IN THE MISSISSIPPI SUPREME COURT

RIVERSIDE TRAFFIC SYSTEMS, INC.,
BOOKER FARR, AND LEHMAN-ROBERTS COMPANY — APPELLANTS

VS. — NO. 2009-CA-00710

ROBIN BOSTWICK, ERIC FROHN,
ALLEN MAXWELL, HERBERT G. ROGERS,
RAY TATE, AND CITY OF NEW ALBANY,
MISSISSIPPI — APPELLEES

On Appeal From the Circuit Court of Union County, Mississippi

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BRIEF OF APPELLEES, ROBIN BOSTWICK, ERIC FROHN, ALLEN MAXWELL, HERBERT G. ROGERS, AND RAY TATE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. William O. Rutledge III and Valarie B. Hancock of Rutledge, Davis and Harris, PLLC and L.N. Chandler Rodgers, Counsel for Robin Bostwick, Eric Frohn, Allen Maxwell, Herbert G. Rogers, and Ray Tate, Appellees;
2. Robin Bostwick, Appellee;
3. Eric Frohn, Appellee;
4. Allen Maxwell, Appellee;
5. Herbert G. Roberts, Appellee;
6. Ray Tate, Appellee;
7. Roger H. McMillin, Jr., Esq., Counsel for City of New Albany, Mississippi;
8. City of New Albany, Mississippi;

9. E. Patrick Lancaster, Kathryn H. Hester, and Robert T. Jolly, Watkins Ludlam, Winter & Stennis, P.A., Counsel for Lehman-Roberts Company, Appellant;

10. Lehman-Roberts Company, Appellant;

11. Anthony Rhett Wise, Counsel for Riverside Traffic Systems, Inc., and Booker Farr, Appellants;

12. Riverside Traffic Systems, Inc., Appellant;

13. Booker Farr, Appellant;

Respectfully submitted, this the 21 day of April, 2010.

William O Rutledge

WILLIAM O. RUTLEDGE III,

ATTORNEY FOR

ROBIN BOSTWICK, ERIC FROHN, ALLEN MAXWELL, HERBERT G. ROGERS, AND RAY TATE, APPELLEES

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STATEMENT OF THE ISSUES

1. Whether the Appeal in this matter should be dismissed as the claim is barred by *res judicata* because Booker Farr filed a separate Petition to Rezone the subject property from agricultural to industrial and the City of New Albany has since held a public hearing and made a decision on Farr's Petition that his Farr property is and should remain zoned Agricultural.

2. Whether the Appeal in this matter should be dismissed because Booker Farr, by filing a separate Petition to Rezone the subject property from agricultural to industrial has admitted the true zoning of the Farr property is Agricultural.

3. Whether any points other than notice can be considered by this Court as the that was the sole point that was considered by the Circuit Court judge.

4. Whether the Circuit Court judge was correct in finding there to be insufficient notice of a public hearing on rezoning the Farr property from Agricultural to Industrial.

5. Whether Lehman-Roberts Company has any standing to appeal the Circuit Court's decision; and if so, whether they waived any rights to do so by their own acts.

6. Whether the 10 day time period set forth in Miss. Code Ann. §11-51-75 even applies to the facts and issues at hand in the manner stated by Lehman-Roberts in its brief.

7. Whether waiver and estoppel apply to the facts and issues at hand in the manner stated by Lehman-Roberts.

8. Whether the City's acts were arbitrary and capricious, fairly debatable, beyond the legal authority of the City or supported by substantial evidence.

9. Whether the Property Owners' Bill of Exceptions had arguments outside the scope of appeal that should not have been considered.

ORAL ARGUMENT REQUESTED

The Appellees disagree with the Appellant, Lehman Roberts Company, that any issue in this appeal is a matter of first impression. Due to the intricacy of factual matters and the importance to property owners, municipalities and counties, however, the Appellees agree that oral argument would indeed assist the Court in an understanding of the facts and issues presently before the Court.

I. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

This is an appeal of the Circuit Court's decision on a Bill of Exceptions filed by property owners in the City of New Albany, concerning the zoning of certain property located at 1305 Munsford Drive, New Albany, Mississippi.[1] A hearing was initially held on the question by the New Albany Board of Aldermen on August 29, 2008. After much discussion from Booker Farr, Lehman-Roberts Company, and from various citizens and property owners of the City of New Albany, the Board of Aldermen took the matter under advisement, promising to have a decision within 15 days. On September 15, 2008, the Board of Aldermen held a meeting wherein they voted in a 3 to 2 vote that the property was appropriately zoned as industrial.

The undersigned attorney, William Rutledge, on behalf of his clients, Appellees herein who are citizens of New Albany, filed a Bill of Exceptions, appealing the decision of the Board of Aldermen. Appellants Booker Farr and Lehman-Roberts Company intervened in the Circuit Court Bill of Exceptions. The Circuit Court Judge found in favor of the surrounding property owners on the basis that notice was never adequately given under the requirements of state law to rezone the land, and also that the City had failed to follow its own ordinances. Judge Lackey ruled that a newspaper article which mentioned the zoning map was not legal notice and had not even included what year the hearing would be held, among other required exclusions, all in violation of state law requirements and city ordinances.

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[1] All references to "land" or "property" throughout this Brief mean the Booker Farr land located at 1305 Munsford Drive, New Albany, Mississippi.

The Attorneys for Booker Farr and Lehman-Roberts Company immediately filed appeals with the Mississippi State Supreme Court. Lehman-Roberts Company has filed a Brief with this Court, while Booker Farr has joined in the Summary of the Argument and the Argument developed in the Lehman-Roberts Appellant Brief. This Appellees' Brief addresses Lehman-Roberts arguments, and by default, Farr's arguments as well.

Conspicuously absent from this appeal is the City of New Albany. Judge Lackey's ruling was made against the City, which would actually be the injured party in this case, but the City has not appealed the Circuit Court ruling. In fact, the Board of Aldermen have since reconsidered the matter of the zoning of the Farr property and voted 3 to 2 that the Farr property is Agricultural, denying a petition of Farr to rezone the property as Industrial.

Rather than await a decision from this Court, Appellant Booker Farr filed a Petition to Rezone his same land with the City of New Albany, wherein he asked, over his signature, the City to change the zoning of his property from Agricultural to Industrial. (Record Excerpt 15, Petition to Rezone). A separate public hearing was held on this matter on June 15, 2009 at which time the Board of Alderman, in a 3 to 2 vote found the Farr property to be properly zoned Agricultural, and denied Farr's Petition to Rezone, thus making this matter moot and barred by *res judicata*. (R.E. 16, November 2009 Finding of Fact and R.E. 17, Transcript of June 15, 2009 Hearing).

B. Statement of Facts

The city claims to have adopted comprehensive zoning regulations on May 28, 1980. At that time, or soon thereafter, the City tried to adopt a zoning map showing the various zoned areas within the City limits. The map was to be maintained in the office of the zoning administrator in city hall. It is agreed by all that the subject property was annexed into the City in 1968. At that time,

Munsford Drive, a four lane high volume road connecting US 78 and Highway 30 West, had not been built.

The subject property and that surrounding it was primarily agricultural consisting of row crop land and woodlands but for a large machine shop and welding operation, located to the northwest of the subject property, and the residence of Ray Tate, located to the northeast of the subject property. Both the machine shop operation and the Tate residence fronted on Wesson Tate Drive, a frontage road running roughly parallel to US 78. (Record Excerpt 1, City of New Albany's October, 2008, Finding of Fact, Record at 154).

Munsford Drive was built in 1996/1997 with a 150 foot right of way and was built to state aid road specifications. The initial purpose for which it was built was to connect Highway 78 and Highway 30 with commercial zoning on both sides of the road. Munsford Drive also is a part of the long range traffic plan for the City of New Albany and constitutes a portion of what is known in the plan as the "outer loop."

Phil Morris was the owner of 100+ acres lying adjacent to and northwest of the subject property. He held an ownership interest in the machine shop and welding operation located on his property. In 1996 Morris applied for and received a rezoning of approximately 48 acres lying adjacent to and immediately north of the subject tract. Portions of the 48 acres were formerly zoned A-1 and C-1.

Soon after the rezoning of the 48 acres, a small, locally owned asphalt plant was constructed on land adjacent to the subject tract, but not connecting to Munsford Drive. This small asphalt plant has been in operation since being constructed 10 to 12 years ago.

The official minutes of the City of New Albany for meetings of the Mayor and Board of Aldermen do not contain any entry wherein it was requested that the subject Farr tract be rezoned

from agricultural to industrial although, at some time unknown for certain by anyone, it was erroneously shown as being zoned industrial, instead of agricultural, on the City's zoning map. In fact, neither the City of New Albany, nor any of the current or previous owners of the subject Farr property have ever taken statutory steps, or the steps set out as required in the City's own ordinances, which are required to rezone Farr's land from Agricultural to Industrial. (R.E., 2, Booker Farr Deposition, Exhibit "A" at 22-23; R.E. 3, Ann Neal Deposition, Exhibit "I" at 40-41; and R.E. 4, Michael Armstrong, Exhibit "J" at 49:10-23 to Bill of Exceptions).

In the years 1999-2000, the City of New Albany underwent two separate annexations. The city employed Bridge & Slaughter, Urban Planners, to assist it with the annexations. Chris Watson of that firm was the professional designated to assist the City. Following the annexations, Bridge & Slaughter recommended that the official zoning map be redrawn. Bridge & Slaughter redrew the map and then presented it to the City for review. On both the prior and current maps, the subject property was erroneously shown as industrial.

The official minutes of the City reflect that on July 3, 2001, the Mayor and Board of Aldermen set a public hearing for July 26, 2001 to receive citizen input on the proposed redrawn map. A news story (not a legal notice) about the proposed zoning map and the public hearing was published on the front page of *The New Albany Gazette* along with a color-coded proposed zoning map in the July 6, 2001 edition of that paper. (R.E. 5, *New Albany Gazette* News Story, Exhibit "R" to Bill of Exceptions). The news story stated that a large version of the proposed map could be inspected at City Hall and that the hearing on the same would be held on Thursday, July 26, (year omitted) at 6:00 p.m. in City Hall. Accompanying the article and reproduction of the color-coded zoning map was a listing of New Albany's zoning districts and what was allowed in each district. (Id.). No notice of the hearing was published in the "legal notices" section of *The New Albany*

Gazette, nor was a formal legal notice in the form required by New Albany ordinances ever published at any time.

A hearing was held on August 29, 2008, where the undersigned, attorney for Robin Bostwick, Dr. Eric Frohn, Allen Maxwell, Herbert G. Rogers III, and Ray Tate, presented his clients' position in the argument along with exhibits and overhead projector presentations. (Record, August 29, 2008 Hearing Transcript, Exhibit "M" to Bill of Exceptions). Mr. Rutledge contended that the land had always been agricultural since being brought into the city; that it had never been rezoned; and that it remained agricultural through the date of the hearing. (Id.). The undersigned cited numerous legal precedents in support of his clients' position. (Id.).

Mr. Rutledge made the point that the land in question was clearly annexed into the City as agricultural in 1968. Citing case law in support, the undersigned outlined the proof which must be established before a rezoning can take place. This is: (1) that there was a mistake in the original zoning; (2) the character of the neighborhood has changed to such an extent as to justify the reclassification; and (3) there is a public need for the rezoning. Requirements for this proof are that it must be shown through clear and convincing evidence. (Id.).

Booker Farr testified that he bought the subject property in 1999 and did not know the status of its zoning until sometime around 2002 or 2003 when he was advised by a city official that the subject property was zoned industrial. He checked on the zoning because he wanted to sell the land. (R.E. 2, Booker Farr Deposition at 22:9-18).

After much discussion from various citizens, the Board of Aldermen took the matter under advisement, promising to have a decision within 30 days. (R.E. 6, August 29, 2008 Hearing Transcript, Exhibit "M" to Bill of Exceptions at 171:13-24). On September 15, 2008, the Board of Aldermen held a hastily called special meeting wherein they voted in a 3 to 2 vote that the property

was appropriately zoned as industrial because the zoning map showed it that way. (R.E. 1, Finding of Fact at 161-163).

Mr. Rutledge, on behalf of his clients, filed a Bill of Exceptions, appealing the decision of the Board of Aldermen. (Bill of Exceptions, R. 117). Mr. Wise and Mr. Lancaster intervened on the part of Booker Farr and Lehman Roberts Paving respectively. (Order, R. 145). Circuit Court Judge Henry Lackey found in favor of the surrounding property owners on the basis that notice was never adequately given under the requirements of the state law or New Albany ordinances. (Circuit Court Final Order, March 31, 2009, R.310).

In fact, no notice for a public hearing on the zoning map was ever given, due in part to the fact that the City had failed to follow state law and its own ordinances and that the newspaper article had not even included a year for the hearing to be held in violation of state law requirements. (Id.). Judge Lackey stated that the newspaper article clearly excluded the Farr property. (Id.). Judge Lackey did not rule on the City's other violations listed in the Bill of Exceptions because they were moot due to the ruling that the City's actions were arbitrary and capricious because of improper notice. (Id.).

Shortly after receiving the Circuit Court ruling, dated March 31, 2009, Appellant Booker Farr filed a petition to rezone the subject property from agricultural to industrial, stating in his application the correct zoning of his property to be agricultural. (R.E. 15, Booker Farr Petition to Rezone). This petition was filed on April 15, 2009. (Id.). Then, on April 24, 2009, counsel for the Appellants filed their notices of appeal with the Mississippi State Supreme Court in this action which is currently before the Court. (R. 321-324). Again, the City of New Albany did not join in the appeal.

The New Albany Board of Aldermen held a public hearing on Farr's new petition to rezone on June 15, 2009. (R.E. 16, June 15, 2009 Hearing Transcript and R.E. 17, November 2009 Finding

of Facts). Booker Farr and Lehman Roberts, along with their attorneys and witnesses, appeared and stated their case to the Board. Appellees herein did the same. Both sides offered expert testimony. (Id.).

After a hearing lasting approximately four hours, where all parties and concerned citizens were given the opportunity to be heard, including experts for both the property owners and Booker Farr, the Board, in a 3 to 2 vote, found the Farr property to be properly zoned Agricultural, denying Farr's Petition to Rezone his land to Industrial. (Id. at 189: 8-9).

II. SUMMARY OF THE ARGUMENT

This appeal should not be heard due to judicial estoppel and election of remedies on the part of Booker Farr and Riverside Traffic. Furthermore, Appellant Lehman Roberts has no standing to make any claims in this matter. If the Court does find the Appellants to have valid appeal issues, the only issue that should be considered in this appeal is that of notice as this is the sole issue that was addressed by the Circuit Court.

There was never sufficient legal notice at any time to give any indication to the Appellant property owners that the Farr property was even being considered for rezoning. The "notice," on which the Appellants want to rely, (if the Court finds that a newspaper article stating only a month and day, omitting even the year of the public meeting, constitutes legal notice) **specifically excluded the Farr property in question**. Improper notice on the part of the City resulted in the remaining issues before the Court being moot, as without proper notice, there could be no change in zoning.

If the Court determines it should consider any of the many other issues brought up in the Appellants' briefs, the Appellee property owners would state that each and every issue considered favors the Appellees and further supports the Circuit Court's ruling.

The Appellee property owners bill of exceptions was not a direct appeal of the 2001 Ordinance and Map as stated multiple times by Lehman Roberts in this appeal.[2] It was in fact an appeal of the September 15, 2008 determination of the Board of Aldermen refusing to correct a previous mistake on the part of the City of New Albany that resulted in the Zoning Map's being incorrect. Therefore, any and all information and evidence presented to the board in previous meetings and hearings leading up to its vote was appropriately considered on appeal.

The City did fail to follow proper procedure required by Mississippi statutes as well as its own ordinances. Their failures included (1) not signing the minutes adopting the ordinance; (2) not properly adopting a comprehensive plan; (3) not giving proper notice of public hearings on these matters, and more. The City has admitted it made mistakes and has since taken steps to correct those mistakes in finding the Farr property to be properly zoned Agricultural. Appellants, Lehman-Roberts and Booker Farr, cannot reasonably attempt to argue on behalf of the City of New Albany that the property is Industrial when the City is an Appellee in the new Circuit Court action, defending its 3 to 2 vote that the Farr land is Agricultural and the City has not appealed in this action.

Furthermore, the Bill of Exceptions which the Circuit Court ruled on contained no inappropriate or inadmissible documents. Appellants attempt to limit the record only to the September 15, 2008 vote, leaving out all of the documents that show how that vote came about. The Appellants would even omit the transcript of the hearing where the Board of Aldermen took the matter under advisement, eventually leading to the September 15, 2008 vote where the "final determination" was actually made. All of the documents attached to the Bill of Exceptions were

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[2] Oddly enough, in its brief to the Circuit Court, Lehman-Roberts attempted to limit review strictly to the September 15, 2008 vote and exclude all evidence that led up to that vote, including the transcript of the public hearing. Now, in its appeal to this Court, Lehman-Roberts wants to limit the scope of appeal to the 2001 ordinance and map.

produced to the Board of Aldermen and the Appellants prior to the actual vote, were considered in making that vote, and were fully and correctly within the Circuit Court's consideration.

III. ARGUMENT

A. Standard of Review.

This Court must determine if the Circuit Court based its ruling on the record or on its own judgment. Upon appeal of a municipal action or lack of action, the Circuit Court is required to determine whether the municipality acted in a manner that was arbitrary and capricious, discriminatory, beyond the legal authority of the City, or unsupported by substantial evidence. 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 v. Bunker*, 733 So.2d 842, 845 (Miss. Ct. App.1998).

A court is allowed to substitute its judgment for that of a municipality regarding the classification of property when the municipality's decision is arbitrary or capricious, not supported by substantial evidence, beyond the scope of the municipality's powers, or violated the constitutional or statutory rights of a party. *City of Petal v. Dixie Peanut Co.*, 994 So.2d 835 (Miss.App. 2008)(Citing *Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.*, 767 So.2d 1007 (Miss. 2000)).

An agency may not adopt rules and regulations which are contrary to statutory provisions or which exceed or conflict with the authority granted by statute. *Haas Trucking, Inc. v. Hancock County Sold Waste Authority*, No. 2009-CA-00373-COA (Citing *Miss. Pub. Serv. Comm'n v. Miss Power & Light Co.*, 593 So.2d 997, 1000, 1004 (Miss. 1991). "[A]n agency's rule-making power does not extend to the adoption of regulations which are inconsistent with actual statutes." *Id.* (Citing

Tillmon v. Miss. State Dep't of Health, 749 So.2d 1017, 1023 (Miss. 1999); *State ex rel. Pittman v. Miss. Public Serv. Comm'n*, 538 So.2d 367, 373 (Miss. 1989)).

The Mississippi Supreme Court has set fort the following guidelines for determining whether an action is arbitrary and capricious:

> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending on the will alone, -absolute in power, tyrannical, despotic, non-rational, - implying either a lack of understanding or disregard for the fundamental nature of things.
>
> "Capricious" means freakish, fickle, or arbitrary. An act is capricious when 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.

City of Petal v. Dixie Peanut Co., 994 So.2d 835 (Miss.Ct. App. 2008)(Quoting *Harrison County Bd. v. Carlo Corp.*, 833 So.2d 582, 583 (Miss. 2002); *McGowan v. Miss. State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992)).

The cases cited in Lehman-Roberts' brief do not apply to the circumstances now before this Court. In *Ridgewood Land Company, Inc. and Board of Supervisors of Hinds County, Mississippi v. W.J. Simmons, et al.*, an actual Petition to Rezone was filed by the applicant and notice was published. There was a minor change in the property that was not listed in the notice, but the objectors were actually present at a public hearing on the matter of rezoning and had knowledge of the change. By appearing and being heard, they waived their objections to the defect in the notice. Furthermore, the Court found the zoning amendment to be reasonable, partially because it was in accordance with a comprehensive plan. 243 Miss. 236, 137 So.2d 532 (Miss. 1962).

This is not at all the case before the Court presently. In the case *sub judice*, there was no notice given at all concerning the Farr property, which was clearly **excluded** from a news story about

it. Neither did any of the property owners in the disputed area, including Booker Farr, appear at the invalid public hearing due to their property's being specifically excluded in the news story. Finally, the City cannot say that any zoning amendments would be in accordance with a valid comprehensive plan due to the fact that (1) no comprehensive plan was ever legally adopted; and (2) the City did not show, through any finding of facts, that any comprehensive plan was considered when attempting to adopt the official zoning map.

In another case cited by Lehman Roberts, *City of New Albany, et al. v. Howard Lee Ray,* the Board of Aldermen refused to rezone property when there was an objection to the rezoning request and set forth various requirements that must exist and be shown before a rezoning can occur. 417 So.2d 550 (Miss. 1982). The Court found that the refusal to rezone was reasonable because the requirements had not been met. *Id.* This case further shows that the City of New Albany was aware of the requirements that it had to meet as it had litigated such matters in the past when the City of New Albany used them as a reason NOT to rezone. Yet, it followed none of these in the case *sub judice.*

The case presently before this Court is actually much more akin to the situation discussed in *City of Petal v. Dixie Peanut Co.*, where an application for a zoning variance was before the Board of Aldermen at a meeting for which no notice was given. 994 So.2d 835 (Miss.Ct. App. 2008). The Court held that the City of Petal acted outside its legal authority and the Court said the City's acts were arbitrary and capricious and violated Dixie Peanut's due process rights. *Id.* Furthermore, the Circuit Court in *Dixie Peanut, Co.* based its decision on the fact that the City of Petal failed to comply with ordinances and statutes. *Id.* Lehman-Roberts is well aware of this case as Circuit Court Judge Henry Lackey specifically brought this case to the parties attention, giving them both the name of this case as well as its cite.

Before the lower court, the City of New Albany as well as the Appellants claimed that the subject property had been rezoned as industrial at some time in the past. Neither the City nor the Appellants, however, were able to explain when or how that occurred. It is understood now that the Farr property was mistakenly labeled as Industrial on the City's zoning map even though no notice was given that the subject property was being considered for rezoning.

The so-called "notice" that the Appellants relied upon is a news story printed in the local paper which states that the only property to be considered in the rezoning is "newly annexed territory." The news story **specifically excludes property that was already within the City limits,** which clearly **excludes** the Farr property which was annexed in 1968.

The Appellee property owners never received notice of a public hearing on rezoning the Farr property, and the City's minutes discussing the re-zoning were never signed. The minutes certainly did not include the necessary finding of facts showing the requirements had been met to rezone. The City of New Albany also failed to give appropriate notice of any public hearing in which they discussed or adopted a comprehensive plan which must be followed in order to rezone property.

The City of New Albany also granted a voidable building permit to Lehman-Roberts that, upon the determination that the true zoning of the property was Agricultural, became absolutely void. The permit was for a structure that is now illegal to operate on the Farr property. At the time the permit was issued, both the City of New Albany and Lehman-Roberts were fully aware of the zoning dispute.

In fact, the City of New Albany and the Appellants simply ignored any legal requirements placed upon them concerning the zoning and building on the Farr property. This decision on the part of the City of New Albany was clearly beyond its legal authority, was arbitrary and capricious, was

not supported by any substantial evidence, and violated both the constitutional and statutory rights of the Appellants.

B. <u>This Appeal Should Be Dismissed Because Booker Farr Has Admitted That The Subject Property Is Zoned Agricultural, Elected His Remedy By Petitioning The City of New Albany to Rezone His Property, and There Is No Remaining Arguable Claim Before This Court Due to Judicial Estoppel and the Doctrine of Election of Remedies.</u>

Judicial estoppel is a doctrine of law applied by the court to a situation where a party asserts one position in a prior action or pleading but then seeks to take a contrary position to the detriment of the party opposite. *In the Matter of the Enlargement of the Municipal Boundaries of the City of Southaven, Mississippi,* 864 So.2d at 918 (Citing *Mississippi Power & Light Co. v. Cook*, 832 So.2d 474, 482 (Miss. 2002); *Mauck v. Columbus Hotel Co.,* 741 So.2d 259, 264 (Miss. 1999); *Skipworth v. Rabun*, 704 So.2d 1008, 1015 (Miss. 1996)).

Judicial estoppel arises from the taking of a position by a party to a suit that is inconsistent with the position previously asserted in prior litigation. *Beyer v. Easterling*, 738 So. 2d 221(Miss. 1999); *Ivy v. Harrington*, 644 So. 2d 1218 (Miss. 1994); *Daughtrey v. Daughtrey*, 474 So. 2d 598, 602 (Miss. 1985); *Banes v. Thompson*, 352 So. 2d 812 (Miss. 1977); *Wright v. Jackson Municipal Airport Authority*, 300 So. 2d 805 (Miss. 1974); *Sullivan v. McCallum*, 231 So. 2d 801 (Miss. 1970).

The doctrine of judicial estoppel is based on expediting litigation between the same parties by requiring orderliness and regularity in pleadings. *Id.* at 918-19. Judicial estoppel will be applied where there is multiple litigation between the same parties and one party knowingly asserts a position inconsistent with the position in the prior litigation. *Id.* at 919.

> "This doctrine is said to have its foundation in the obligation under which every man is placed to speak and act, according to the truth of the case; and in the policy of the law to suppress the mischief from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that, which by their solemn and deliberate acts, they have declared to be true."

Clarke v. Ripley Savings Bank & Trust Co., 181 S.W.2d 386 (Tenn. App. 1943)(Quoting *Hamilton v. Zimmerman*, 37 Tenn. 3, 48)).

The doctrine of election of remedies is very nearly the same defense. "Election of remedies" may be defined to be the adoption, by an unequivocal act, of one of two existing alternative remedial rights, inconsistent and not reconcilable with each other, the effect of which is to preclude a resort by the plaintiff or creditor to the other. *Clark v. Ripley Savings Bank & Trust Co.*, 181 S.W.2d 386 (Citing *Phillips v. Rooker*, 184 S.W. 12)).

The conditions which must exist before one can use the election of remedies doctrine are :(1) the existence of two or more remedies; (2) the inconsistency between such remedies; and (3) a choice of one of them. *O'Briant v. Hull*, 208 So.2d 784 (Miss. 1968). "The doctrine is applicable where an aggrieved party has two remedies by which he may enforce inconsistent rights growing out of the same transaction and, being cognizant of his legal rights and of such facts as will enable him to make an intelligent choice, brings his action by one of the methods." *Id.*

In cases where two or more inconsistent remedies are given, which depend upon inconsistent facts, and which must result in the suitor assuming a position inconsistent with the position which he must afterwards assume to prosecute the alternative remedy, an election, deliberately made with full knowledge of the facts and without fraud or imposition upon the part of his adversary, works a judicial estoppel, whether the adversary has been injured thereby or not. *O'Briant v. Hull*, 208 So.2d 784 (Miss. 1968)(Citing *Clark v. Ripley Savings Bank & Trust Company,* 181 S.W.2d 386; *Grizzard v. Fite*, 191 S.W. 969)).

The Appellees can show that all three required conditions have been met in order to bar Farr's appeal. They are: (1) Farr had the option of appealing the Circuit Court order or filing a Petition to Rezone; (2) In order to appeal the Circuit Court ruling, Farr must maintain his contention

that the subject property is properly zoned as "industrial." At the same time, in order to petition the Board of Aldermen to "rezone" the property, Farr stated that the property was zoned "agricultural;" and (3) Farr made a calculated and informed decision to file the Petition to Rezone with the City of New Albany prior to filing a Notice of Appeal from the Circuit Court decision.

The Circuit Court ruled the property was agricultural. Instead of protecting his appeal, Farr chose to go in a different direction and filed a Petition to Rezone the property classification from Agricultural to Industrial with the City of New Albany, and the Board of Aldermen voted that the property was properly classified as Agricultural and should not be rezoned. (B.E. 15-17). Farr now has that decision on appeal in the Circuit Court while, at the same time, pursuing this appeal of the Circuit Court's ruling on the zoning of the property.

Booker Farr cannot have it both ways. He is now judicially estopped and barred by election of remedies from pursuing this appeal before this Court. He is estopped from arguing the property is zoned as industrial when he has signed a petition stating that it is zoned agricultural. He is bound to the agricultural classification which makes this appeal before this Court moot and invalid.

It should be made clear to this Court that, even though it is expected that Appellants will object to the Appellee Property Owners putting this argument forth before this Court, this is the appropriate place to do so. The issues of judicial estoppel and election of remedies could not have been raised during the Circuit Court action which has been appealed to this Court and are appropriate to be brought before this Court for the first time. As stated in the facts, Judge Lackey entered his order in favor of the property owners first. Two weeks later, Farr filed his Petition to Rezone, designating the subject property as agricultural. Two weeks after filing this Petition, Farr filed his notice of appeal with this Court on the grounds that the subject property was properly zoned industrial. This is the appropriate Court in which to address the issues which bar Farr's appeal.

The issues of judicial estoppel and election of remedies did not exist prior to the appeal now before this Court and could not have been raised before this time. As stated in the "Statement of Facts," Judge Lackey entered his order in favor of the property owners on March 31, 2009. Two weeks later, on April 15, 2009, Farr filed his Petition to Rezone before then filing his Notice of Appeal on April 24, 2009. This is the appropriate time and place to address this issue.

C. The Appeal Should Be Dismissed Because Lehman-Roberts Company Does Not and Never Has Had Standing to File an Appeal as an Intervenor; and Should Standing Have Existed Initially, Lehman-Roberts Company Has Waived Any Rights to Appeal the Trial court Ruling By Its Own Acts.

Initially, Lehman-Roberts was only an intervenor in the Circuit Court cause of action. Now, before this Court, its rights, if any exist, do not supercede Farr's. If Farr's appeal is dismissed, Lehman-Roberts cannot proceed with its appeal and must also be dismissed.

In order to have standing, an intervening party must show that they have an interest that is "significantly protectable." *Shannon Lumber Company vs. Gilco Lumber*, 2008 U.S. Dist. LEXIS 85827 (N.D. Miss. 2008)(Citing *Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.* 725 F.2d 871, 874 (2nd Cir. 1984); *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 27 L.Ed. 2d 580 (1971)). The interest must be direct and not just remote or contingent. *Id.*

In order to have standing to intervene in an appeal of a judgment or decision of a city board, Lehman-Roberts would have to show standing as a "person aggrieved," showing an injury separate and apart from other citizens. First, Lehman-Roberts is not a citizen of New Albany. It is an out-of-town company that was still considering a move to New Albany when the question of zoning was first raised. At that time, Lehman-Roberts had suffered no injury at all. The only injury the Appellants may have possibly incurred due to the City's decision on zoning, are injuries that would

not have occurred had Lehman-Roberts not ignored both the warnings from the Appellees and those of Judge Lackey in Circuit Court, telling Lehman-Roberts that proceeding would be at its own peril. (R.E. 7, Transcript of August 5, 2008 City Meeting, Exhibit "L" of Bill of Exceptions at 23-24.).

"Standing" is a jurisdictional issue which may be raised by any party or the Court at any time. *DeSoto Times Today v. Memphis Publishing Company,* 991 So.2d 609 (Miss. 2008); *City of Madison v. Bryan,* 763 So.2d 162, 166 (Miss. 2000). There must be a present, existent actionable interest at the time the cause of action is filed. *City of Madison v. Bryan* at 165 (Citing *Crawford Commercial Constrors., Inc. v. Marine Indus. Residential Insulation, Inc.*, 437 So.2d 15, 16 (Miss. 1983); *American Book Co. v. Vandiver*, 181 Miss. 518, 178 So. 598 (1938); *Shaw v. Shaw*, 603 So.2d 287, 294 (Miss. 1992)). In order to have standing, an appellant must show that a City's actions had an adverse effect on property in which the appellant had an **actual interest**. *City of Madison v. Bryan* at 166 (Citing *White Cypress Lakes Dev. Corp. v. Hertz*, 541 So.2d 1031, 1034 (Miss. 1989) (Emphasis added)). In *City of Madison*, Bryant had an option to purchase property conditional on the zoning of the area. The Court found that this was an option and was not an actionable interest giving Bryant standing to appeal. *Id.*

Speculative damages, such as the ones at hand, are not enough to convey standing or to survive dismissal under MRCP 12(b)(6). *Little v. KPMG LLP*, 575 F.3d 533, 535 (5th Cir. 2009); *Bell v. Dow Chemical Company*, 847 F.2d 1179, 1183-84 (5th Cir. 1988); *Pete's Mobile Homes, inc. v. Board of Supervisors, Lee County, Mississippi* (1998 U.S. Dist. LEXIS 13527)(Citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L.Ed. 2d 351, 112 S.Ct. 2130(1992)); *Rowen v. Rosenblatt*, 206 Miss. 259, 39 So. 2d 873 (Miss. 1949).

An actual interest must be had in the outcome of the matter to grant standing. *Bryan*, 763 So.2d at 166. In order to have standing, the persons claiming standing must demonstrate that the

City's actions have had an adverse effect on property in which they **actually have an interest**. *Id.* The Court has found standing where the appellants were property owners with property located near the controversial site. *Id.* It has also found that there is no standing when property at issue was not owned by the persons attempting to claim injuries. *Burgess v. City of Gulfport*, 814 So.2d 149, 153 (Miss. 2002).

At the beginning of litigation, Lehman-Roberts did not own the subject property, had no vested interest in the property, and had not expended any great amount of funds on developing the Farr property. Lehman-Roberts cannot now claim damages that it waived by its own actions. Also troubling is Lehman-Roberts' attempt to claim it suffered future damages. It did not own the property. The very contract between Farr and Lehman-Roberts was contingent upon the zoning issues being resolved. (R.E. 8, Contract, Exhibit "G" to Bill of Exceptions).

Lehman Roberts was warned repeatedly not to proceed by both the Court and opposing counsel. (R.E. 7, August 5, 2008 Transcript at 23-24.) It had no more vested interest than any other company considering buying property in the City. There were no damages special to Lehman-Roberts, which can, in fact, show no actual damages at all. Speculative damages cannot be claimed and do not give standing.

Lehman-Roberts has just made a guess that it could have made money operating an asphalt plant on the Farr property and has never provided any proof in that regard. It is not entitled to damages that are based purely upon speculation. Speculative future business profits do not currently belong to Lehman-Roberts and cannot be claimed.

Lehman-Roberts Company does not and has never had standing to intervene in this matter. At the beginning of litigation, the company did not own the subject property, had no vested interest in the property, and had not expended any great amount of funds on developing the Farr

property. The only damages Lehman Roberts has ever suffered in this matter have been caused by its own determination to proceed against both the property owner Appellees' warnings as well as warnings from the Circuit Court. Therefore, any damages Lehman Roberts may have suffered were of its own making and it is now estopped from appealing the decision of the Circuit Court.

By ignoring the zoning issues and beginning construction against advisement, Lehman-Roberts became responsible for any damages it suffered due to its own acts. It is unclear why the company presumptiously commenced construction after litigation began and then continued even against advisement, if not so that it could show that it had indeed invested money into the project.

D. If This Court Holds That This Appeal Should be Heard, the Only Point That Should be Considered is the Lack of Notice by the City of New Albany as This was the Basis for the Circuit Court's Ruling.

There is one overriding issue in this Appeal. The trial judge only ruled on the issue of Notice, leaving all other issues as moot. This Court must first consider the issues actually addressed by the trial court. In this case, if the trial court was correct in finding notice to be insufficient, the remaining issues will remain moot and the trial court ruling should be affirmed at once.

E. The Circuit Court Was Correct in Finding There to be Insufficient Notice of a Public Hearing by the City of New Albany on Rezoning the Farr Property From Agricultural to Industrial.

The Appellants continue to treat the subject of notice in the same manner in which they did before the Circuit Court by refusing to address the true issue concerning what Appellants consider to be published notice. The Appellants take the position that a newspaper article on the front page of the *New Albany Gazette* provided adequate notice for the rezoning of the subject property. Even if this Court should find that an article in the newspaper rather than a listing in the legal notices section of the newspaper, and not in a form required by city ordinances, is proper "legal notice," the article at issue still fails to meet the proper standards.

The article that the Appellants claim was adequate notice clearly states that any zoning issues to be addressed at the public hearing related only to **"newly annexed"** property and further stated, **"Zoning has not been changed in the part of the city not annexed."** (R.E. 5, *New Albany Gazette* News Story). The Farr property was **not** part of the "newly annexed" property. (R.E. 9, E-Mail Correspondence from Robert Carter, Exhibit "C" to Bill of Exceptions).

The Appellants have continually relied upon an opinion from the Attorney General of the State of Mississippi in their contentions that the newspaper article was proper notice. Attorney General opinions are, however, only advisory and not binding upon this Court. Miss. Code Ann. § 7-5-25. Furthermore, in the case discussed by that Attorney General Opinion, the newspaper article the opinion referenced **did not exclude** anyone specifically, as did the newspaper article that ran in the *Gazette* and provided that zoning had not changed in the property that was not newly annexed. In fact, if the newspaper article is to be considered notice at all, it was notice that the subject property was **not** being considered for rezoning. Also, the referenced Attorney General Opinion discussed an article that had a correct date in it. This is not the case before this Court.

The Appellants attempt, in a latter section of their brief, to convince this Court that municipalities do not have to follow their own ordinances, and are, in fact, entitled to waive the requirements of any such ordinances whenever it suits them. This is incorrect as will be addressed by the portion of Appellees' brief that addresses the section on ordinances. The Appellants have attempted to avoid the requirements set out by the City's own ordinances and this is the only way they have seen to do so. The Ordinances of the City of New Albany require a specific set of procedures that must be completed in order to rezone. One who wishes for property to be rezoned must meet the following requirements:

(A) No amendment to this ordinance shall be adopted until the amendment has been examined by the planning and zoning commission and the recommendations of the planning and zoning commission received by the mayor and board of aldermen;

(B) No amendment to this ordinance shall be adopted whereby the regulations and restrictions so established are not uniform for each district having the same zoning classification and bearing the same symbol or designation on the official zoning map;

(C) No amendment to this ordinance shall be adopted which establishes a new zone, regardless of size which permits uses not compatible with the uses of surrounding zones or which violates the purposes of this ordinance;

(D) No amendment to this ordinance shall become effective until after a public hearing in relation thereto has been held by the mayor and board of aldermen. Notice of the time and place of such hearing shall be published at least once in a newspaper of general circulation in the city at least fifteen (15) days prior to such hearing...

(E) Any area for which an application for a change in zoning classification is being considered shall be posted for at least fifteen (15) days prior to the hearing. Such posting shall be by means of a sign or signs erected in a conspicuous location on the property, using at least one sign for every two hundred (200) feet of frontage on each street upon which the property abuts. The sign shall be at least two (2) feet by three (3) feet in size, with the lower edge of the sign at least three (3) feet above ground level, in letters legible from the nearest street...

(F) In the event of written protest against such amendment signed by twenty (20) per cent or more of the owners of property either within the area to be rezoned, or within one hundred sixty (160) feet therefrom, such amendment shall not become effective except by the favorable vote of four-fifths (4/5) of all the members of the board of aldermen.

Ordinances of the City of New Albany, Sect. 114.02. (R.E. 10, New Albany Ordinances, Exhibit "Q" to Bill of Exceptions). The Appellants have been unable to show that any of these requirements were even attempted, let alone completed. In fact, Farr admitted he never met any of the requirements. (R.E. 2, Booker Farr Deposition at 22:19-21).

In the Mississippi Supreme Court case of *City of Petal v. Dixie Peanut Company*, no notice of a public meeting was provided, thus violating Dixie Peanut's due process rights. 994 So.2d 835 (Miss. 2008). The Court in *Dixie Peanut Company* held that notice is an absolute requirement. *Id.* Actions on the part of the City involving zoning or rezoning must include the proper notice or they will be reversed. Without proper notice, such actions are arbitrary and capricious. *Id.* (See also *Niefeldt v. Grand Oaks Communities, LLC*, 987 So. 2d 1043 (Miss. Ct. App. 2008)).

The newspaper article in the *New Albany Gazette* provided **no** legally required notice to the Appellee property owners and was not adequate notice to anyone. The article explicitly stated that the rezoning only applied to "**newly annexed territory**." The article went on to state "**Zoning has not been changed in the part of the city not annexed.**" This clearly and incontrovertibly **excludes** the subject property as it was annexed into the City in 1968. Also, the news story neglected to give a specific date for the "public hearing," completely omitting the year. Judge Lackey found the notice to be deficient as this was required by ordinance and statute. (Order, R. 310).

The City of New Albany failed to follow proper procedure and publish the form of notice required by its own ordinances, instead, attempting to rely on nothing but a newspaper article that specifically excluded the subject property and which was not prepared by the City, to stand as its sole form of notice. By then attempting to rezone the subject area regardless of those defects, the City of New Albany violated the due process rights of the Appellee property owners. Common sense is enough to tell us that an article that **specifically excludes** certain persons and property **cannot** provide due process notice. Lehman-Roberts states that the article set forth the City's intent along with the date, time and place of the hearing. Clearly, the intent of the City did not include the subject property as it had been annexed long before the news article was published.

Appellants argue that the newspaper article contained a map that included the subject property. This is simply an attempt to muddy the waters on notice. The map could have shown anything and it still would have been irrelevant when the news article specifically set out what type of property would be included and what would definitively not be included. The article set out, in writing, the clear intent of the City, to zone "**newly annexed territory**"only. Appellants also rely on the fact that there were citizens that attended the 2001 hearing to make various requests about zoning. They fail to mention, however, that these citizens were owners of newly annexed property, unlike Farr who owned the subject property that was previously zoned as Agricultural, and already in the City since 1968. (R.E. 9, E-Mail Correspondence from Robert Carter).

Lehman-Roberts stresses repeatedly the fact that the Appellees did not appeal the City's decision to adopt the current zoning map without bothering to explain exactly how they expected the Appellees to appeal something of which they were given no notice and had no knowledge. Regardless of what the Appellants consider sufficient notice, this was clearly no such thing. The City of New Albany failed to follow state law or even its own Ordinances in regard to notice. Even though Lehman-Roberts, through its counsel, has made the wild claim that the City can ignore its own Ordinances whenever it chooses, stating "As long as substantial and basic requirements of notice are met, it's up to the City to determine whether or not its procedural requisites have been met or if it pleases waiving them..." (R.E. 14, Transcript of Circuit Court Hearing at 52:2-6). Such is not the case before the Court. By completely failing to meet any of the notice requirements as to the Appellee property owners, the City acted so far beyond the bounds of its authority that it could be nothing other than arbitrary and capricious.

In its brief, Lehman-Roberts even goes so far as to insinuate that it is acceptable to give notice that is ambiguous and unclear and that the Circuit Court judge overstepped his scope of review in

requiring such. Lehman-Roberts relies so heavily upon *Ridgewood* as an authority on zoning requirements, even stating that it was the standard for more than 40 years, that it seems odd that the Appellants did not appear to notice the statement in that case saying, "The required notice must set forth the pertinent information unambiguously so as to inform interested persons of the proposed action." *Ridgewood Land Company, Inc., and Board of Supervisors of Hinds County v. Simmons*, 243 Miss. 236, 137 So.2d 532, 538 (Miss. 1962).

F. Issues Introduced In the Brief of the Appellant.

1. The 10 Day Time Period for Appeal Set Forth in Miss. Code Ann. §11-51-75 Applies to the September 15, 2008, Vote by the Board of Aldermen Rather Than to the 2001 Zoning Ordinance as Stated by Lehman-Roberts.

Miss. Code Ann. §11-51-75 allows 10 days to file an appeal to the Circuit Court of a final decision of a municipality. Lehman-Roberts attempts to relate this statutory time limit back to the City's 2001 Zoning Ordinance and Map. This is simply incorrect. The decision which was appealed by Appellees herein, was the September 15, 2008, vote by the Board of Aldermen refusing to correct the official zoning map to show the Farr property as Agricultural.

The City has absolute authority to correct zoning when a mistake has been made. *Bridge v. Mayor and Board of Aldermen of City of Oxford*, 995 So.2d 81 (Miss. 2008). The Petitioners requested that the City correct the mistake, but the City refused to correct the zoning map. This refusal was promptly and timely appealed.

Even if the Appellee property owners had tried to appeal the 2001 Zoning Ordinance and Map, rather than asking the City to correct its obvious mistake, the statutory 10 day time limit would only apply if there was notice. If no notice is given of any public hearing or act of the board, there is no way anyone can know to appeal any action taken at the hearing.

As soon as the Petitioners discovered the City's allegations that the subject property had been rezoned, they took steps to start the process of having the zoning map corrected. In fact, no one was aware that the subject property was listed as anything other than Agricultural, including Booker Farr and the persons who sold the property to Farr. (R.E. 11, Robin Bostwick Deposition, Exhibit "B" to Bill of Exceptions at 15:5-10). At the time Farr purchased the property, the zoning made no difference to him. (R.E. 2, Booker Farr Deposition at 17:23-24).

2. Waiver and Estoppel Against the Appellees Does Not Apply to the Facts and Issues in the Case Now Before the Court.

The Appellants rely on the cases of *McKenzie v. City of Ocean Springs*, 758 So.2d 1028 (Miss. App. 2000), *Walker v. City of Biloxi*, 229 Miss. 890, 92 So.2d 227 (1957), and *Southland Management v. Cit y of Columbia*, 744 So.2d 774 (Miss. 1999), concerning waiver, estoppel and laches based upon their reliance on the City's zoning map. Yet again, these cases are not applicable to the case *sub judice*.

The mistakes on the part of the cities in those cases are not comparably egregious as the ones made by the City of New Albany. In *McKenzie,* the Court found that the Plaintiffs were 20 years too late to challenge the validity of an ordinance that was passed with 14 days notice (as opposed to the 15 required by law), but notice was given correctly. 758 So.2d 1028. The Mississippi Supreme Court relied on *Southland Management v. City of Columbia*, stating, "Once an ordinance, though technically noncompliant with statutory dictates in its publication and recordation, has been recognized and relied upon by the community and given effect by the local government for many years, it will not be struck down due to technical failings." *Id.* OSYC was a yacht club that had been in operation in that location for over 20 years. It conducted business, accepted new members, improved the property with a swimming pool and clubhouse and added a pier for use by its members.

Voiding the zoning ordinance due to a minor technical mistake would be unfair given that OSYC had been an indispensable part of the community for so many years.

This is not even close to the case at hand. The difference here is that 1) unlike *McKenzie*, the case *sub judice* contains much more than a minor technical noncompliance. It contains manifest error and blatant disregard of statutory zoning laws as defined within the Mississippi code and all relevant precedent; 2) The zoning of the subject tract has not been relied on by previous owners and certainly not by the public or even the past or current landowners until recently. The community of New Albany has not relied at all on the classification of the subject tract. In fact, the few parties that have had any financial interest in the property at all have until recently believed it to be Agricultural, including Respondent Farr.

Lehman-Roberts obtained a building permit from the Zoning Administrator for the City of New Albany after litigation concerning the question of zoning had commenced. Lehman-Roberts ignored warnings not to begin or continue construction after it received a building permit. In fact, it seemed to move in and do as much construction as it could as quickly as it could, knowing that it might not be able to operate the asphalt plant if the City or Court found the property to be zoned Agricultural.

Lehman-Roberts knew that its building permit could possibly be illegal and that it could have no vested interest in an illegal permit. Any reliance upon an illegal and void permit is made at the holder's peril. It is irrelevant whether the holder of the permit has gone to considerable expense or not. There is still no vested interest. *City of Jackson v. Kirkland*, 276 So.2d 654 (Miss. 1973). This fact was brought to the company's attention, both by the undersigned and Circuit Judge Henry Lackey himself.

Lehman Roberts also cannot claim reliance on business relations they did not have at the time of the zoning dispute. Statements have been made by Lehman-Roberts that should Lehman Roberts not be allowed to operate at the subject location, they would not be able to obtain as much business in this area, a totally speculative claim. They are no more entitled to acquire hundreds of thousands of dollars worth of business in the area than anyone else who has yet to actually start conducting business. This is business they have not yet acquired. They cannot rely on something that does not yet exist.

Upon discovering that a mistake in zoning had somehow occurred, the Appellee property owners made their complaints known to the City of New Albany. This is not a case where a business was already in place and well established. Nor is this a case where the City was using the property, or in fact, where anyone at all was using the property in any manner that would show reliance. The only actual use of the land until now by any of the previous or current owners has been for agricultural purposes which matches the correct zoning.

The City of New Albany stated that it relied upon a zoning map that showed the subject property as industrial for many years. Chris Watson, an urban planner who had assisted with the zoning map attempted to justify the change by stating that the property **should** by zoned Industrial. Yet, when Watson attempted to show the location of the subject property on the map, he was unable to accurately locate the area. (R.E. 6, August 29, 2008 Transcript at 147). He further stated repeatedly that the maps were not drawn to scale and were not totally accurate. (*Id.* at 146-147).

Clearly, the City of New Albany could not rely upon Mr. Watson's mere opinion of how the area "should" be zoned in order to rezone the property without further steps. Without following proper rezoning procedure, it is completely irrelevant how Watson thinks the property **should** be

zoned. The important factor is that the property was annexed as Agricultural and neither the City nor the property owners have ever taken any steps to have the property zoned as anything other. The Appellant's allegations of estoppel and reliance, therefore, have no basis.

3. The City's Acts Were Clearly Arbitrary and Capricious, Outside Their Authority, and Not Supported by Substantial Evidence.

Mississippi case law is clear as to the guidelines for determining whether an action is arbitrary and capricious. (See *City of Petal v. Dixie Peanut Co.*, 994 So.2d 835 (Miss.Ct. App. 2008); *Harrison County Bd. v. Carlo Corp.*, 833 So.2d 582, 583 (Miss. 2002); *McGowan v. Miss. State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992)).

It is incomprehensible how Lehman-Roberts continues to contend that the City of New Albany was fully within its legal bounds and not acting arbitrarily and capriciously by stating the property had just "become" zoned as Industrial. Not only was there no significant evidence the Farr land was rezoned, there was no evidence at all.

Lehman Roberts is correct in citing *City of New Albany v. Ray*, "A mistake within the meaning of the law is not a mistake of judgment, but, rather, a clerical or administrative mistake." 417 So.2d 550, 552 (Miss. 1982). Clearly, in the case at hand, a mistake was made. That mistake was most certainly a clerical or administrative mistake that placed the subject property on the zoning map incorrectly. It certainly was not a mistake of judgment as no one even knows or remembers how it occurred. No decision was made to change the zoning of the subject property. No procedural steps were taken to do this. No judgment was used.

In the case of a clerical or administrative mistake, the City is fully entitled to correct the mistake and return the property to its correct zoning designation. *Bridge v. Mayor and Board of*

Aldermen of City of Oxford, 995 So.2d 81 (Miss. 2008); *Arkansas Fuel Oil, Co. v. City of Oxford,* 195 So.316 (Miss. 1940).

It is difficult to understand how the Respondents can even question that the Petitioners have shown by clear and convincing evidence that the City failed to follow any of the required procedures in this case. The City has most certainly acted outside of its legal authority and has infringed upon the constitutional rights of the Petitioners. This is not debatable.

a. Notice.

In cases where cities have failed to give notice of hearings on zoning issues, they have been found to have acted in an arbitrary and capricious manner. *City of Petal v. Dixie Peanuts* 994 So.2d 835 (Miss. 2008). In that case, the City failed to give notice of a hearing on a zoning variance and the lower court found its acts to be arbitrary and capricious. This Court upheld the ruling of the lower court in determining that the City did not follow ordinances and statutes and was thus acting in an arbitrary and capricious manner. *City of Petal v. Dixie Peanut Co.*, 994 So.2d 835 (Miss. 2008). In the *Dixie Peanut Company* case, the failure to give notice of a public meeting violated Dixie Peanut's due process rights. 994 So.2d 835. The Court in that case held that **notice is an absolute requirement**. *Id.* Actions on the part of the City involving zoning or rezoning must include the proper notice or they will be reversed. Without proper notice, such actions are arbitrary and capricious. *Id.* (See also *Niefeldt v. Grand Oaks Communities, LLC*, 987 So. 2d 1043 (Miss. Ct. App. 2008)).

Furthermore, the notice must be clear and unambiguous. "The required notice must set forth the pertinent information unambiguously so as to inform interested persons of the proposed action." *Ridgewood Land Company, Inc., and Board of Supervisors of Hinds County v. Simmons*, 243 Miss. 236, 137 So.2d 532, 538 (Miss. 1962).

Appellees have already discussed the issue of Notice previously in this brief. They shall, however, address once more the importance of proper notice being given. Without notice, the Appellees could not possibly have objected or even known that the Farr property might be rezoned, whether by mistake or intentionally. Lehman-Roberts is completely wrong claiming that the City of New Albany was not required to provide notice, and that notice is something that can simply be waived. Even more incomprehensible is Lehman-Roberts' contention that the Appellees should have known the Farr property was being rezoned and should have attended a hearing on the matter. How could Appellees possibly have had notice of this when the newspaper article specifically excluded the very property in dispute and there was no complete date in the story?

b. Signing of the Minutes.

There was some question as to whether the minutes of the meeting dealing with rezoning were actually signed. The set of minutes containing the rezoning decision had several signature blocks. (R.E.12, July 26, 2001 Minutes, Exhibit "U" to Bill of Exceptions). Each of the blocks on the minutes are signed and certified except for the block under the minute entry discussing rezoning "newly annexed territory." There are any number of reasons for multiple signature blocks. The various portions of the minutes could have been signed at different times as separate signature blocks were provided for the portions of the minutes discussing separate topics. Also, at times, meetings are recessed and certain things may not be voted upon and signed until a later date. All of the other portions were signed. If this one was not supposed to be signed, why was the signature block included?

Importantly, even the unsigned minutes exclude the Farr property stating that the rezoning only applied to "**newly annexed territory**." Either the minutes are void and the zoning map and ordinance were never adopted or, even if they were adopted, the clear intent of the minutes shows

Not only has the City of New Albany failed to produce adequate proof of these requirements, it has produced absolutely **no** proof that any of these requirements were met. The minutes did not contain any finding of facts and the qualifications were not supported by any evidence, let alone substantial or clear and convincing evidence. This just further shows that the City of New Albany acted in an arbitrary and capricious manner.

c. Adherence to Ordinances.

In reviewing Lehman Roberts' argument regarding the failure of the City of New Albany to follow its own ordinances, it appears that Lehman Roberts is stating that the City of New Albany can arbitrarily determine when it will, and when it will not, abide by its own ordinances. Lehman-Roberts claims that the City of New Albany could simply waive its duty to follow its own ordinances.

In this case, the City of New Albany failed to follow both state law and its own ordinances. Waiving ordinances and state law is not an option. The City of New Albany is required to follow its own ordinances which were adopted as the laws its citizens must follow. Ordinances cannot simply be ignored and only followed when the City so chooses. If they are not going to be followed, and adherence is not going to be enforced, there is absolutely no reason for the Ordinances to exist. By acting so far beyond the bounds of their own Ordinances, the City has clearly acted outside its legal authority.

The City of Petal failed to follow the requirements for notice in its ordinances by not giving notice of a hearing on a zoning variance. The lower court found the city's acts to be arbitrary and capricious. This decision was upheld by the Mississippi Supreme Court. *City of Petal v Dixie Peanut Co.*, 994 So.2d 835 (Miss.Ct. App. 2008).

Lehman-Roberts cites various cases contending that a municipality can waive procedural requirements. In these cases, the deficits were very minor. In *Town of Florence v. Sea Lands Limited*, the Court held that a municipality could be excused for **minor** procedural deficits. 759 So.2d 1221 (Miss. 2000). The deficits in the case at hand, however, are certainly more than "minor."

The Court in *Sea Lands Limited* held that there is a rebuttable presumption that a municipality rezoned the subject property deliberately and thoughtfully. *Id.* Exactly how much clearer can it be that this is not the case with the Farr property? The City of New Albany did not even realize the property had been designated as anything other than agricultural, as it was annexed, until they were so informed. There was nothing deliberate or thoughtful about this. The actions by the City of New Albany involve more than simple "procedural formalities." This case involves total violation of state law and the City's ordinances as well as violation of the Petitioner's due process rights.

In *Sea Lands Limited,* the City of Florence failed to show that a substantial change had occurred in the area and failed to show a public need for rezoning by clear and convincing proof. The Court held, "A finding of no sufficient proof will lead this Court to conclude that the Board's decision was arbitrary and capricious." Id. (Citing *The Board of Aldermen v. Conerly*, 509 So.2d 877 (Miss.1987);*W.L. Holcomb, Inc. v. City of Clarksdale*, 217 Miss. 892, 65 So.2d 281, 284 (1953)). Much the same as the City of New Albany, Florence failed to present substantial evidence that there was a substantial change and public need before rezoning. The Court reversed the Board's decision.

In *Thrash v. Mayor and Commissioners of City of Jackson*, the Court states that it is up to the municipality to determine whether it has met its procedural requisites or that it can, in fact, even waive these requisites. 498 So.2d 801 (Miss. 1986). At the same time, this case lists exceptions to

this statement which Lehman-Roberts delegates to a footnote in its brief. The exceptions are extremely important to the case at hand. Those exceptions are (1) cases which have transgressed some important limitation or procedure imposed by state law; and (2) cases in which the procedural deficiency may be said to have contravened citizens' due process rights. (Id.).

The Court in *Thrash* upheld minor procedural defects and held that the objectors' due process rights had not been violated when **the objectors all appeared** at a hearing on the matter before the Zoning Commission and were allowed to express their objections to the City. (Id.)(emphasis added). This is not at all the equivalent of the case *sub judice* as the Petitioners never received notice of the hearing, unless it was notice that the subject property was **not** included, and were never allowed to express their objections to any proposed rezoning.

Clearly, the City of New Albany's acts fall into, not just one, but **both** of the exceptions set forth in *Thrash*. It is hard to understand how anyone could show any more clearly than the Petitioners have that the City has blatantly ignored state law, its own ordinances, and due process requirements. It is absolutely ridiculous to suggest that a municipality can create and pass ordinances and then enforce them only when they choose against certain citizens and not others, such as demanding that some property owners meet each and every requirement of the ordinances before allowing a rezoning of their property and then simply failing to follow any procedure at all with the Farr property.

The City of New Albany is well aware it must follow its own ordinances. In her deposition on April 2, 2008, City Clerk Anne Neal was asked:

> Q. And anyone who wants property zoned or rezoned has to follow the city ordinances; right?
> A. Yes
> ...
> Q. You just know they do have to follow city ordinances?

A. Yes

....

Q: And are you obligated to follow those city ordinances as well in your job?

A: Yes

Q: Anyone who works for the city or anyone who does anything for the city has to follow city ordinances. And any citizen in the City of New Albany susceptible to those ordinances has to abide them; correct?

A: Yes

Q: And if anyone tries to do anything different from what those ordinances say, then they're going to be in violation of the ordinances right:

A: Yes.

(R.E. 3, Ann Neal Deposition at 35:14 - 36:15).

It is ludicrous to suggest that a municipality can set forth rules and procedures that it must follow and then be allowed to waive such rules whenever it is more convenient to do so. The point of having a set of ordinances is to follow them. Clearly, a municipality acting in such a manner as to not follow its own ordinances would truly be arbitrary and capricious.

d. Comprehensive Plan.

In order to rezone, the zoning amendment must be in compliance with a comprehensive plan. Miss. Code Ann. § 17-1-19. The City attempts to say that it had a comprehensive plan and complied with that plan. In order to enact a comprehensive plan, however, a public hearing must be held upon giving the same notice as the one required for the public hearing concerning rezoning. Op.Atty.Gen. No. 2001-0266, Gordon, May 30, 2001; *Freelance Entertainment, LLC v. Sanders,* 280 F.Supp.2d 533 (N.D. Miss. 2003). There must be at least a 15 day notice published in a local newspaper stating the date, time, and place of the meeting. Miss. Code Ann. §17-1-11, §17-1-17.

It has never been shown that any such notice was ever published. Without notice, the ordinance approving the comprehensive plan is void and thus, there is no authorized comprehensive

plan in effect for the City of New Albany. There is no doubt about this fact, and the Respondents have never provided any proof to the contrary.

Lehman-Roberts continues to claim the comprehensive plan is valid because there was no appeal from any adoption of the comprehensive plan that may or may not have occurred. Yet again, no one can appeal something of which they have no knowledge. This is why the statute concerning comprehensive plans also requires a 15 day notice.

The City has not been able to show there was any notice on the comprehensive plan. This is a requirement that must be met for a plan to be valid. The minutes adopting the comprehensive plan cite the wrong type of notice, citing the notice statute for a recessed meeting from the regular meeting and not the public notice required for both rezoning and adoption of a comprehensive plan. (R.E.13, April 21, 1997 Minutes, Exhibit "T" to Bill of Exceptions). Without appropriate notice, ordinances approving either rezoning or adoption of comprehensive plans are void.

Lehman-Roberts misses this point. It argues that because Chris Watson, an urban regional planner used a plan that he believed to be valid when assisting the City in certain annexations and in preparing maps, then the plan must have been valid. This is yet another logical misstatement. Simply because Watson used something he thought was a valid comprehensive plan did not make it so. This is, in fact, the entire point of the matter. The use of an invalid comprehensive plan cannot support an invalid rezoning map.

Watson was never able to actually show how the Farr property became labeled as Industrial. He discussed how he thought various areas **should** be zoned, but this is totally irrelevant as to how the Farr property actually **is** zoned. Watson even admitted the prior zoning map was not to scale and was out of date. (R.E. 6, August 29, 2008 Transcript at 137). Watson was unable to testify to anything other than his opinion of what he "thought" the property should have been zoned.

Simply because Watson looked at a map and had the **opinion** that the subject property should be zoned as industrial does not make this so. Watson's opinion of the proper land use does not authorize him, as a planner, or the City to simply change a property's zoning classification on the map without following the procedure with which the City is legally required to comply.

There was no Munsford Drive anticipated in 1968 when the land was annexed as agricultural. It made perfect sense, and was the law, when the subject property was annexed, to bring it into the City and leave it as agricultural regardless of Watson's opinion of appropriate land use.

Therefore, Watson's opinion and use of the purported comprehensive plan simply does not and cannot show that a proper rezoning of the Farr property occurred when the appropriate procedure was completely ignored.

e. Justifiability of Reversal.

Again, Appellees will restate that the Bill of Exceptions filed in the Circuit Court was never a "direct appeal" of the 2001 zoning ordinance and map. The Bill of Exceptions was on the September 15, 2008 vote of the board of aldermen. While the actual vote did not occur until September 15, 2008, the public hearing on the matter occurred August 29, 2008. There was a process that had to be undergone in order to reach this September 15, 2008 vote, and every step of that process was open to review, including the multiple procedural defects. The Circuit Court was correct in finding the City's acts to the vote to be arbitrary and capricious.

f. The Arguments in the Property Owners' Bill of Exceptions Were Within the Proper Scope of the Appeal and Could be Considered by the Circuit Court.

i. Exhibits Proper Part of the Record.

It is odd that in the Circuit Court litigation, Lehman-Roberts objected to the Bill of Exceptions containing information that Lehman-Roberts contended was outside of the scope of the

appeal and stated that the appeal, at that point, was limited strictly to the September 15, 2008 vote and nothing else. In this appeal, however, Lehman-Roberts attempts to change its story to say the Bill of Exceptions applied instead to the 2001 ordinance and zoning map.

Regardless, the Bill of Exceptions necessarily contained exhibits that demonstrate the steps the Appellees as well as the other parties have taken in attempting to resolve this matter. It is necessary to show the City of New Albany's complete refusal to follow proper procedure in order to show that their acts were arbitrary and capricious. The Circuit Court judge must have a complete record in order to make an informed decision. All of the exhibits to the Bill of Exception were necessary to form a complete record of the proceedings before the board of aldermen.

The City of New Albany also introduced evidence that the property owners found to be outside the scope of the Circuit Court's consideration. This information was also allowed and is, in fact, even included in part in Lehman-Roberts' brief. None of the information about businesses using Munsford Drive, including mention of Martintown Industrial Park or Vuteq was mentioned until the City introduced its 12 page "Findings" after the Bill of Exceptions was filed. None of this information was properly before the Circuit Court and should not have been included in this appeal.

ii. Zoning Commission Involvement.

Appellees believe any involvement of the Zoning Commission is irrelevant to the appeal before this Court and do not believe it was considered by the Circuit Court either. The Circuit Court based its ruling on lack of notice, including the City of New Albany's refusal to follow its own ordinance requirements for proper notice.

iii. Issue of Building Permit.

There is no vested interest in an illegal permit. Any reliance upon an illegal and void permit is made at the holder's peril. It is irrelevant whether the holder of the permit has gone to

considerable expense or not. There is still no vested interest. *City of Jackson v. Kirkland*, 276 So.2d 654 (Miss. 1973).

The issue of the invalid building permit is important because it shows that Lehman-Roberts had no justifiable reliance on the flawed zoning map. Lehman-Roberts has argued reliance and cannot object to the Appellees showing that the company had no right to reliance. This is of particular importance when one realizes that Lehman-Roberts obtained the building permit **after** they knew there was a question about the zoning.

It would be completely unjust to allow a company which has knowledge of a dispute over the zoning of a piece of property to obtain a building permit for that same property and then claim reliance on the permit and the zoning. Due to the fact that Lehman-Roberts claimed reliance, the building permit's validity is most certainly within the scope of the Circuit Court's review and was a proper part of the Bill of Exceptions.

iv. Other Outside Matters.

As far as the Petitioner's Bill of Exceptions containing information that was outside of the scope of the appeal, this is simply inaccurate. The record should and indeed must include all of the actions that were taken by the parties leading up to the Petition, the hearing on the matter, and the vote. Every part of the record presented by the Petitioners involves the issue of whether the zoning of the subject property was proper and whether the acts taken by the Board of Aldermen were appropriate or even legal in certain circumstances.

The Circuit Court review should certainly contain all of the record made before the governmental body at its hearing on the issue. Sometimes, however, actions are taken by the governmental body without a hearing. If that governmental body had other information available for review, including any and all petitions and applications to that body, that information must be

made a part of the record. Without the Petition to Correct the Zoning Map being a part of the record, this matter would never even have reached the Board of Aldermen for a hearing.

If the Bill of Exceptions was limited only to the very last vote as Respondent Lehman Roberts contends, city officials could use any means necessary to get to the actual vote. They could break the law repeatedly every time and as long as they followed proper procedure in holding the actual end vote, nothing else would matter. Surely, this is not acceptable.

IV. CONCLUSION

The decision of the Circuit Court was not based on its own determination and judgment but on the failure of the City to demonstrate in the record that it had complied with its own ordinances and state statutes. Therefore, the lower court judge acted completely within his discretion and within the limited scope of review and his ruling is not reversible.

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CERTIFICATE OF SERVICE

I, William O. Rutledge III, attorney for the Appellees, Robin Bostwick, Eric Frohn, Allen Maxwell, Herbert G. Rogers, and Ray Tate, do hereby certify that I have, on this date, filed the Brief of Appellees, Robin Bostwick, Eric Frohn, Allen Maxwell, Herbert G. Rogers, and Ray Tate with the Clerk of this Court and have mailed via United States mail, first class, postage prepaid, a true and correct copy of this Brief to the following:

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SO CERTIFIED, this the 1 day of April, 2010.

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