL" AS THE REZONING ORDER CONSTITUTED IMPERMISSIBLE SPOT-ZONING.**

C. **THE LOWER COURT ERRED IN AFFIRMING THE ORDER OF THE BOARD OF SUPERVISORS GRANTING A SPECIAL EXCEPTION FOR THE OPERATION OF A JUNKYARD ON ALDRIDGE'S PROPERTY AS THE ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS.**

D. **THE LOWER COURT ERRED IN RULING THAT THE PROVISION OF THE PANOLA COUNTY ZONING ORDINANCE WAS NOT IMPERMISSIBLY VAGUE THEREBY MAKING THE APPROVAL OF ALDRIDGE'S REQUEST FOR A SPECIAL EXCEPTION ARBITRARY AND/OR CAPRICIOUS AND/OR UNCONSTITUTIONAL.**

V. STATEMENT OF THE CASE.

A. THE NATURE OF THE CASE.

On January 14, 2008, the Board of Supervisors of Panola County, Mississippi, entered an Order rezoning five (5) acres owned by Chris Aldridge from "Agricultural" to "Industrial". In that same Order, the Board of Supervisors also granted Aldridge a special exception to operate a junkyard on the same five (5) acres.

Appellant here, Lent Thomas, an adjoining landowner, appealed the Board's decisions to the Circuit Court of Panola County, Mississippi. Following a hearing on the appeal, the Circuit Court affirmed both decisions of the Board of Supervisors.

Lent Thomas now appeals the Circuit Court's Order to this Court.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

The five (5) acre parcel which is the subject of this appeal was zoned "Agricultural" in 2002 (R.49) with the adoption of the Panola County Zoning Ordinance (R.144). Chris Aldridge ("Aldridge") purchased this five (5) acre parcel in 2006 (R.28). The subject five (5) acre parcel is located on Chapeltown Road, just off of Mississippi Highway 6, in Panola County, Mississippi (R.28).

In September, 2006, Aldridge applied for a special exception to operate a junkyard on the subject five (5) acre parcel located in the "Agricultural"-zoned area (R.29). The special exception was granted by the Panola County Board of Supervisors (R.29). Mr. Lent Thomas, Appellant here, filed an appeal of that decision with the Circuit Court of Panola County, Mississippi (R.29). The Circuit Court reversed the Board's order granting the special exception to Aldridge to operate a junkyard on the five (5) acres on the grounds that the Zoning Ordinance did not allow for a junkyard in an "Agricultural"-zoned area, even with a special exception (R.29). See Order of Circuit Court of

Panola County dated October 19, 2007 (R.106-107).

Subsequent to the Court's Order, on November 13, 2007, Aldridge filed an application to rezone the property to "Industrial", and for a special exception to operate a junkyard should the rezoning request be granted by the Board (R.332-335). Over the objection of Appellant Lent Thomas and other surrounding residents and business owners, on January 14, 2008, the Board granted the rezoning request and approved the special exception to operate a junkyard on the five (5) acre parcel (R.309).

Appellant Lent Thomas timely filed an appeal of the Board's decision(s) to the Circuit Court of Panola County on January 18, 2008 (R.1-9). Aldridge filed a Motion To Intervene in the appeal (R.16-18), and that Motion was granted by the Court on August 12, 2008 (R.167-168).

Following a hearing on the appeal held on January 22, 2009, the Circuit Court entered an Order on February 10, 2009, affirming the decisions of the Board of Supervisors (R.472-481).

Appellant Lent Thomas timely appealed the Circuit Court's Order to this Court on February 27, 2009 (R.482-483).

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

In June, 2006, Chris Aldridge purchased from MMC Materials, Inc., a five (5) acre parcel of property located on Chapeltown Road in Panola County, Mississippi, near the intersection of Chapeltown Road and Highway 6 (R.28, 337-339). At the time of Aldridge's purchase of the property, the property was zoned "Agricultural" which had been its zoning designation at all times since the adoption of the Panola County Zoning Ordinance in March, 2002 (R. 49 and 144-146). Following his purchase of the property, Aldridge unsuccessfully attempted to acquire a "special exception" to operate a junkyard on the property (R. 105-107). Although the "special exception"

request was granted by the Panola County Board of Supervisors, the Board's Order was reversed by the Circuit Court of Panola County, Mississippi, on the grounds that the Panola County Zoning Ordinance did not allow a junkyard to operate in an "Agricultural" zone, even with a special exception (R. 105-107, 153). Aldridge then filed subsequent applications to have the property rezoned from "Agricultural" to "Industrial", and, as zoned "Industrial", for a special exception to operate a junkyard.[1] The Panola County Board of Supervisors granted both of these applications (R. 309), the Circuit Court affirmed the Board's Order (R. 472-481), and this appeal follows.

Prior to Mr. Aldridge's purchase of this property in 2006, Appellant Lent Thomas previously owned the property and sold the property to an individual[2] who at the time resided in Marks, Mississippi (R. 45). At the time of sale of the property by Mr. Thomas to this individual, the property was rural and not zoned,[3] and the use of the property was almost exclusively agricultural and residential as it remains today (R. 54).

The individual to whom Mr. Thomas sold the property subsequently sold the property to MMC Materials, Inc., and MMC Materials then used the property for the operation of a concrete plant (R. 28, 45).[4] However, prior to Aldridge's purchase of the property from MMC Materials, MMC Materials had ceased using the property for concrete plant operations (R. 28-29, 45).[5]

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1 Under the Panola County Zoning Ordinance, a junkyard cannot even exist in an "Industrial" zone without a special exception (R. 155).

2 This individual was not identified in the record, but there was no dispute that Mr. Thomas sold the property to an individual from Marks, Mississippi, prior to the sale of the property by that gentleman to MMC Materials, Inc.

3 The Panola County Zoning Ordinance was not adopted until 2002 (R. 144).

4 The Circuit Court Order entered in this matter on February 10, 2009, erroneously states that Aldridge purchased the property from "Kelly Greenwood" (R. 474).

5 The Circuit Court's Order of February 10, 2009, made the following findings concerning the "concrete plant":

> Testimony at the Commission and Board hearings included information that the property was sold to Aldridge by Kelly Greenwood and the property was used as a concrete plant and therefore being used as industrial property at the time of purchase by Aldridge, even though it was zoned as "agricultural" and therefore a non-conforming use of agricultural land prior to the 2002 adoption of the Land Use Ordinance by Panola County, and continued as a non-conforming use until October 19,

Mr. Aldridge allegedly purchased this property for the purpose of operating a junkyard, but Aldridge claimed before the Board that at the time of his purchase of the property he was not aware of any zoning which would prevent him from operating a junkyard on the property (R. 28). Belying this claim, however,[6] Aldridge did apply for a special exception to operate a junkyard on the property

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> 2007, when the Circuit Court Order signed by the undersigned setting aside the original special exception because of the restriction contained in the land use ordinance prohibiting a special exception being granted for this type of business on agricultural land.

(R. 474-475).

As previously discussed, the evidence presented to the Board was clear that the property was not being used as an industrial concrete plant operation at the time that Aldridge purchased the property. Even Aldridge's counsel acknowledged this at the Board hearing (R. 28-29). Therefore, there was no "industrial" use of the property at the time that Aldridge purchased the property as stated by the Circuit Court. The only evidence of use of the property at the time of Aldridge's purchase was that there was office work being conducted by the owners of the previous concrete operation (R. 28-29), apparently in the winding-down of operations which had already ceased prior to Aldridge's purchase as acknowledged by Aldridge's counsel at the Board hearing (R. 28-29).

Additionally, assuming *arguendo* that some "industrial" concrete plant operation was still being conducted on the property at the time of Aldridge's purchase, that use---which would at the time be a non-conforming use of "Agricultural"-zoned property under Panola County's then-enacted Land Use Ordinance---could not be continued as a "non-conforming" use of a different character as stated by the Circuit Court (R. 474-475). Mississippi law is clear that a non-conforming use may continue only until there is a change in the use or an abandonment of the use. See Barrett v. Hinds County, 545 So.2d 734, 737 (Miss. 1989):

> Non-conforming uses may be permitted to continue where the uses were lawfully established at the adoption of the ordinance; however, depending on the ordinance provision, the exemption granted to a pre-existing non-conforming use may be lost upon any change in the use, or abandonment.

Significant in this regard, the Panola County Land Use Ordinance provides in relevant part:

> **Non-Conforming Uses** --- Any use or structure existing at the time of enactment of or subsequent amendment to this ordinance, but not in conformity with its provisions, may be continued with the following limitations. Any use or structure which does not conform to the provisions of this ordinance shall not be:
>
> i. Changed to another non-conforming use.

Panola County Land Use Ordinance at § Article IV a.i. (R. 157).

Although the Circuit Court included this paragraph in its Order that Aldridge's junkyard was the continuation of a pre-existing non-conforming use (R. 474-475), it nevertheless does not appear that the Circuit Court relied on this finding in affirming the actions of the Board in rezoning the property and granting the special exception (R. 476-481).

6 Of course, Aldridge's claimed ignorance of any "zoning" prohibition at the time he purchased the property is wholly irrelevant to the merits and this Court's decision.

before he began junkyard operations on the property (R. 105-107). Although the Board of Supervisors granted this special exception, the Circuit Court reversed the Board's order on appeal on the grounds that the Land Use Ordinance did not permit a special exception for the operation of a junkyard in an "Agricultural" zone (R. 105-107).

While Aldridge never ceased conducting junkyard operations on the property despite the initial Order of the Circuit Court holding that the Board's grant of the special exception in an "Agricultural" zone was unlawful, Aldridge "re-applied" for a special exception predicated on Aldridge's then requested "rezoning" of the lone five (5) acre parcel from "Agricultural" to "Industrial".[7]

Following a hearing before the Board of Supervisors, the Board granted Aldridge's request to rezone the lone five (5) acre parcel from "Agricultural" to "Industrial" and also to allow Aldridge a special exception use to (continue to) operate his junkyard in the now "Industrial" zoned five (5) acres owned solely by Aldridge (R. 309).

Appellant Lent Thomas appealed the Board's decision to the Circuit Court, and the Circuit Court affirmed the Board's order in all respects (R. 472-481). This appeal followed.

VI. SUMMARY OF THE ARGUMENT.

The Panola County Land Use District Ordinance allows a junkyard in only one zoning district, "Industrial", and then only by special exception. Therefore, in order for Aldridge to be entitled to a special exception to operate a junkyard, Aldridge's property must first be rezoned from "Agricultural" to "Industrial".

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7 The Land Use Ordinance allows for a special exception for junkyard operations in an "Industrial" zone (R. 155).

Aldridge's property has been zoned "Agricultural" at all times since the adoption of the Ordinance in 2002. In order to be entitled to a rezoning of this property, Aldridge must prove by clear and convincing evidence that, either, (1) there has been a substantial change in the character of the neighborhood since the original zoning such that rezoning is justified **and** that there is a public need for the rezoning, or, (2) that there was a mistake in the original zoning. Aldridge did not prove either grounds required for rezoning.

The record evidence clearly demonstrates that there has been **no** change in the **"character"** of the neighborhood since the time of the initial zoning by Panola County as "Agricultural" in 2002. The area in which Aldridge's property is located continues to predominate as a rural, agricultural area just as at the time of its original zoning. Although there are a few retail businesses and one (1) light industrial facility located in the area, all of these businesses also existed at the time of the original zoning as "Agricultural". In fact, at the time of Aldridge's application, the only use change in that entire area since the original zoning in 2002 was that there had been one special exception request for the operation of a used car lot. Even this, however, would not constitute a change in any way in the "character" of the neighborhood as there already existed several car lots in the area at the time that the area was originally zoned "Agricultural". Furthermore, the requisite change must be to the **"character"** of the area such that rezoning can be reasonably justified as consistent with the change in the character of the area, not simply any change at all in the area.

Aldridge also failed to present evidence to the Board of a "public need" for another junkyard in this area, or even in Panola County. There was no evidence of any unfulfilled need for another junkyard in this area which has for many years been serviced by an already existing yard in Panola County and several other yards in adjacent counties. Furthermore, any industrial development in Panola County is intended to be in the entirely opposite end of the County from Aldridge's property

in a planned industrial park area so, even if anticipated "future" need for another junkyard could legally satisfy the "public need" requirement for rezoning under Mississippi law, there is no future need for another junkyard in the area of the County in which Aldridge's junkyard would be located.

This rezoning request is simply for a lone five (5) acre parcel in the middle of a rural, agricultural area. It is not intended to create more "industrial"-zoned property to further industrial development in Panola County. The only "need" for this requested rezoning is a private citizen's desire to use his property to conduct a business for profit which would be wholly inconsistent with the County's comprehensive planning and original zoning, out of character with the existing area, and for a purpose that no other neighboring resident would be able to use their property. This rezoning, if allowed to stand, would be a classic case of "spot zoning" interposed on neighboring residents who do not want a junkyard in their backyards and for the sole purpose of favoring Aldridge.

Further, assuming *arguendo* that Aldridge could even prove by clear and convincing evidence that rezoning of this lone five (5) acre tract to "Industrial" was justified and appropriate, a junkyard could only be allowed by special exception even in an "Industrial" zone. Aldridge wholly failed to present **any** evidence to the Board which satisfied any of the requirements of the Ordinance's special exception provision. Aldridge's failure to prove satisfaction of these requirements by a preponderance of the evidence is fatal to the requested special exception for operation of a junkyard.

Finally, the special exception provision by which the Board approved Aldridge's special exception request to operate a junkyard is so vague and ambiguous that it is unconstitutional and violates Appellant Lent Thomas' substantive due process rights. That provision should be stricken from the Ordinance, and, with that provision declared inoperable as unconstitutional, there is no legal basis upon which Aldridge can be allowed to operate a junkyard on this five (5) acre parcel in the

middle of rural, agricultural property.

VII. ARGUMENT.

A. STANDARD OF REVIEW.

The standard of review of a board's decision on appeal is determined by whether the reviewing court is considering a factual issue and the "burden of proof" required to support the requested change, or, whether the court is considering a question of law and/or a constitutional issue implicated by the board's decision.

1. Factual Issues and Burden of Proof.

(i) **Rezoning.**

A rezoning decision of a local governing body may be reversed on appeal if the decision was "arbitrary, capricious, discriminatory, illegal or is not supported by substantial evidence". See Gentry v. City of Baldwin, 821 So.2d 870, 872 (Miss.Ct.App. 2002).

"Substantial evidence has been defined as 'such relevant evidence as reasonable minds might accept as adequate to support a conclusion' or to put it more simply, more than a 'mere scintilla' of the evidence." Hooks v. George County, 748 So.2d 678, 680 (Miss. 1999). "An act is arbitrary when it is not done according to reason or judgment, but depending on the will alone. 'Capricious' is defined as any act done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard of the surrounding facts and settled controlling principles." Id.

(ii) **Special Exceptions.**

Decisions by local governing bodies on special exceptions are adjudicative in nature. See Mayor and Board of Aldermen of Town of Prentiss v. Jefferson Davis County, Mississippi, 874 So.2d 962, 964 (Miss. 2004). "A reviewing court's obligation on appeal regarding zoning issues that are adjudicative in nature . . . is to determine whether the applicants proved by a preponderance of

the evidence that they met the conditions for a special exception." Bowling v. Madison County Bd. Of Supervisors, 724 So.2d 431, 436 (Miss.Ct.App. 1998) (citation omitted). See also Beasley v. Neelly, 911 So.2d 603, 607 (Miss.Ct.App. 2005) (citations omitted):

> Zoning issues that concern whether to grant or deny a request for a . . . special exception, are adjudicative, as opposed to legislative, in nature; therefore, on appeal, the reviewing courts must determine whether the applicant proved by a preponderance of the evidence that all conditions required for the requested [special exception] were satisfied.

In reviewing the board's decision, the reviewing court is to determine whether the board's action is supported by "substantial evidence".

> In obtaining the special exception, the burden is on the applicant of the change to show by a preponderance of the evidence that the elements/factors outlined in the ordinance have been met. Once the burden has been met at the administrative agency level, the Board's decision is binding on an appellate court if the decision is founded upon substantial evidence.

Perez v. Garden Isle Community Ass'n, 882 So.2d 217, 224 (Miss. 2004) (Carlson, J., concurring) (citations omitted).

"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'". Beasley, 911 So.2d at 607 (citations omitted).

> It may be said that "it means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred."

City of Olive Branch Bd. Of Aldermen v. Bunker, 733 So.2d 842, 845 (Miss.Ct.App. 1998) (citations omitted).

2. Legal and Constitutional Issues.

Where the board's action/decision involves a question(s) of law and/or the constitutional rights of an aggrieved party, the board's action/decision is subject to *de novo* review. See Hearne v. City of Brookhaven, 822 So.2d 999, 1003 (Miss.Ct.App. 2002) (citation omitted) ("While factually-based decisions are not reversed unless the decision is not founded on substantial evidence or is arbitrary or capricious, legal errors are readily reversible and subject to a *de novo* review."); Hinds County Bd. Of Supervisors v. Leggette, 833 So.2d 586, 590 (Miss.Ct.App. 2002) ("We will review questions of law *de novo*."). See also Kemper Nat'l Ins. Co. v. Coleman, 812 So.2d 1119, 1124 (Miss.Ct.App. 2002) ("Generally an administrative agency is accorded deference, but when the agency has misapprehended a controlling legal principle, no deference is due.").

Issues implicating constitutional rights are also to be reviewed *de novo* by an appellate court. See County Bd. Of Education of Alcorn County, Mississippi v. Parents and Custodians of Students at Rienzi School Attendance Ctr., 168 So.2d 814, 819 (Miss. 1964) ("questions of law and constitutional rights are issues for judicial determination on appeal from a legislative agency").

B. THE LOWER COURT ERRED IN AFFIRMING THE ORDER OF THE BOARD OF SUPERVISORS REZONING ALDRIDGE'S PROPERTY FROM "AGRICULTURAL" TO "INDUSTRIAL" AS THE ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS.

In order to obtain rezoning on property, the proponent must prove to the board, by clear and convincing evidence, that either (1) there was a mistake in the original zoning of the property, or (2) the character of the neighborhood has changed to such an extent as to justify reclassification **and** there is a public need for the requested rezoning. See, e.g., Gentry v. City of Baldwin, 821 So.2d 870, 872 (Miss.Ct.App. 2002).

The Mississippi Supreme Court has "said over and over again that the burden of proving the need for a change in zoning rests squarely on those property owners requesting the change." City of Jackson v. Husbands, 233 So.2d 817, 820 (Miss. 1970). See also Wright v. Mayor and Commissioners of City of Jackson, 421 So.2d 1219, 1222 (Miss. 1982) ("to justify a rezoning . . . the applicant must prove the requisite elements by clear and convincing evidence"). "An amendment to a zoning ordinance is not meant to be easy otherwise the ordinance would be a meaningless scrap of paper." Fondren North Renaissance v. Mayor and City Council of the City of Jackson, 749 So.2d 974, 979 (Miss. 1999).

> An attack upon a zoning ordinance, to be successful, must show affirmatively and clearly that it is arbitrary, capricious, discriminatory, or illegal. The presumption of reasonableness and constitutional validity applies to rezoning as well as to original zoning. The courts presume that original zoning is well planned and designed to be permanent. Accordingly, it is a firmly established rule that before a zoning board reclassifies property from one zone to another, there should be proof either (1) that there was a mistake in the original zoning, or (2) that the character of the neighborhood has changed to such an extent as to justify reclassification.

Moore v. Madison County Bd. Of Supervisors, 227 So.2d 862, 863 (Miss. 1969) (citation omitted).

1. The "Character" of the Neighborhood Has Not Changed.

Rezoning in this case can only be predicated upon clear and convincing evidence that the **character** of the neighborhood in which the property is located has changed to such an extent as to justify rezoning, and, additionally that there is a demonstrated public need justifying the rezoning.[8] See, e.g., Carnes v. Harrow Dev. Co., 244 So.2d 27 (Miss. 1971).

The Mississippi Supreme Court has held that the relevant facts necessary to justify rezoning in substantial change cases **are** "clearly establishable" and should be **"clearly established"** before

8 The Circuit Court did not discuss or rely on "mistake" in its Order (R.472-481).

rezoning is permitted:

> [I]n substantial change of neighborhood cases, the facts generally ought be undisputed. The present zoning of all areas surrounding the [subject property] is a matter ascertainable with legal and factual certainty. The present use of each area is likewise susceptible of factual and legal determination with certainty. The dates of any changes are similarly ascertainable with certainty. There is no reason why there should ever be an evidentiary fact issue in dispute at the conclusion of a rezoning hearing.

Woodland Hills Conservation Ass'n, Inc. v. City of Jackson, 443 So.2d at 1182.

See also Board of Aldermen, City of Clinton v. Conerly, 509 So.2d 877, 886 (Miss. 1987):

> When a local governing board is presented a request to reclassify property from one zone to another, if there has been a change in the neighborhood and if there is a public need therefore, evidence to support it should not be difficult to produce. To support on appeal a reclassification of zones, the record at a minimum should contain a map showing the circumstances of the area, the changes in the neighborhood, statistics showing a public need, and such further matters of proof so that a rational, informed judgment may be formed as to what the governing board considered. When there is no such proof in the record we must conclude there was neither change nor public need.

A review of the evidence presented to the Board on behalf of Aldridge within the framework provided by the Mississippi Supreme Court in Woodland Hills and Conerly, discussed *supra*, clearly shows that there was not substantial evidence supporting the Board's rezoning order:

(a) The present zoning of all areas surrounding the subject property.

The only evidence presented to the Board of the zoning of all areas surrounding the subject property at the time of the requested rezoning was the Panola County Land Use District Map (R.109). This Map clearly shows that the present zoning of **all** areas surrounding the subject property was "Agricultural" as it had been, and at all times remained, since the original zoning in Panola County.

(b) The present use of each area.

The present uses of the areas surrounding the subject property have remained unchanged

since the original zoning, including agricultural, residential, light commercial, and one industrial site (R.54-56). In fact, the vast majority of the surrounding area is rural, agricultural property with single-family residences consistent with its original zoning (R.54-55).

(c) The dates of any changes in zoning or uses in the area since the original zoning.

At the time of Aldridge's application and the Board's consideration, there had been **no** change in the original zoning of any area surrounding Aldridge's property. In fact, according to the Panola County Planning and Land Development Commission, since the original zoning in Panola County in 2002, there had been absolutely no "zoning"-type issue in this area other than one (1) requested special exception to operate a used car lot (R.51-52). Indeed, the record before the Board is wholly devoid of any reference to any "zoning" change in the areas surrounding Aldridge's property further evidencing that there was in fact no such change.

(d) A map showing the circumstances of the area.

The only map submitted to the Board by Aldridge was an aerial map of the subject property attached to Aldridge's application for rezoning (R.334). This map clearly evidences the overwhelmingly predominant agricultural nature of the areas surrounding Aldridge's property (R.334). Also, as previously indicated, the Panola County Land Use Districts Map (R.109) clearly evidences that the Aldridge property is wholly encompassed for many miles by property zoned (only) "Agricultural". The nearest property not zoned "Agricultural" is found at the City Limits of Batesville, Mississippi, several miles east of the subject property and where the County has no zoning authority.

(e) The changes in the neighborhood since the original zoning.

Mississippi law makes clear that, in order to support rezoning, there must be a "**substantial**"

change in the **character** of the neighborhood---i.e., as opposed to "**any**" change in the character of the neighborhood. See, e.g., Wright v. Mayor and Commissioners of City of Jackson, 421 So.2d 1219, 1222 (Miss. 1982) ("to justify a rezoning, the burden of proof is upon the applicant to show... that the **character** of the neighborhood had changed **substantially** . . . .") (emphasis added).

The evidence presented to the Board reveals that there was very little, if any, "change" whatsoever in the **character** of the area surrounding Aldridge's property since its original zoning as "Agricultural" in 2002, and certainly that there was not a **substantial** change in the **character** of the neighborhood in which the property is located.

To the contrary, Brenda Solomito, a certified land planner, appeared before the Board and provided materials to the Board (R.341-372) evidencing the basis for her professional opinion that, considering the original/current zoning and the existing conditions in the area, there was **no** "change" in the area which could justify rezoning to "Industrial" (R.54-56 and 342-343). Significantly, neither Ms. Solomito's credentials nor her opinions were questioned by either the Board or counsel for Aldridge.

The materials presented to the Board by Aldridge in support of his position that there was a "change" in the neighborhood justifying rezoning was comprised of the following:

(i) **Type-written argument and unsupported narrative of alleged "facts" by Aldridge's counsel** (R.303-308).

Aldridge's counsel provided a lengthy rendition of what counsel represented to the Board as the evidence presented to, and findings of, the Panola County Planning and Land Development Commission at a prior hearing before that Commission. Of course, the Commission, as with any other public body, only speaks through its minutes, and there was no copy of the relevant minutes provided to the Board by Aldridge; simply, Aldridge's counsel's rendition and unsupported

argument. Also significant for appeal purposes,[9] it should be noted that counsel for Appellant Thomas expressly objected to this submission on behalf of Aldridge, and the Board's consideration thereof:

> [T]he Planning Commission speaks through its minutes just as you. The Planning Commission can only speak through its minutes. Mr. Lewis can't type up this piece of paper telling you what he thinks the Planning Commission said and come in here and say that's what the Planning Commission said.[10]
>
> The Planning Commission's minutes are the only record of that hearing. That's the only thing you can consider as the Planning Commission's decision, not what Mr. Lewis types up and tells you that the Planning Commission said.[11]

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9 Byram 3 Dev. v. Hinds County Bd. Of Supervisors, 760 So.2d 841 (Miss. Ct. App. 2000) (objections to materials presented at board hearing may be waived on appeal if not challenged during board proceeding).

10 Notably, in this regard, it was clear during the Board hearing that the Board members did not know "what" the minutes of the previous Planning Commission hearing included. For example:

> BY MR. GRAVES: Mr. President, may I ask, any conditions imposed on the special exception?
> BY MR. AVANT: Whatever the land use board had in place.

Excerpt from hearing transcript (R.78).

In fact, the Board President expressly asked that the Commission chairman and administrator inform the Board of the Commission's decision:

> BY MR. AVANT: .... Phil [Dew] and Dianne [Stewart], would you all come up, please, if you don't mind, and just tell a little what the land use committee decided at their last meeting on this issue, if you don't mind, and tell the new Board members. BY MS. STEWARD: They granted a special exception in an agricultural district to operate this recycling, not a junkyard. BY MR. AVANT: Phil. BY MR. DEW: Coming past, they recommended to the board, which you said they recommended that they add to this rezoning and then they did give a special exception to do the things, but only with the stipulation that it is rezoned. BY MR. AVANT: Rezoned industrial and granted a special exception. Okay.

Excerpt from hearing transcript (R.70-71).

11 And, in fact, there were numerous inaccuracies in the materials presented by Aldridge's counsel to the Board, which, importantly for appeal, were specifically pointed out to the Board by counsel for Appellant Thomas at the Board hearing:

> [BY MR. GRAVES:] Specifically, as concerning this particular document [submitted by Mr. Lewis], I want to point our several inaccuracies, which Mr. Lewis handed this [document] to me two minutes before he stood up so I haven't had a chance to go through it in great detail, but I have had enough time to pick out some that are in particular inaccuracies. No. 3 on the second page, [Mr. Lewis] said that this property had been sold by Mr. Lent Thomas to be used as a concrete plant. That is inaccurate. Mr. Lent Thomas sold this property to an engineer from Marks. All he did is sell the property. That man had no particular plans for that property to Mr. Lent Thomas' knowledge at the time of that sale.

. . . .

Excerpt from hearing transcript (R.44).

> Now, the second handout that Mr. Lewis gave to you is this list of physical evidence. And, first of all, let me say that for the record, that we wholly object to this, quote, list, just being presented to the Board without any of these materials being presented to the Board. First of all, the Board should be provided whatever Mr. Lewis wants you to look at and consider, he should have and present to you for you to look at. That is not done. Secondly, the problem with that, it doesn't give us any opportunity to see what he is talking about. We don't have any opportunity to address the relevance of any of this. For instance, he says any document relating to the population growth. How do we know that even such a document exists, the timeliness of it or the relevancy of it?[12] We don't know that whatsoever. For the record's purpose I want to state our objection to that and also his comment that he asked the Board to keep the record open for y'all to put these additional documents in there. We further object to that on the same basis. We won't have any opportunity to address that, see that, and it would be wholly inappropriate for the Board to just continue to keep its record open after this meeting to have people just come stick stuff in it they want to stick in it later.

Excerpt from hearing transcript (R.46-47).

> We understand that later that gentleman then sold it to someone else who put a concrete plant there. That statement by Mr. Lewis is wholly inaccurate.
>
> [BY MR. GRAVES:] Page 3, No. 7, [according to Mr. Lewis' document] this land could have been zoned industrial at the time the zoning ordinance was adopted in 2002, but it was not since the non-conforming use at that time to continue, and he said this was a mistake by omission. The Planning Commission absolutely did not say that. As a matter of fact, there was nothing about a mistake ever mentioned to the Planning Commission . . . . "Mistake" was never, ever the word mentioned at the Planning Commission hearing, much less as a basis for this rezoning.
>
> [BY MR. GRAVES:] On the same page, Item No. 8, moving over to Page 4, the top of that, Mr. Lewis says the character of the commercial area along Highway 6 is changing and shows a definite industrial development. That again is wholly inaccurate. There is nothing out there that shows a definite industrial development. ACI is the only thing along that Highway 6 corridor from the city limits to the Tallahatchie River that could conceivably be considered industrial. Everything else out there is light commercial.

Excerpts from hearing transcript at (R.44-46).

12 For example, assuming *arguendo* that such (current) statistics and "document" did exist, there is no way to know whether those statistics and/or document(s) would reflect a population "increase" or "decrease", or how either would purportedly support Aldridge's rezoning application as suggested by Mr. Lewis' unsupported statement.

Nevertheless, even if one were to accept the veracity and appropriateness of these written, unsupported assertions and argument by Aldridge's counsel, **none** of the representations and/or arguments evidence a change in the "**character**" of the surrounding properties since the County's original zoning in 2002.

(ii) **"List Of Physical Evidence".**

Very similar to the written, unsupported representations and arguments by Aldridge's counsel discussed immediately above, Aldridge's counsel also presented the Board with a written "list" of information and materials which counsel asked that the Board consider (R.311-340). This "list" consists of the following, *seriatim*:

1. Aerial Map showing the five (5) acres (R.311). If anything, this "aerial map" (R.310) shows only that the area surrounding Aldridge's property is overwhelmingly, predominantly rural, agricultural land as it was, and has remained, since its original zoning by the County in 2002.

2. Panola County Zoning Ordinance (R.311). The Ordinance in no way supports Aldridge's request for rezoning. The Ordinance (with its incorporation of Panola County's Land Use Districts Map) (R.144-166) clearly shows that Aldridge's property was planned and intended to be included in an "Agricultural" zone when originally zoned in 2002 consistent with the character of the area in which the property is located. See, e.g., Moore v. Madison County Bd. Of Supervisors, 227 So.2d 862, (Miss. 1969) ("The courts presume that original zoning is well planned and designed to be permanent."). In fact, Mississippi courts have long-recognized that the citizenry, including Appellant Lent Thomas and other neighbors, is entitled to rely on the permanency of local government

zoning to protect their personal property interests,[13] and, to be immune from the personal and/or political whims of local decision-making:

> Purchasers of small tracts of land invest a substantial portion of their entire lifetime earnings, relying upon a zoning ordinance. Without the assurance of the zoning ordinance, such investments would not be made. On this small area they build their homes, where they expect to spend the most peaceful, restful and enjoyable hours of the day.
>
> . . . .
>
> In the absence of agreement between all interested parties, an amendment to a zoning ordinance is not meant to be easy. Otherwise, it would be a meaningless scrap of paper.
>
> It is precisely for this reason that, while this Court accords profound deference to actions of governing boards pertaining to their local affairs, we have nevertheless carefully delineated rules for them to follow before amending their duly adopted and established zoning ordinances. The amendment of a zoning ordinance will never be simply a matter of local politics as long as this Court sits.

Conerly, 509 So.2d at 885-86 (quoting Mayor and Comm'rs v. Wheatley Place, 468 So.2d 81, 82 (Miss. 1985)).

See also Cockrell v. Panola County Bd. Of Supervisors, 950 So.2d 1086, 1096 (Miss.Ct.App. 2007):

> The Cockrells and other property owners in the area either bought or built upon their land relying on the agricultural zoning in this predominantly rural area. Except for the one non-conforming use already in existence, Hanson Industries,

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13 At the Board hearing, a nearby resident, Amy Thomas, voiced this very concern (R.73):

> "Placing a junkyard in front of my home would be totally incompatible. When I built the home in '96, I had no idea that something as unsightly as a junkyard could be placed in front of my home. All the land surrounding the proposed rezoning remains zoned agricultural. It will affect our house. I know Mr. Lewis is stressing that it won't, but it does very strongly. I do want to keep saying---they keep saying that it is---we are---it's like we don't exist out there. They are saying it's out there in the middle of nowhere, it's not going to affect anyone. I don't consider my house a pup tent. I consider my house---it is just as valuable to me as the Cockrells' home is to them. And I am closer to Mr. Aldridge then Mr. Cockrell was to the Martins. So we are becoming the Cockrells. We are very upset about it."

> they could never have expected to be neighbors to an offensive salvage metal yard that will crush, burn, and transport scrap metal by rail and road past their, and others' residences. The rezoning is in conflict with the reason the [Panola County Zoning] Ordinance was adopted in the first place: to maintain property values, promote stable development, and encourage compatible land uses with the zoning in place.

Just as the Panola County Board of Supervisors was told by the Mississippi Court of Appeals in Cockrell approximately two years ago, a rezoning decision by it to allow an incompatible land use with the zoning already established by its Zoning Ordinance will encourage further hap-hazard development in the County inconsistent with the original zoning and will decrease the property values and security of residents who have relied on the previous zoning by the County.

3. Panola County Land Use Map (R.311 and 329). As discussed immediately above, the Panola County Land Use Districts Map clearly evidences why the Board's rezoning of this property was erroneous.

4. List of businesses on Highway 6 west of Batesville (R.311 and 330-331). Aldridge mistakenly suggests that the mere existence of businesses on the Highway 6 corridor west of the Batesville city limits somehow supports the rezoning application. What Aldridge fails to recognize, and wholly disregarded by the Board, is that **all** of the identified businesses/schools/churches existed **at the time of the County's original zoning in 2002**. Therefore, the mere "existence" of these businesses on Highway 6 does not constitute a **change** in the **character** of the neighborhood, much less a **substantial** change in the character of the neighborhood. The fact is that the **character** of the area surrounding Aldridge's property has not changed one iota since the County's original

zoning in 2002.

As previously addressed, the Panola County Planning and Land Development Commission reports that only one (1) special exception has been granted in that area since the original zoning in 2002, and that was for a used car lot in an existing commercial business (R.51-52 and 343). Even at that, there already existed three (3) car dealerships and numerous farm tractor/implement dealers in the area (R.343)---dating back to before the original zoning by the County in 2002---so this lone special exception to operate a used car dealership in an existing commercial structure clearly did not in any way change the **character** of the area surrounding Aldridge's property. Also see findings and opinions of Brenda Solomito, certified land planner, concerning the pre-existing nature and character of these businesses, and that there had been no change to the neighborhood to warrant rezoning (R.342-343).

5. Unidentified building and occupancy permits granted in the area (R.311). Aldridge "lists" that he wants the Board to consider all building and occupancy permits issued by the County "on Highway 6 subsequent to the adoption of the Land Use Zoning Ordinance" (R.311). First, as previously discussed, Aldridge does not provide any such alleged materials to the Board for its consideration---even assuming such materials existed. Secondly, Highway 6 spans the entire east-west breadth of Panola County, and it can hardly be said that "[a]ll building and occupancy permits granted . . . on Highway 6" could have any relevance whatsoever to Aldridge's rezoning request. Again, this purported "evidence" was **no** evidence, and any suggestion by Aldridge that any such alleged permits would justify rezoning of his sole five (5) acre tract is wholly illusory and cannot support the Board's action.

6. Aldridge's Application for rezoning and special exception and all documents filed with any agency of Panola County relative thereto (R.311).

The only materials in this regard presented to the Board by Aldridge were the Application, the Panola County Land Use Districts Map, an aerial map of the property, a legal description of the property, a hand-written list of pre-existing businesses on Highway 6, photographs of the subject property and the existing (unauthorized) use of the property as a junkyard, the proof of publication of the rezoning and special exception hearing, and a hand-drawn sketch of Aldridge's planned junkyard (R.310-339). As previously discussed, **none** of these materials evidence that there has been a "substantial change in the character of the neighborhood" since the original zoning in 2002.

7. Copies of the Proofs of Publication (R.311 and 336).

8. Aldridge's deed to the subject property (R.311 and 337-338).

9. Photographs of the subject property and use as a junkyard (R.311 and 313-328).

10. Hand-drawn map and plat of the planned location of structures on the junkyard property (R.311).

11. Certified copies of all Minutes of the Panola County Land Development Commission and Board of Supervisors "in any way connected to" Aldridge's Application (R.311-312).

See notes 9 and 11 and accompanying text supra concerning Appellant Thomas' objection to Aldridge's purported reliance on materials not presented to the Board at the hearing.

12. Copies of all documents "controlled by Panola County demonstrating population growth, business growth, commercial growth and business expansions on Highway 6 West of Batesville" (R.312).

Indeed, if such "evidence" in fact existed and in some (unspecified) way "supported" Aldridge's Application, Aldridge was required to present these materials to the Board. See Woodland Hills, 443 So.2d at 1182 (holding that relevant facts necessary to justify rezoning are "clearly establishable" and should be "clearly established" before rezoning is proper). **Nothing** was presented by Aldridge in this regard. See notes 9 and 11 accompanying text supra concerning Appellant Thomas' objection to Aldridge's purported reliance on materials not presented to the Board.

13. "Copies of any documents within the control of Panola County Board of Supervisors or any of its agencies or employees demonstrating that this property was used for industrial purposes at the time the Zoning Ordinance was adopted or indicating that there was in any way an omission or mistake in failing to zone this property or any other property used for industrial purposes 'industrial' at the time the Zoning Ordinance was adopted." (R.312)

Again, if such "evidence" in fact existed and in some way "supported" Aldridge's Application, Aldridge, as the proponent of the rezoning request, was required to present these materials to the Board. See Woodland Hills, 443 So.2d at 1182. **Nothing** was presented in this regard by Aldridge. See notes 9 and 11 and accompanying text supra concerning Appellant Thomas' objection to Aldridge's purported reliance on materials not presented to the Board.

(f) Statistics showing a public need.

See section VIII.B.2. infra.

2. The Circuit Court's Order Regarding "Substantial Change" Is Not Supported By The Record.

The Circuit Court's Order entered on February 10, 2009, addresses the following "facts" as concerns the alleged change in the "character" of the neighborhood surrounding Aldridge's

property:[14]

> The record before the Panola County Land Development Commission as well as the Panola County Board of Supervisors is that there are numerous businesses along highway 6 west from Batesville. Some are industrial; some are commercial. Some are supply companies. Many are related to the retail sale of automobiles. There are lumber supply companies, schools, and private homes, farms as well as others. Therefore, there was ample evidence before the board of heavy industrial business as well as recent industrial and commercial expansions.
>
> This Court is of the opinion that there was ample evidence before the Board of Supervisors for a finding by the Board that there is an ongoing material change in the character of the neighborhood and the change has continued since the adoption of the Panola County Land Use Ordinance in 2002.

Court Order (R.476-77).

While the Circuit Court was correct in recognizing that there are numerous businesses along the Highway 6 corridor extending west from Batesville into Panola County (R.54-56), the Circuit Court failed to acknowledge that **all** of these businesses were in existence at the time of the adoption of the Panola County Land Use Ordinance in 2002 (R.54-56). In fact, earlier in its very same Order, the Circuit Court stated: "This heavily developed area of Panola County[15] was in place for the most part when the Panola County Land Use Ordinance was adopted in 2002 and placed them in an 'agricultural' zone, and were able to remain in business as a non-conforming use of agricultural land." (R.475-76) Also, the only record evidence of any use or zoning-type "change" in this area since the adoption of the Land Use Ordinance was that there had been but **one** requested special exception to operate a used car lot since the adoption of the Ordinance (R.51-52).

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14 There are no further facts addressed in the Circuit Court Order as concerns a "change in the character of the neighborhood" (R.472-481).

15 Based upon the record evidence, Appellant Thomas respectfully disagrees with the Circuit Court's characterization of the subject neighborhood as a "heavily developed area of Panola County". To the contrary, the unrefuted record evidence establishes that the vast majority of the property surrounding Aldridge's five acre tract is

With all due respect to the Circuit Court, as previously discussed, there is simply no record evidence of **any** change in the "use" of the property in this area, and, hence, the "**character**" of the neighborhood, since the adoption of the Land Use Ordinance in 2002. Furthermore, in order to justify a rezoning order, the change in the character of the neighborhood must be so substantial as to justify a need for rezoning. See, e.g., Carnes, 244 So.2d 27. There was simply no factual or legal basis evidencing a substantial and material change in the character of this neighborhood since the original zoning of the property such as to justify rezoning Aldridge's lone five (5) acre tract from "Agricultural" to "Industrial". Indeed, there has been **no** change in the **"character"** of this neighborhood since the adoption of the original zoning as "Agricultural" in 2002.

Under the clear guidance of the framework for rezoning decisions provided by the Mississippi Supreme Court and Court of Appeals as discussed above, Aldridge did not satisfy the burden to prove by clear and convincing evidence that there was a "substantial change in the character of the neighborhood" since the original zoning in 2002 to justify rezoning of this lone five (5) acre parcel to "Industrial".[16] There is not substantial evidence appearing in the record to support the Board's rezoning decision, the Board's decision and order is therefore arbitrary, capricious, and illegal, and the affirmance of the Board's decision by the Circuit Court should be reversed.

3. There was no "Public Need" for Rezoning of Aldridge's Property.

(a) The "evidence" presented to the Board.

In order for the rezoning to be proper, Aldridge was also required to prove to the Board by

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rural, agricultural property with single-family residences (R.54-55).

16 In fact, there is no evidence to support a rezoning change to any other zoning district in this area, even as suggested by Aldridge's counsel: "So we are asking you to change the law. If you don't want to change it to industrial, change it to something else. Change the law some way where this man can operate this business out there." Excerpt from hearing transcript (R.70).

clear and convincing evidence that there is a "public need" for the requested rezoning. See, e.g., Gentry, 821 So.2d at 872.

The sole basis upon which Aldridge contended to the Board that there was a "public need" for this rezoning to allow his junkyard was because, during the period that Aldridge operated the junkyard under the authority of the prior Board order (before being reversed by the Circuit Court (R.105-107)), Aldridge allegedly had enough business to keep his operation open:

> [BY MR. LEWIS:] Was there a public need for this business? Absolutely. The public need is shown because when you granted him permission to operate this business in 2006, he had a successful year, continued in business throughout 2007 until we got the Court ruling.

Excerpt from hearing transcript (R.35-36).

However, as presented to the Board at the hearing, there are numerous pre-existing scrap yards in and/or or adjacent to Panola County which fully serviced the needs of Panola County residents and businesses before Aldridge even began the process of attempting to obtain authorization from the County to operate his junkyard:

> [BY MR. GRAVES:] Mr. Aldridge has to show by clear and convincing evidence there is a public need for this. There is no public need for another scrap yard in Panola County. There is already one in Panola County at Sardis. That's Martin Brothers, and it's about ten miles from Mr. Aldridge's site. There are also many others which are in close proximity to it. There's one between Crenshaw and Marks which is about twenty miles away, one in Clarksdale which is about twenty-five miles away, one in Oxford which is about thirty miles away. There is no proof before the Board that there is a public need for another scrap yard. The fact that it may be more convenient for one or two persons to take some cans out there rather than drive to Sardis or Clarksdale does not show public need. There is no evidence that any of these scrap yards that already exist do not fully serve and satisfy the needs of Panola County because, frankly, they were at all times prior to this being here. I mean, I would like for any Board member to tell me if they ever had a citizen come before the Board before Chris Aldridge put his plant out there and say, "I don't have somewhere to take my scrap." There has also been ample avenues for people to take their scrap in Panola County. And there still is. All those still exist. There has been no evidence presented to you that

> any of these scrap yards can't handle all of the scrap that's brought to them at any one time. There is no public need for this. Mr. Aldridge wants to do it to make money. It's not for Panola County. It's for Mr. Aldridge.

Excerpt from hearing transcript (R.63-64).

Further evidence that the requested rezoning is merely for a wholly private venture of Aldridge rather than the fulfillment of a recognizable public need is that the request for rezoning is for a lone five (5) acre tract situated in the middle of an agricultural field. This is **not** an effort to rezone more property in Panola County as "industrial" to further industrial development for the betterment of Panola County. As presented to the Board, this requested rezoning is simply for Aldridge's "spot",[17] and the rezoning would do nothing to foster industrial development in the County:

> [BY MR. GRAVES:] Also, bear in mind on the public need issue, all that Mr. Aldridge is requesting to rezone is five acres, five acres for his one scrap yard. He is not asking to rezone a thousand acres up there in Sardis for an industrial park. He is not asking to rezone 20 acres so he can sell some more industrial property to somebody else and help industrial development in Panola County. He is simply wanting you to rezone five acres so he can set his trailers on it and have his junkyard. That is not public need.

Excerpt from hearing transcript (R.64-65).

Additionally, at the time of the Board's hearing on Aldridge's Application for rezoning, there was then scheduled to be presented to the Board by the Planning Commission proposed changes to several zoning designations in the County, specifically including a large tract of land in north Panola County from "Agricultural" to "Industrial" for the very purpose of creating an industrial park to promote industrial development in the County. There was also an additional small parcel immediately west of Aldridge's property on Highway 6 which was wholly occupied by the ACI plant

17 Also see section VII.C. infra discussing impermissible "spot zoning" of this lone five (5) acre parcel.

which was proposed to be rezoned from "Agricultural" to "Industrial" consistent with the industrial use of that property by ACI **prior to** the adoption of the Panola County Zoning Ordinance in 2002. See proposed Panola County Land Use Districts Map (R.109).

> [BY MR. GRAVES:] Also, at that same Planning Commission meeting on December 10, the Planning Commission looked at a proposed revised land use map which is to be proposed to change certain zoning designations in the County. And that's at Tab 4 [(R.109)] of your materials. I obtained a copy of that from Mr. Bob Barber [(planner for Panola County)]. And this is what the Planning Commission is looking at to recommend to you to change the zoning designations in the county. You can see there's some additional industrial areas that are added to it. You will see up north in the county around Sardis where everybody knows that there's been talk for years about putting an industrial park in. They are recommending to change that to industrial there. And then you'll also see down here on Highway 6 right by the river that they are asking to change where ACI is and add that as an industrial zoning designation. What you don't see is you don't see any industrial zoning designation to be changed where Mr. Aldridge's property is. And that's because, apparently, the Planning Commission doesn't see that there's any need to rezone one five-acre piece of property for Mr. Aldridge to operate a scrap yard. And it's my understanding that this map will be recommended and I think [Supervisor] Burge was at that Planning Commission meeting when they looked at this map, and that's where this map come (sic) from. I didn't make it up.
>
> And, by the way, the Planning Commission absolutely knew that Mr. Aldridge's application for this rezoning and junkyard was there at the time they did this because this only came up [at that same meeting] **after** Mr. Lewis and Mr. Aldridge had already spent about two hours that night talking about their junkyard, and, yet, we still have this right here.

Excerpt from hearing transcript (R.52-53).

This is clear evidence that the Planning Commission did not find there to be any "public need" for the rezoning of Aldridge's lone five (5) acre parcel from "Agricultural" to "Industrial", and the Planning Commission---although it was fully aware of the pending application by Aldridge---therefore did not recommend to the Board that Aldridge's lone five (5) acre tract be redesignated from "Agricultural" to "Industrial".

There was no evidence presented to the Board of a "public need" for another scrap yard in Panola County, and there was no evidence that there was any "public need" for the rezoning of Aldridge's lone five (5) acre tract to "Industrial". The Board's Order was not supported by substantial evidence and was arbitrary and capricious.

(b) The Circuit Court's Order on "public need".

The Circuit Court found as follows concerning the required predicate of "public need":

> The Board of Supervisors had sufficient evidence before them, as revealed by the record, to find there is a public need in Panola County for an additional company to buy and dispose of scrap metal. The Board had the right to consider the ongoing expansion of industry in Panola County and the need for private citizens as well as other commercial and industrial entities to have another outlet for scrap metal. The record reveals that there is only one other scrap metal collector in Panola County.[18]

(R.477).

(i) No "common knowledge".

The Circuit Court's Order relies on the purported "common knowledge" of the Board. As stated by the Circuit Court, "The Board **had the right to consider** the ongoing expansion of industry in Panola County and the need for private citizens as well as other commercial and industrial entities to have another outlet for scrap metal." (R.477 (emphasis added)) However, no such "common knowledge" as suggested by the Circuit Court is evidenced in the Board's Order (R.309). In fact, there is **nothing** in the Board's Order indicating in any way what evidence the Board considered in granting Aldridge's rezoning request. See Order Of The Board Of Supervisors dated January 14, 2008 (R.309).

The Mississippi Supreme Court has made clear that, if a board decision is based on the "common knowledge" of a board member (or the board), the board should "clearly so state":

> We emphasize that whenever zoning authorities act on the basis of their general knowledge of their community or on the basis of any other information obtained other than "from the parties", they should clearly so state. In order that we might effectively perform our judicial review responsibilities, it is vital that we are reliably informed of all bases of the decision of the zoning authorities.

Woodland Hills Conservation Ass'n, Inc. v. City of Jackson, 443 So.2d 1173, 1181 n.8 (Miss. 1983). Furthermore, since the rezoning decision---including the requisite finding of "public need"---must be based on clear and convincing evidence, the Mississippi Supreme Court has indicated that the Board's "common knowledge" alone is insufficient:

> We have recognized that informality attends rezoning proceedings, and governing board members may take into consideration their personal knowledge and familiarity with their community (as indeed it would be well nigh impossible in reality to ignore), this by no means suggests that, in order to justify rezoning, a board need not find the necessary criteria for rezoning by clear and convincing evidence and that it is not necessary that such evidence appear in the record.

Board of Aldermen, City of Clinton v. Conerly, 509 So.2d 877, 885 (Miss. 1987).

The Mississippi Court of Appeals has most recently further emphasized the requirement that any such purported "common knowledge" be clearly revealed in the record:

> If the Planning Commission or the Board of Supervisors used their common knowledge and familiarity with the property in question, that common knowledge and familiarity is not borne out by the record. What is more, that common knowledge or familiarity is not related to any particular finding. Was that common knowledge related to any particular justification for rezoning? If so, it is not mentioned even once in the record before us. "Absent a record showing sufficient evidence to support the findings, it is inevitable that reversal will follow."

Childs v. Hancock County Bd. Of Supervisors, 1 So.3d 862, 868 (Miss.Ct.App. 2007) (citation omitted).

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18 This excerpt is the only reference in the Circuit Court's Order to "public need".

The Circuit Court's Order relies on assumed, undisclosed "common knowledge" of the Board members. The decision cannot be upheld according to Mississippi precedent.

(ii) No evidence of "need" as stated in the Circuit Court Order.

As concerns the need for "another" scrap metal company as indicated by the Circuit Court, there was absolutely no such evidence presented to the Board. As discussed above,[19] there was absolutely **no** evidence presented to the Board of a single person or business in Panola County who claimed that there was insufficient scrap metal service available, and the Board's Order did not include any such finding. To the contrary, the evidence before the Board clearly indicated that there was an existing scrap metal yard in Panola County, and numerous scrap metal yards in very close proximity to Panola County (R.63-64). Frankly, to suggest that an existing scrap metal yard in the eastern portion of Quitman County could not continue to service the needs of the western part of Panola County, as it has for many years, would be to ignore practical reality and past experience in favor of transparent county boundary lines and the profit-seeking desires of one citizen to the detriment of surrounding neighbors.[20]

The Circuit Court also suggested that "ongoing expansion of industry in Panola County" justified the "public need" for another scrap metal yard. The Circuit Court's Order overlooks, however, that any planned industrial expansion in Panola County is planned to be at the wholly opposite end of the County than where Aldridge's five (5) acres is situated.[21] Furthermore, the

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19 See section VII.B.3.(a) supra and (R.63-64).

20 See section VII.C. infra discussing "spot zoning".

21 Aldridge's lone five (5) acre parcel is located in the southern quarter of Panola County on the western edge of the County. The "industrial park" which Panola County hopes to develop for "expansion of industry in Panola County" will be located in the northeast portion of the County:

> [MR. GRAVES:] Also, at that same Planning Commission meeting on December 10, the Planning Commission looked at a proposed revised land use map which is to be proposed [to the Board] to change certain zoning designations in the County. And that's at Tab 4 of your materials [(R.109) (compare to existing map at R.112)].

location of the intended "industrial park" for Panola County is only a very short distance from the "other" scrap metal yard already existing in Panola County---Martin Brothers Scrap Metal.[22] Finally, there was no evidence presented to the Board by the Panola County Economic Development Commission or other similar entity responsible for encouraging industrial development in the County that there was a public need for another scrap metal yard to foster such development as is often the case with requests for further infrastructure development. In sum, there was simply no evidence presented to the Board or included in the Board's Order to support the Circuit Court's holding that another scrap yard was necessary for "ongoing expansion of industry in Panola County".

(iii) Circuit Court's Order <u>presumes</u> "ongoing expansion".

The Circuit Court's Order and finding on "public need" merely **<u>presumes</u>** that there will be "ongoing expansion of industry in Panola County" (R.477). Again, there was absolutely **<u>no</u>** evidence presented to the Board of any planned location of a new industry(s) in Panola County at the time of

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> I obtained a copy of that [(R.109)] from Mr. Bob Barber. And this is what the Planning Commission is looking at to recommend to you to change the zoning designations in the county. You can see there's some additional industrial areas that are added to it. You will see up north in the county around Sardis where everybody knows that there's been talk for years about putting an industrial park in. They are recommending to change that to industrial there. And then you'll also see down here on Highway 6 right by the [Tallahatchie] river that they are asking to change where ACI is and add that as an industrial zoning designation. What you don't see is you don't see any industrial zoning designation to be changed where Mr. Aldridge's property is. And that's because, apparently, the Planning Commission doesn't see that there's any need to rezone one five-acre piece of property for Mr. Aldridge to operate a scrap yard. And it's my understanding that this map will be recommended and I think Mr. [Supervisor] Burge was at that Planning Commission meeting when they looked at this map, and that's where this map came from. I didn't make it up.
>
> And, by the way, the Planning Commission absolutely knew that Mr. Aldridge's application for this rezoning and junkyard was there at the time they did this because this only cam up after Mr. Lewis and Mr. Aldridge spend about two hours that night talking about their junkyard, and, yet, we still have this right here [without the Planning Commission recommending Aldridge's property to be zoned "industrial" with the other proposed zoning redesignations].
>
> (R.52-53)

22 Martin Brothers Scrap Metal is located in Sardis (R.30 and 61). As can be seen from the **<u>proposed</u>** <u>Land Use Map</u> intended to provide more "industrial" zoning for industrial development in the "industrial park" area of Panola County, the planned "industrial park" is located in Sardis in the northeast portion of Panola County (R.109). Compare the current Panola County zoning Map (R.112) to the proposed Map (R.109) to easily see the added industrial zoning in and

Aldridge's rezoning application. Although, as previously discussed, it is clear from the Planning Commission's attempt to have acreage in the northeastern portion of the County rezoned to "industrial" for purposes of establishing an "industrial park", there was no evidence presented to the Board by the Planning Commission or anyone else that there were in fact industries which in fact planned to locate in the industrial park area if appropriately zoned. While everyone in the County would presumably hope for that to occur, the fact is that there was no such industrial development at the time the Board considered Aldridge's rezoning application, and there was no evidence of any upon which the Circuit Court could rely in its finding and holding that there was "ongoing expansion of industry in Panola County". Indeed, if rezoning decisions were allowed to be made on some supposed or presumed **future** need, local boards would be vested with untethered discretion based on little or no evidence.

There was simply no **existing** public need for another scrap metal yard at the time of Aldridge's application, and this is clearly borne out by the "lack of" evidence in the record.

C. THE LOWER COURT ERRED IN AFFIRMING THE ORDER OF THE BOARD OF SUPERVISORS REZONING ALDRIDGE'S PROPERTY FROM "AGRICULTURAL" TO "INDUSTRIAL" AS THE REZONING ORDER CONSTITUTED IMPERMISSIBLE SPOT-ZONING.

Impermissible "spot zoning" occurs when a board rezones a particular "spot" which is not in character with the zoning of the surrounding properties. See, e.g., McKibben v. City of Jackson, 193 So2d 741 (Miss. 1967). In most cases, impermissible "spot zoning" is found when a landowner is attempting to extract his particular parcel of land from surrounding, similarly zoned property for some benefit peculiar only to that landowner:

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around the Sardis area where Martin Brothers is already located and has been in operation as a scrap metal yard for years.

> There is a clear cut distinction between a validly enacted amendatory zoning ordinance and a "spot zoning" ordinance. Not all amendments which change or alter the character of a use district fall within the category of "spot zoning" as we generally understand the term. The term "spot zoning" is ordinarily used where a zoning ordinance is amended reclassifying one or more tracts or lots for a use prohibited by the original zoning ordinance and out of harmony therewith. Whether such an amendment will be held void depends upon the circumstances of each case. The one constant in the cases . . ., where zoning ordinances have been invalidated due to "spot zoning" is that they were designed "to favor" someone.

McKibben, 193 So.2d at 744 (citations omitted).

As previously discussed,[23] Aldridge's requested rezoning is intended for no purpose other than "to favor" Aldridge. The requested rezoning is not to further industrial development in Panola County, it is simply the rezoning of one lone five (5) acre tract for a private individual to conduct a private business which no other surrounding landowner would be able to conduct.[24] The rezoning is designed to give Aldridge a preferred use of his property for a private business purpose for which it was not originally zoned, which would not be consistent with Panola County's comprehensive plan for growth as evidenced by its zoning designations adopted in 2002, and which would be wholly incompatible with and out of harmony with the surrounding properties which continue to overwhelmingly predominate as rural/agricultural and single-family residences.[25] While there is admittedly some light-commercial business on this Highway 6 corridor, **all** of those uses **pre-dated**

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23 See section VII.B.3. supra.

24 See section VII.B.3. supra.

25 Although it is clear from the evidence presented to the Board by both Brenda Solomito and from neighboring residents that Aldridge's property is surrounded by single-family residences, Aldridge's counsel nevertheless represented to the Board that was not the case, and, if it were, Aldridge's request "would be unlawful":

> "[BY MR. LEWIS:] If we were asking you to rezone something industrial in the middle of a residential area---first of all, just wouldn't do it. I wouldn't do it because it would be unlawful."

Excerpt from hearing transcript (R.42-43).

the Zoning Ordinance,[26] and **none** of them are "industrial" in nature with the lone exception of ACI which is, according to Aldridge, well over a mile from his property (R.331), **and** also pre-dated the adoption of the Zoning Ordinance.

Finally, Aldridge essentially admitted to the Board that this rezoning would constitute "spot zoning" while attempting to deny same:

> [BY MR. LEWIS:] Now, look, the words "spot zoning" makes everybody jumpy, but I can tell you if you just leave one spot zone where you can put this type of business, that is spot zoning.

Excerpt from hearing transcript (R.68).

That is exactly what the Board's rezoning order and the Circuit Court's affirmance allows---i.e., it creates one "spot" for Aldridge to conduct a business that no one else can because of the existing zoning designations. By definition, and admission by Aldridge, that is impermissible "spot zoning", and the Board's Order is therefore unlawful, and the Circuit Court erred in affirming the Board's Order.

D. THE LOWER COURT ERRED IN AFFIRMING THE ORDER OF THE BOARD OF SUPERVISORS GRANTING A SPECIAL EXCEPTION FOR THE OPERATION OF A JUNKYARD ON ALDRIDGE'S PROPERTY AS THE ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS.

Assuming *arguendo* that Aldridge's property was properly zoned "Industrial" such that it would be capable of supporting a request for a special exception to operate a junkyard, there is not substantial evidence supporting the approval by the Board of the special exception.

> In obtaining the special exception, the burden is on the applicant of the change to show by a preponderance of the evidence that the elements/factors outlined in the ordinance have been met. Once that burden has been met at the administrative agency level, the Board's decision is binding upon the

26 The Circuit Court's Order also recognized that most of these businesses were already in place at the time of the adoption of the Ordinance in 2002 (R.475-476).

appellate court, **if the decision is founded upon substantial evidence**.

Perez v. Garden Isle Community Ass'n, 882 So.2d 217, 224 (Miss. 2004) (emphasis added).

The Panola County Zoning Ordinance contains only the following guidance for the Board's consideration of an application for a special exception:[27]

> **Special Exception:** A special exception, as used in this Ordinance, is granted by the Land Development Commission and is limited to those special exceptions specifically set forth in this Ordinance. A special exception is a use that would not be appropriate generally or without restriction throughout the Land Use district but which, if controlled as to number, area, location or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare.

Panola County Zoning Ordinance, Article I.f.ii.(50). (R.150).

The Board's Order approving the special exception for Aldridge's junkyard (R.309) is totally devoid of any evidence being presented in support of the Application indicating the proposed use---i.e., a junkyard---"would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare" of Panola County as required by the Ordinance. Aldridge had the burden to prove these elements/factors by a preponderance of the evidence. See Perez, 882 So.2d at 224.

In light of the complete absence of any evidence presented by Aldridge to the Board in support of the Application as contemplated by the Ordinance, the Board's Order could not in any way be construed to be based upon a finding of the elements/factors included in the Ordinance being established by a preponderance of the evidence. The elements/factors of the Ordinance and the evidence presented to the Board on each element/factor follow:

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27 See section VII.E. infra discussing the unconstitutional vagueness of this provision of the Panola County Zoning Ordinance.

Public Health: There was no evidence presented to the Board and there is no record evidence that the proposed use would "promote public health".

Safety: The only evidence presented concerning "safety" was that the proposed use would create traffic hazards. There was absolutely no proof that the proposed use would "promote safety":

> BY MR. GRAVES: . . . . You will have people in trucks and cars and people hauling trailers with scrap and metal going up and down those roads dropping mess out in the middle of the highway . . . .
>
> . . . .
>
> In addition to property values and just the way that it will affect the traffic out there, remember that there's going to be traffic coming into there with loads of materials. There are going to be trailers hauling things in there. And as I said earlier, these things will fall off. They'll be in the road. Not only will there be inconvenience and hazards to the local businesses and landowners that are out there, it's going to be to the general citizens that travel up and down Highway 6, there will be hazards there. I mean, there's no reason to have that sitting on a main highway. This Martin Brothers up in Sardis has come up. You all know where that is. That's not sitting on a main highway. You know, we are turning right out of here onto Highway 6 onto Chapeltown Road, and that's right where it is, right at that intersection right on the corner.

Excerpt from hearing transcript (R.59 and 62-63).

Welfare: The only evidence concerning "welfare" was that the proposed use would increase crime in the area because of Aldridge's junkyard buying, storing, and selling copper.

> [BY NEIGHBORING RESIDENT:] I do have concerns with theft. And you can ask Shot [(Panola County Sheriff)]. I am the next house that somebody would run to and the occasions he's been broke into, it does scare me. I have a two-year-old at home and it does bother me very bad, down there as to when anybody is breaking in for this copper.

Excerpt from hearing transcript (R.74).

Also relevant to this issue is the previously discussed issue of increased traffic hazards caused by the proposed use (R.59 and 62-63). And, there was absolutely no

evidence presented to the Board that the proposed use would promote the welfare of Panola County.

Morals: The only evidence concerning "morals" is that the proposed use would increase crime in the area because of Aldridge's junkyard buying, storing, and selling copper (R.74). There was absolutely no evidence that the proposed use would "promote morals".

Order: The only evidence concerning "order" was the evidence presented to the Board that Aldridge's junkyard would increase crime and traffic hazards in the area (R.59, 62-63, and 74). There was absolutely no evidence that the proposed use would "promote order".

Comfort: The only evidence concerning "comfort" was the evidence presented that the proposed use would increase traffic hazards (R.59 and 62-63). There was absolutely no evidence presented that the proposed use would "promote comfort".

Convenience: The only evidence concerning "convenience" presented in support of the Application was that it would create another junkyard approximately ten (10) miles closer to the City of Batesville. However, if the City of Batesville perceives a public need for a "closer" junkyard, there are zoning mechanisms within the city limits to provide for such. Of course, the purported "convenience" of having a closer junkyard to the city limits of Batesville is countered by the increased traffic hazards on a main highway and the main thoroughfare leading into the City of Batesville (R.59 and 62-63). In balance, it certainly cannot be said that Aldridge established by a preponderance of the evidence that a "closer" junkyard located on a main highway and main thoroughfare leading into the City of Batesville would "promote convenience" of the **County's** residents.

Appearance: There was no evidence presented to the Board that Aldridge's junkyard would "promote appearance" in the area. To the contrary, area residents, by testimony and letters

presented to the Board, objected to the unsightliness of the proposed use and the affect which a junkyard would have on their residential property values:

> [BY NEIGHBORING RESIDENT:] Placing a junkyard in front of my home would be totally incompatible. When I built the home in '96, I had no idea that something as unsightly as a junkyard could be placed in front of my home. All the land surrounding the proposed rezoning remains zoned agricultural. It will affect our house. I know Mr. Lewis is stressing that it won't, but it does very strongly. I do want to keep saying---they keep saying that it is---we are---it's like we don't exist out there. They are saying it's out there in the middle of nowhere, it's not going to affect anyone. I don't consider my house a pup tent. I consider my house---it is just as valuable to me as the Cockrells' home is to them. And I am closer to Mr. Aldridge than Mr. Cockrell was to the Martins. So we are becoming the Cockrells. We are very upset about it.
>
> . . . .
>
> I do wish that y'all would keep it under consideration that our house is---we just got through paying over $4,000 in property taxes. It is a nice home and we value it---it is going to devalue it. It is a sore eye in front of our house, and we did build our house before this [junkyard] was ever built.
>
> . . . .
>
> [T]he houses that are there now, us, the Elmores, the Robinsons. All these people. I don't know if you need these letters that all the people behind are opposing. They are acting like it's no houses back there. I am the first. But there are a lot back there. You do need these letters [from the other neighbors].

Excerpts from hearing transcript (R.73-75).

Also see Cockrell, 950 So.2d at 1096 (quoted and discussed supra).

Prosperity: There was no evidence presented to the Board that Aldridge's junkyard would "promote prosperity" in Panola County. To the contrary, there was evidence presented to the Board that Aldridge's junkyard would increase traffic hazards and crime in the area, and would decrease neighboring residential property values (R.59, 62-63, and 73-75). Those things do not "promote prosperity" in the County.

General Welfare: There was no evidence presented to the Board that Aldridge's junkyard would "promote the general welfare" of Panola County. To the contrary, there was evidence presented to the Board that for many years prior to Aldridge's junkyard, there have been many junkyards in existence in and in close proximity to Panola County which have fully serviced the needs of Panola County residents, and there was no public need for another junkyard (R.63-65). Additionally, there was evidence presented to the Board that the location of the junkyard would increase crime and traffic hazards in the area, and would decrease neighboring residential property values (R.59, 62-63, and 73-75). Aldridge's proposed junkyard is not concerned with the general welfare of Panola County; it is simply about Aldridge's desire to establish a for-profit business at the expense of nearby residents who have lived and invested considerable money in this area for many years before Aldridge even owned the property on which he is seeking to establish the junkyard.

There was simply **no** factual basis upon which the Board was authorized to grant Aldridge's special exception to operate a junkyard, and the Board's order certainly was not based upon a preponderance of the evidence as required by Mississippi law. In short, the Board's decision was not based on substantial evidence, and it is therefore arbitrary and capricious. See Mississippi State Dep't of Health v. Natchez Community Hosp., 743 So.2d 973, 977 (Miss. 1999) ("If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious."). See also Davis v. Public Employees' Retirement System, 750 So.2d 1225, 1230 (Miss. 1999) ("a decision unsupported by any evidence is by definition arbitrary and capricious").

While Appellant Thomas does not disagree with the Circuit Court that it is to grant a "presumption of validity" to the Board's findings (R.478), there is no presumptive validity due when

the record is totally devoid of any evidence.[28] That is particularly true when the only evidence presented to the Board on each of the factors showed that the factors were **not** met.

E. THE LOWER COURT ERRED IN RULING THAT THE PROVISION OF THE PANOLA COUNTY ZONING ORDINANCE WAS NOT IMPERMISSIBLY VAGUE THEREBY MAKING THE APPROVAL OF ALDRIDGE'S REQUEST FOR A SPECIAL EXCEPTION ARBITRARY AND/OR CAPRICIOUS AND/OR UNCONSTITUTIONAL.

Reported decisions of both the Mississippi Supreme Court and Mississippi Court of Appeals have always addressed and/or contemplated that the involved ordinance contains specific "elements/factors" which must be satisfied by the applicant---by a preponderance of the evidence---prior to the local governing authority validly issuing a conditional use permit or special exception. See Barnes v. Board of Supervisors, 553 So.2d 508, 510 (Miss.1989) (holding that in order to obtain a special exception, applicants must "prove by a preponderance of the evidence that they have met the elements/factors essential to obtaining the conditional use permit"). See also Nichols v. Madison County Bd. of Supervisors, 953 So.2d 1128, 1130 (Miss. Ct. App. 2006).

While these "elements/factors" are typically specifically enumerated in the ordinance, the elements/factors should at least be stated in a sufficiently definite manner to insure that the provision of the ordinance is applied equally and uniformly—i.e., in a constitutional manner. See 101A C.J.S., Zoning And Land Planning § 233 (footnotes omitted):

> [I]n order to be valid, provisions for the granting of variances or special exceptions must affect alike all persons in the same situations, must prescribe an adequate method of giving the parties affected due notice of the hearing before the board, and must contain sufficiently definite standards to guide and control the action of the board; and where such requirements are not satisfied the provision may be invalid.

28 The Circuit Court's Order specifically acknowledges that the proponent of the special exception must "prove[d]

The Panola County Ordinance provision concerning special exceptions provides no definite guidance whatsoever as to what "elements/factors" must be satisfied in order for the County to validly grant a special exception. See Ordinance, Article I.f.ii.(50) (R.150):

> **Special Exception.** A special exception, as used in this Ordinance, is granted by the Land Development Commission and is limited to those special exceptions specifically set forth in this Ordinance. A special exception is a use that would not be appropriate generally or without restriction throughout the Land Use District but which, if controlled as to number, area, location or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare.

This provision provides no guidance as to the type of evidence which must be presented to the Board on a request for a special exception, or, importantly, as to the type of evidence which the Board must require in order to validly grant a special exception. To the contrary, the provision is so vague as to any "requirements" which must be met to be entitled to a validly issued special exception that it is a patent invitation to the Board to approve or deny special exception requests at its sole whim and discretion, and not dependent upon any reason or basis. Indeed, to make the provision even more vague—while concomitantly increasing the near unbridled discretion of the Board under the provision—the "requirements" are listed with the disjunctive "**or**". See Ordinance, Article I.f.ii.(50) (R.150).

> An administrative agency's decision is "arbitrary" when it is not done according to reason or judgment, but depending on the will alone. An act is "capricious" if it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.

Marquez, 774 So.2d at 429-30 (citations omitted).

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by a preponderance of the evidence that **all** conditions required for the requested exception were satisfied" (R.480).

2. The Circuit Court's Order.

The Circuit Court's Order seems to indicate that the special exception provisions of the Ordinance can be made constitutionally specific and definite by the action of the Board in imposing restrictions on the grant of the special exception (R.479-480). However, it is respectfully suggested that this puts the proverbial "cart before the horse".

"Restrictions" on a special exception use would only be appropriately imposed **after** the applicant for the special exception satisfied **all** of the conditions imposed by the ordinance for entitlement to the special exception. At that point, the board could then impose appropriate use restrictions if necessary. However, the necessary predicate decision is whether the applicant is entitled to the special exception in the first instance. It is upon this initial, preliminary predicate that there can be no informed, rational decision made under Panola County's existing Ordinance as previously discussed. In the instant case, rather than the use restrictions "justifying" the special exception as found by the Circuit Court, the issue of possible use restrictions should be a *non sequitur* because of the constitutional infirmity of the special exception provision in the Ordinance in the first instance.

The special exception provision of the Ordinance is impermissibly vague and provides no definitive parameters to guide the Board's decision, thus making any decision of the Board wholly discretionary and, therefore, arbitrary. Such a provision, having the force of "law" in Panola County, violates Appellant Thomas' substantive due process rights, and is therefore unconstitutional. The Board's approval, and the Circuit Court's subsequent affirmance, are therefore violative of Appellant Thomas' substantive due process rights, and should be reversed.[29] See Bunker, 733 So.2d at 844 (the

29 The Court should be aware that the Ordinance contains a "Severability Clause" which allows the special exception provision to be stricken from the Ordinance (or re-drafted) without the entire Ordinance being declared unconstitutional.

governing body's decision must be reversed if it "violated the constitutional or statutory rights of the aggrieved party").

VIII. CONCLUSION.

There is no legal or factual basis to support the Circuit Court's affirmance of the Board's decision rezoning Aldridge's property to "Industrial" and granting a special exception to operate a junkyard. There is no "mistake" in the original zoning as recognized by Mississippi law which would allow rezoning to take place. There has been **no** change in the **character** of this neighborhood since its original zoning in 2002, much less "substantial change in the character of the neighborhood" as required by Mississippi law. And, there is no public need for Aldridge's lone five (5) acre parcel to be rezoned "Industrial" to allow a sole landowner to operate a junkyard. This is a classic case of impermissible "spot zoning" designed simply "to favor" Aldridge.

For all of the above-stated reasons, the decisions and order of the Panola County Board of Supervisors in rezoning Aldridge's five (5) acres as "Industrial" and granting a special exception to operate a junkyard on that property were arbitrary and capricious, in violation of Mississippi law, not supported by substantial evidence, violative of Appellant Thomas' substantive due process rights, and/or unconstitutional, and should be reversed.

DATED this the 17th day of July, 2009.

See Article I.e. (R.146):

> **Severability Clause** -- If for any reason, should any section of provision of this Ordinance be declared by the courts to be unconstitutional or invalid such decision shall not affect the validity of the Ordinance as a whole, or any part thereof other than the part so declared to be unconstitutional or invalid.

LENT E. THOMAS, JR

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CERTIFICATE OF SERVICE

I, Michael K. Graves, one of the attorneys for Appellant, do hereby certify that I have this day provided a true and correct copy of the above and foregoing **Brief of Appellant**, via U. S. Mail, postage prepaid, to the following:

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This the 17th day of July, 2009.

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