

IN THE MISSISSIPPI SUPREME COURT

NO. 2009-CA-00710

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

APPELLANTS

VS.

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

APPELLEES

Appeal From The Circuit Court of Union County, Mississippi

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	v
ORAL ARGUMENT REQUESTED.....	vi
I. INTRODUCTION	1
II. SUMMARY OF THE ARGUMENT.....	1
III. ARGUMENT	3
A. The Subject Property Was Zoned I-1 Industrial Before the 1997- 2025 Comprehensive Plan Was Adopted	4
B. Bostwick Cannot Legitimately Invalidate the City's 1997 and 2001 Ordinances.....	10
C. The Comprehensive Plan was Adopted in 1997	12
D. The City Can Rezone Property Without the Property Owner Petitioning	14
E. There Has Been Reliance on the 1997-2025 Comprehensive Plan and the 2001 Official Zoning Map by the City and Multiple Property Owners.....	17
1. Farr.....	18
2. The City.....	19
3. The Mississippi Department of Environmental Quality.....	20
4. Property Owners Whose Property Was Rezoned Pursuant to Adoption of the 2001 Official Zoning Map	20
F. Appellee Bostwick Has Benefitted from the Adoption of the 2001 Official Zoning Map	22
CONCLUSION.....	24
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Board of Aldermen v. Conerly</i> , 509 So.2d 877 (Miss. 1987)	4
<i>Childs v. Hancock County Bd. of Supervisors</i> , 1 So.3d 855	4, 11, 13
<i>Fondren N. Renaissance v. Mayor of Jackson</i> , 749 So.2d 974 (Miss. 1999)	4
<i>Hooks v. George County</i> , 748 So.2d 678 (Miss. 1999)	12
<i>McKenzie v. City of Ocean Springs</i> , 758 So. 2d 1028 (Miss. App. 2000)	17
<i>Southland Management v. City of Columbia</i> , 744 So. 2d 774 (Miss. 1999)	17
<i>Walker v. City of Biloxi</i> , 92 So.2d 227 (Miss. 1957)	17
STATUTES	
Miss. Code Ann. § 25-41-13	13, 14

I. INTRODUCTION

Riverside Traffic Systems, Inc and Booker Farr ("Farr") are using this Reply Brief to respond to the issues that were before the City of New Albany ("City") at the August 29, 2008 hearing which they believe to be the issues in this appeal. If the Court allows the Appellees to add to the record matters that occurred after that hearing that were not considered by either the City or the Circuit Court on appeal, Farr requests the opportunity to respond to those matters at that time.

II. SUMMARY OF THE ARGUMENT

Farr joins in and incorporates the Summary of the Argument and Argument developed in the Lehman-Roberts Company Reply Brief. Farr would add and emphasize the following:

The Appellees/Petitioners ("Bostwick") filed a Petition to Correct Zoning Map or in the Alternative, to Rezone on June 10, 2008. (Vol. 1 Bill of Exceptions at ¶13). The City of New Albany ("City") denied both requests on September 15, 2008, following a five-hour hearing on August 29, 2008. (Vol. 2, CP at 153, 164)(R.E. 6). The issue before this Court is whether that zoning decision was arbitrary and capricious and/or unsupported by evidence. Even if the decision was fairly debatable, under this Court's decisions, the City's ruling must stand.

In order to overturn the City's 2008 decision, Bostwick seeks before this Court to invalidate the City's 1997-2025 Comprehensive Plan adopted on April 21, 1997, the City's current Official Zoning Map, adopted on July 21, 2001, and the City's 1997-2025 Comprehensive Plan as amended by three inconsequential amendments on July 21, 2001. Since the Farr Property ("Subject Property") was rezoned I-1 Industrial prior to

1997, Bostwick apparently also wishes to invalidate the City's pre-1997 Official Zoning Map, whenever and however it was adopted.

So many dates can be confusing. In summary, to show that the City's September 15, 2008 decision was arbitrary and capricious, Bostwick seeks to invalidate ordinances that the City adopted on April 21, 1997 (the 1997-2025 Comprehensive Plan) and on July 21, 2001 (the City's current Official Zoning Map). No one appealed the April 21, 1997 or the July 21, 2001 decisions. That in itself should end the argument, but since the Circuit Court allowed this out-of-time appeal of those actions, Farr addresses the impropriety of that decision.

The fact that the ordinances that Bostwick seeks to invalidate affect every property owner in the City and impact the zoning of multiple properties, including Appellee Bostwick's own property, has not diminished their enthusiasm for their claims, but the fact that those ordinances have long been relied on by every property owner in the City and by the City Government itself should.

The fact, moreover, that the Subject Property was zoned I-1 Industrial prior to the adoption of both the 1997-2025 Comprehensive Plan and the July 21, 2001 Official Zoning Map should moot all of the claims related to the adoption of the July 21, 2001 Map. Since they were argued before the City¹ and here, Farr will address the issues raised after providing the record evidence that the Subject Property was zoned I-1

¹ The City likewise addressed the issue in its Final Finding (Vol 2 CP 164, ¶16)(R.E. 6) "Plaintiffs have failed to show a mistake in the rezoning of the subject property which was not cured by the 2001 public hearing. Further, there was no proof of a change in the character of the neighborhood which would justify a rezoning of the property from industrial to agricultural. Lastly, there was no proof that it would be in the best interest of the public for the property to be rezoned from industrial to agricultural."

Industrial before the 1997 - 2025 Comprehensive Plan was adopted on April 21, 1997, and before the 2001 Official Zoning Map was adopted on July 21, 2001.

III. ARGUMENT

This is a zoning case. Bostwick went before the City in 2008 and asked the City to find that the Subject Property was mistakenly zoned I-1 Industrial and that it should be returned to A-1 Agricultural zoning or alternatively that the Subject Property should be rezoned from I-1 to A-1. (Vol. 1, Bill of Exceptions Following Table of Exhibits, at ¶13)². The Subject Property is 29.42 acres in northwest New Albany. (Vol. 1, Ex. F; Vol. 2, Ex. 16). It adjoins other industrially zoned property on which is also located an asphalt plant. (Vol. 1, Ex. K at 87-88)(R.E.B. 6).

Bostwick presented multiple reasons as to why the Subject Property was mistakenly zoned I-1 Industrial, and those issues are addressed in both the Farr and Lehman-Roberts Appellant Briefs, and is responded to in part by the Appellees' Brief.

On September 15, 2008, the City declined to rezone the Subject Property from I-1 Industrial to A-1 Agricultural zoning or to find that there was a mistake in the City's Official Zoning Maps. That decision was neither arbitrary nor capricious, and it was supported by overwhelming evidence. Bostwick failed to put any evidence into the record that would show that there had been a change in the area and that there was a

² Volume 1 of the Exhibits contains the Bill of Exceptions and Exhibits to the Bill of Exceptions to the Union County Circuit Court ("Vol. 1, Ex. ___"). The pages are not numbered and are cited by their Exhibit number. Volume 2 of the Exhibits contains the Exhibits to the August 28, 2008 Hearing before the New Albany Board of Alderman ("Vol. 2, Ex. ___"). The pages are not numbered, and they are cited to their Tab Number. The remaining record is Vol. 1-3 Clerk Papers before the Union County Circuit Court ("Vol. 1 CP at ___") and Vol. 4 of 4, the Transcript of the March 24, 2009 Union County Circuit Court Hearing ("Vol. 4 CP Tr."). Record Excerpts are cited by their Tab Number ("R. E. ___")(Lehman/Farr Excerpts; (R.E.B. ___) Farr Excerpts.

need for additional agricultural property, the legal prerequisites for rezoning. See *Childs v. Hancock County Bd. of Supervisors*, 1 So.3d 855, 860-861 (Miss. 2009)("[b]efore property is reclassified, an applicant seeking rezoning must prove by clear and convincing evidence either that (1) there was a mistake in the original zoning, or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need exists for rezoning."); see also *Board of Aldermen v. Conerly*, 509 So.2d 877, 883 (Miss. 1987). The unequivocal testimony of Chris Watson, who drew the 2001 Official Zoning Map and relied on the I-1 Industrial zoning of the Subject Property on the previous Official Zoning Map was that there had been no mistake in the drawing of the map. (Vol. 1, Ex. K at 132-145)(R.E.B. 6).

Since there is record evidence to support the City's decision, then the Court may not substitute its own opinion for that of the City. See *Fondren N. Renaissance v. Mayor of Jackson*, 749 So.2d 974, 977 (Miss. 1999)("In other words, the judicial department of the government of this state has no authority to interdict either zoning or rezoning decisions which may be said 'fairly debatable.'") Consequently, the City's September 15, 2008 zoning decision must be reinstated.

A. The Subject Property Was Zoned I-1 Industrial Before the 1997-2025 Comprehensive Plan Was Adopted

The City found that the Subject Property was zoned I-1 Industrial prior to the adoption of the 1997-2025 Comprehensive Plan in 1997 and that the adoption of the 2001 Official Zoning Map confirmed that zoning. (Vol 2 CP 164, ¶16)(R.E. 6).

Bostwick, other than trying to insert new issues into this appeal,³ concentrate their efforts here on invalidating the City's adoption of the 1997-2025 Comprehensive Plan or the adoption of the 2001 Official Zoning Map as a way to show that the Subject Property should never have been shown as I-1 Industrial in the first place. The facts in evidence prove, however, that the Subject Property was zoned I-1 Industrial on the City's Official Zoning Map in effect at the time the City adopted the 1997-2025 Comprehensive Plan on April 21, 1997. Consequently, efforts to invalidate the City's actions of April 21, 1997 or July 21, 2001 would not affect the zoning of the Subject Property or make the City's September 15, 2008, refusal to rezone the Property from I-1 Industrial to A-1 Agricultural arbitrary and capricious.

One part of a Comprehensive Plan is a Future Land Use Plan. The 1997-2025 Comprehensive Plan relied on the Zoning Map then in effect for Future Land Use. (Vol. 2, Ex. 15 at 51-52)(“On the basis of the policies outlined earlier in this section the current zoning map will provide guidance for future land use until a study is made and a future land use plan is prepared for New Albany.”). The Official Zoning Map then in effect (Vol. 2, Ex. 16) showed that the Subject Property was zoned I-1 Industrial.⁴ See also 1997-2025 Comprehensive Plan, Vol. 2 Ex. 15 at 47 (“About 7% of the City is

³ Appellee Brief pages 13-19 contain an effort to add matters to the record and issues on appeal that were not considered by either the City (the trial court) or the Circuit Court on appeal.

⁴ The Circuit Court incorrectly concluded that the 1997 Comprehensive Plan designated the Subject (Farr) Property to be A-1 Agricultural. “The City adopted a Comprehensive Zoning Plan in 1997 which designated the Farr tract as being classified as agricultural land (A-1). According to the Comprehensive Zoning Plan the Farr tract could not be used to contain an asphalt batch plant.” (Vol. 2 CP at 311; R.E. 5). Both the Official Zoning Map in effect in 1997 and the testimony of Chris Watson who relied on the 1997 Comprehensive Plan and Zoning Map to draft the 2001 Official Zoning map irrefutably show that the Subject (Farr) Property was shown as zoned I-1 Industrial in 1997. Even Bostwick agrees that the prior Official Zoning Map showed the Subject Property to be zoned I-1 Industrial. Appellee Brief at 4.

zoned for Industrial purposes. Much of the industrial zoned land is along the both railroads, however, three large parcels are located away from the railroad. *Two parcels are in the northwest segment of the City and one is in the southeast segment on old highway 78.*") (Emphasis added).

Chris Watson, an urban regional planner with a master's degree in city and regional planning, participated in the development of the City's current Official Zoning Map and Comprehensive Plan in conjunction with the City's Zoning Administrator, Bill Wages. At the time he drew the 2001 Official Zoning Map, Watson had been an expert planner for fourteen years. (Vol. 2, Ex. 14 at 1-4). Watson had drawn comprehensive plans with future land use and current zoning maps for twelve cities including the City of New Albany. (Vol. 2, Ex. 14 at 7). He assisted the City in the 1999 and 2000 annexations and drew the maps of those areas as well as the City's subsequent redistricting maps. (Vol. 1, Ex. K at 134) (R.E.B. 6).

Watson testified unequivocally that the Subject Property was zoned I-1 Industrial prior to the adoption of the 1997-2025 Comprehensive Plan and prior to the adoption of the 2001 Official Zoning Map. The August 29, 2008 Hearing Transcript reveals the following testimony.

MR. MAYOR: Are you saying that property was zoned industrial before Munsford Drive?

MR. WATSON: I'm not sure when Munsford Drive was constructed, Mayor. *What I do know is that the zoning map, which preceded the 2001 map, showed the property industrial.*

(Vol. 1, Ex. K at 146) (R.E.B. 6). (Emphasis added). There was no contradictory testimony.

Watson introduced into evidence as Exhibit 16 at the August 29, 2008, hearing eight large maps showing the zoning of the Subject Property on the Official Zoning Map

prior to the 1997-2025 Comprehensive Plan and the zoning of the Subject Property on the City's current 2001 Official Zoning Map. Those eight large zoning maps in Exhibit 16 are in order:

- 1997 and 2001 Official Zoning Map Blow-up of the area in question.
- 7-26-01 Official Zoning Map of the City of New Albany dated July 26, 2001. The subject property is in the northwest area of the City in grey (Industrial) surrounded by red (Commercial) on three sides and green (Agricultural) on the west. Munsford Drive and the Highway 78 interchange are shown on the map, both sides of which are zoned Commercial (red) or Industrial (grey).
- 8-28-08 Aerial view of the area with the Subject Property highlighted in yellow, the remaining Industrial property shown in yellow, and the Commercial property overlaid in brown [legend is in top right of the map].
- 8-28-08 Aerial view showing Subject Property outlined in yellow and location of the roads on which Appellees resided (Glendale Road, Rogers Drive, Oxford Loop).
- 8-28-08 Aerial view of Subject Property with 500 foot Buffers.
- 8-29-08 Map of the City of New Albany with Prior Municipal Boundaries (green) and Annexed Areas (Pink). All of Munsford Drive, both within the prior municipal boundaries and in the annexed areas was rezoned to Commercial with the 2001 adoption of a new Official Zoning Map.
- 7-2-01 Blow-up of the Proposed Zoning Map from the first page of the New Albany Gazette with the caption: **"This is the proposed new Zoning Map of New Albany. It includes the newly annexed area."** The Subject Property is shown as Industrial (Grey), and all of the property fronting on either side of Munsford Drive is shown as Commercial (Red) per the proposed new Official Zoning Map.
- 1997 Official New Albany Zoning Map Showing Blow-Up of the Subject Property which is shown as zoned I-1 Industrial.

(Vol. 2, Ex. 16).

There is no evidence to refute the I-1 Industrial zoning of the Subject Property on the City's Official Zoning Map in effect prior to the 2001 Official Zoning Map. Even though Bostwick agrees that the prior Official Zoning Map showed the Subject Property zoned Industrial (Appellee Brief at 4), Bostwick then attempts to belittle the testimony of Watson with regard to the status of the Subject Property on the Official Zoning Map in effect when the 1997-2025 Comprehensive Plan was adopted. Bostwick states at Appellee Brief at 27:

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 be 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).

Their efforts are not availing. To the contrary, Watson explained in detail how and why the Official Zoning Map in effect in 1997 showed the Subject Property to be Industrial, and how he had drawn the 2001 Official Zoning Map to scale to show that the Subject Property was still zoned I-1 Industrial.

The first thing I've gone back to is the prior zoning map. On this map I have placed side by side in a large photograph of the applicable area of the City's prior zoning map. Now, you see on this zoning map where I have my finger is the intersection of Munsford Drive and Highway 78. This map is old enough that it doesn't even show the extension of Munsford Drive. And its features such as that, that caused part of the problems that Mr. Wages was having with the map. Where I hold my finger now is a piece of property that is labeled and zoned as I-1 industrial. When we drew the 2001 zoning map, we drew that map based on a number of factors. One of which included the existing zoning map. So I think there has been some illusion that somehow the 2001 map somehow changed to show the property zoned industrial. I will submit to you that the property was zoned industrial before we even drew the 2001 zoning map.

(Vol. 1, Ex. K at 138)(R.E.B. 6).

If you extend Munsford Drive, and it has some curvature to it and back around, you'd see that this, the southern portion of this property that is labeled I-1 for all practical purposes, correlates with the Farr property. So that is one of the factors

that we've relied on. Now, I've also looked to see whether or not we could have simply just made a mistake in the computer system in drawing this. In other words, do we have one shaded color on top of another one and that type of thing; did we accumulate parcels to achieve this shape? You know, was there a way that we physically, in the technical side of it, make a mistake? And I've looked and I've concluded that no, there's not a way that that could have occurred. Because when we drew these shape in our GIS system, they're drawn as solid polygons. They're not an accumulation of properties, they're drawn as solid polygons. So then I've also looked at the relationship of the industrial boundaries as shown on this 2001 map. I have by hand, and I don't have it up here, but by hand I've plotted the boundaries of the subject property, the Booker Farr property. Coincidentally, it matches up nearly perfectly with what is shown to be industrial here (indicating). That's not by accident. Okay. So we can attribute it to the prior zoning map, and we can attribute it to a more precise zoning map having been drawn in 2001. None of those factors indicate error.

(Vol. 1, Ex. K at 139-140)(R.E.B. 6).

Bostwick claims that "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." Appellee Brief at 27-28.

The City did not rely on Watson's mere opinion "of what the property should be zoned." The City relied on the Official Zoning Map in effect when the 1997-2025 Comprehensive Plan was adopted, the 1997-2025 Comprehensive Plan itself and Watson's fourteen years of planning expertise which were supported by the Plan and the Map. Watson, without contradiction and with Map support, testified that the Subject Property was zoned I-1 Industrial prior to the adoption of the 1997-2025 Comprehensive Plan.

It was absolutely *not* arbitrary and capricious for the City to find that the Official Zoning Map in effect in 1997 showed the Subject Property to be zoned I-1 Industrial. It was *not* arbitrary and capricious for the City to rely on

- the testimony of Chris Watson, a masters' degree urban planner who had developed comprehensive plans for twelve cities including the City of New

Albany and who had assisted the City and drawn the annexation maps for the City in 1999 and 2000 and the City's subsequent redistricting maps,

- and on the Official Zoning Map in effect when the 1997-2025 Comprehensive Plan was adopted in April 1997 and
- on the 1997-2025 Comprehensive Plan itself. (Vol. 2 CP, 162 ¶3)(R.E.6).

It was also *not* arbitrary and capricious for the City to refuse to rezone the Subject Property from I-1 Industrial to A-1 Agricultural after it had been zoned Industrial for at least eleven years and was zoned I-1 Industrial on the City's Official Zoning Map in effect when it adopted its 1997-2025 Comprehensive Plan and its 2001 Official Zoning Map.

The Official Zoning Map adopted on July 26, 2001 showed the Subject Property to be zoned I-1 Industrial. There was nothing arbitrary or capricious about the decision to adopt the 2001 Official Zoning Map in a form that reflected the zoning on the previous Official Zoning Map.

B. Bostwick Cannot Legitimately Invalidate the City's 1997 and 2001 Ordinances

Bostwick claims that no zoning action affecting the Farr Property (Subject Property) since its annexation into the City as A-1 Agricultural in 1968 was valid and that it was thus arbitrary and capricious for the City in 2008 not to either find that the Subject Property's I-1 Industrial zoning was a mistake or to rezone it to A-1 Agricultural. The Circuit Court agreed with that argument. (Vol. 3 CP at 313-314)(R.E. 5).

Since official action both before and after 1997 and 2001 confirmed the I-1 Industrial zoning of the Subject Property, Bostwick claims that the City's Official Zoning Map prior to 1997 erroneously showed the Subject Property to be zoned I-1 Industrial (see above) and that the City's 1997 actions and its 2001 action were invalid. The

City's 1997 and 2001 Ordinances had been in use for eleven and seven years respectively when the first challenge to these decisions was made.

To invalidate the City's actions Bostwick claims that

1. There was no Comprehensive Plan in effect in 2001 and thus the 2001 Official Zoning Map was invalid; (Appellee Brief at p. 35-37)⁵
2. The City violate[s] its Zoning Ordinance by rezoning property unless the property owner petitions the City for the rezoning; (Appellee Brief at p. 28).
3. Neither the City nor Farr relied on the Industrial zoning of the Subject Property. (Appellee Brief at p. 26).

None of Bostwick's assertions have validity.

At issue in these arguments is whether the City, in adopting the 2001 Official Zoning Map, incorporating it into the 1997-2025 Comprehensive Plan and amending three sections of the 1997-2025 Comprehensive Plan had evidence to support its decision. To overturn a zoning decision, Bostwick was required to prove by *clear and convincing evidence* that the City's decisions were arbitrary, capricious, discriminatory or is illegal or without substantial evidential basis. *Childs*, 1 So.3d at 859-860.

According to this Court, substantial evidence is defined as relevant evidence that reasonable minds might accept as satisfactory to support a conclusion, or stated

⁵ E.g. "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 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. "
Appellee Brief at 35-36.

otherwise, that which constitutes “more than a ‘mere scintilla’ of evidence.” *Hooks v. George County*, 748 So.2d 678, 680 (Miss. 1999).

The evidence overwhelmingly refutes each argument to such an extent that it is disingenuous to continue the assertion.

C. The Comprehensive Plan was Adopted in 1997.

There was overwhelming and, in certain cases, uncontroverted evidence before the City to prove the following facts:

- The City adopted comprehensive zoning regulations May 28, 1980. (Vol. 2 CP at 154; R.E. 6).
- The City adopted a Comprehensive Plan in April 1997 to cover development of the City during the period 1997 – 2025. (Vol. 1, Ex. T to Bill of Exceptions; Vol. 2, Ex. 7 to 8-29-08 Hearing)(R.E.B. 13).
- The 1997-2025 Comprehensive Plan is part of the record presented to the City on August 29, 2008 (Vol. 2, Ex. 15), and it outlines the significant citizen involvement in the development of the 1997-2025 Comprehensive Plan (Vol. 2, Ex. 15 at 5-7, 19-20).

The Forward to the Plan states, “this Comprehensive Plan has been developed by the citizens of the City of New Albany and represents a plan generated from within the City rather than developed by an outside firm for the City.” (Vol. 2, Ex. 15 at 5). There follow two pages listing the people within the City Government and among the citizenry at large who participated in the formulation of the Plan. (Vol. 2, Ex. 15 at 6-7).

- Over a seven month period prior to adopting the Comprehensive Plan in April 1997, the City
 - (a) took surveys of its citizenry,
 - (b) presented a preliminary plan to a citizen committee,
 - (c) made revisions based on the citizen’s committee recommendations;

- (d) presented the revised preliminary plan at public hearings in each ward of the city,
- (e) utilized the input from those public hearings to develop a final plan,
- (f) presented the final plan in three formal public hearings prior to the adoption of the plan in April 1997.

(Vol 2, Ex. 15 at 20).

- The Minutes of the City adopting the 1997 - 2025 Comprehensive Plan are in evidence as Ex. 7 to the Hearing Exhibits. They evidence that the Plan was presented to the public at three separate meetings, each conducted in a lawful manner with ample opportunity for input by the public and each properly noticed, and that the meeting at which the final version of the 1997-2025 Comprehensive Plan was adopted was also itself properly noticed. (Vol. 2 , Ex. 7).
- The resolution adopting the Comprehensive Plan listed the eighty-one citizens who had participated on the ten Comprehensive Plan committees. (Vol. 2, Ex. 7 at 286-287).

No one appealed the April 21, 1997 decision of the City in adopting the 1997 - 2025 Comprehensive Plan. Then, eleven years later, Bostwick claims that the City did not provide proper notice of the April 21, 1997 hearing. Since the only notice in evidence is the notice of the recessed meeting, Bostwick claims that the original meeting must not have been noticed correctly. Since the minutes state that the meeting was properly noticed, in the absence of evidence to the contrary, that is conclusive as to notice. That the City correctly noticed the recessed meeting does not prove that it did not correctly notice the original meeting itself, and Bostwick has the burden of proving lack of notice by clear and convincing evidence. See *Childs*, 1 So.3d at 860-861. See also §25-41-13, Notice Requirements for Recessed Meetings⁶

⁶ § 25-41-13. Notice of meetings

The 1997-2025 Comprehensive Plan was in effect when the City adopted a new Zoning Map on July 26, 2001. The Plan was developed with input from at least eighty-one New Albany citizens on ten committees with assistance from Mississippi State; it was presented to the public over a three month period in each ward and then at three properly notice public hearings. It was properly noticed and adopted on April 21, 1997.

Chris Watson, moreover, testified that he relied on the 1997 - 2025 Comprehensive Plan and the Official Zoning Map in effect at that time in the development of the 2001 Zoning Map. (Vol. 1, Ex. K at 138)(R.E.B. 6). The City was clearly entitled to rely on that testimony. There was no contradictory testimony.

D. The City Can Rezone Property Without the Property Owner Petitioning

The rezoning effect of the adoption of the 2001 Official Zoning Map is visually presented in Exhibit 16 to the City's hearing. Those eight large zoning maps in Exhibit 16 are described in a previous section.

Planner Chris Watson testified that the City is entitled to rezone property through the adoption of a new Official Zoning Map. (Vol. 1, Ex. K at 135)(R.E.B. 6). The City's Zoning Ordinance confirms that ability. See Section 114.01 of the Ordinance ("an amendment to this ordinance may be initiated by the mayor and board of alderman, the planning and zoning commission, or by any person, firm or corporation filing application

(1) Any public body which holds its meetings at such times and places and by such procedures as are specifically prescribed by statute shall continue to do so and no additional notice of such meetings shall be required *except that a notice of the place, date, hour and subject matter of any recess meeting, adjourned meeting, interim meeting or any called special meeting shall be posted within one (1) hour after such meeting is called in a prominent place available to examination and inspection by the general public in the building in which the public body normally meets. A copy of the notice shall be made a part of the minutes or other permanent official records of the public body.*

therefor.") (Vol. 1 CP at 32). A comparison of the 1997 Official Zoning Map and the 2001 Official Zoning Map shows that the City indeed rezoned property through the adoption of the Official map without a petition from the property owners.

Watson testified that a large portion of the property shown on the pre-2001 Zoning Map as Agricultural (A-1) was now zoned Commercial on both sides of Munsford Drive and that the rezoning had occurred as a result of the City's adoption of the 2001 Official Zoning Map. (Vol. 2 CP at 160)(R.E. 6).

The first two maps of Exhibit 16, page 1, show the zoning of the area where the Subject Property is located prior to the 2001 Ordinance and the zoning of the area where the Subject Property is located after the adoption of the 2001 Official Zoning Map. The top map on the first page of Exhibit 16 is a portion of the City's Official Zoning Map prior to the 2001 Ordinance. The bottom map on the first page of Exhibit 16 is the same portion of the City's Official Zoning Map after the 2001 Ordinance.

These maps, which are Exhibit 16 to the August 29, 2008 hearing (Vol. 2, Ex. 16) and on which the City was entitled to rely, show the zoning of the area on either side of Munsford Drive before and after the 2001 Comprehensive Plan. The maps support the testimony of Chris Watson that multiple properties were rezoned by the adoption of the 2001 Official Zoning Map.

The Court can see from a comparison of the two maps on the first page of Exhibit 16, that the area of Munsford Drive Extended prior to the 2001 Zoning Ordinance was zoned A-1 Agricultural. The Court can also see that the both sides of Munsford Drive and Munsford Drive Extended after adoption of the 2001 Zoning Map are zoned C-2 Commercial. Likewise, the property between the Rogers Drive R-1 Residential zoning (yellow) and Munsford Drive Extended and the Industrial zoning was A-1 Agricultural

Zoning prior to the 2001 Zoning Ordinance. That same area was zoned C-2 Commercial after the 2001 Zoning Ordinance.

Those properties were rezoned by the City adopting the 2001 Official Zoning Map. They were not the result of individual property owners petitioning for a rezoning of their property. These are the properties which have relied on the City's adoption of the 2001 Zoning Map and incorporating it into the City's 1997 – 2025 Comprehensive Plan. When Bostwick claims that the 2001 Comprehensive Plan and Zoning Ordinance are invalid because the City failed to give proper notice, then these are among the properties which Bostwick claims must be returned to their pre-2001 Agricultural zoning, not just the Subject Farr Property.

Moreover, Appellee Robin Bostwick also had his property rezoned commercial through the adoption of the 2001 Official Zoning Map without a request to the City for rezoning.

The property on both sides of Munsford Drive was rezoned to Commercial as part of the adoption of the July 26, 2001 Zoning Map. Appellee Robin Bostwick testified that he owned property that fronted Munsford Drive. Until 2008 when he opposed the City's adoption of the July 26, 2001 Official Zoning Map, Appellee Bostwick did not know that *his* property that fronted Munsford Drive had been rezoned to Commercial when the City adopted the Official Zoning Map on July 26, 2001. Appellee Bostwick did not request or petition the City to rezone his Agriculturally zoned property that fronted Munsford Drive to Commercial. Moreover, Appellee Bostwick did not object to his property that fronted Munsford Drive being rezoned from Agricultural to Commercial through the City's July 26, 2001 Official Zoning Map. (Vol. 2 CP at 160)(R.E. 6); (Vol. 1 Ex. B at 13-14, 18; Vol. 1, Ex. 16).

The City could rezone property legally without the property owners petitioning for a rezoning, and the Circuit Court erred when it invalidated the City's actions on that basis. (Vol. 3 CP at 311, 313)(R.E. 5).

E. There Has Been Reliance on the 1997-2025 Comprehensive Plan and the 2001 Official Zoning Map by the City and Multiple Property Owners

Bostwick claims that no one has relied on the I-1 Industrial zoning of the Subject Property:

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.

Appellee Brief at 26.

The import of the issue of reliance is found in this Court's decisions related to whether an ordinance can be found invalid after years of application even though technically noncompliant with statutory dictates in its publication. In three similar cases, this Court and the Court of Appeals have held that after an ordinance has been relied on by the public and the governmental entity for a period of time, waiver and estoppel preclude a challenge to irregularities and defects in the ordinance years after its application. See *McKenzie v. City of Ocean Springs*, 758 So. 2d 1028, 1032, (Miss. App. 2000); *Walker v. City of Biloxi*, 92 So.2d 227, 228 (Miss. 1957); *Southland Management v. City of Columbia*, 744 So. 2d 774, 775 (Miss. 1999).

This appeal is of the City's 2008 zoning decision which the Circuit Court invalidated because of the City's unchallenged and un-appealed actions in 1997 and 2001. One of the Ordinances and the pre-1997 Official Zoning Map which the Circuit

Court invalidated had been in effect for at least a decade at the time of this first challenge; the other Ordinance had been in effect and relied upon for seven years.

Farr, Lehman-Roberts, the City, the Mississippi Department of Environmental Quality and all of the people in New Albany whose property was zoned pursuant to the adoption of the 2001 Official Zoning Map have relied on the validity of the City's 2001 actions. Moreover, the public, the citizens' committees and the professional staff which developed the 1997-2025 Comprehensive Plan, relied on the validity of the Official Zoning Map in effect at the time that the 1997 – 2025 Comprehensive Plan was adopted.

1. Farr

Farr's testimony to the City was that he had asked the City officials what the zoning category of his property was and he was told that it was zoned Industrial. He had marketed the Subject Property as I-1 Industrial for several years. (Vol. 1, Ex. K at 87-88)(R.E.B. 6).

Both Official Zoning Maps show that the Subject Farr Property was zoned I-1. (Vol. 2, Ex. 16). Booker Farr has relied on the 2001 Official Zoning Map and on the results of his inquiries to the City with regard to the zoning classification of his property. In 2002 before he placed the Subject Property for sale, Farr contacted the City Zoning Administrator to determine the zoning of the Subject Property and was told that its zoning classification was Industrial. (Vol. 1, Ex. K at 10, 16-25)(R.E.B. 6). Had that not been the case, he would have sought to have it rezoned before he put it on the market. (Vol. 1, Ex. K at 87-88)(R.E.B. 6).

2. The City

The City adopted a Comprehensive Plan on April 21, 1997 to cover development of the City for the period 1997 – 2025. That plan considered that there were two large parcels of Industrial zoned property away from the railroads and in the northwest part of the City. (Vol. 2, Ex. 15 at 47). The development proposal also recommended that

- “Commercial/retail development should occur within the area of the proposed “inner loop” which connects the central business district, CBD and the shopping center in which the Wal-Mart Super Center is located.
- A green belt or buffer zone of open space should exist between residential and light Industrial areas.”

(Vol. 2, Ex.15 at 51).

A review of the current Official Zoning Map in Exhibit 16 shows that pursuant to adoption of the 2001 Official Zoning Map, the City rezoned the “inner loop,” - Munsford Drive Extended - for commercial development to connect the downtown to the shopping center where Wal-Mart was located. A review of the aerial view of the Subject Property, shows that the City provided a green belt buffer zone of trees (of 500 feet or more) between the Industrial zoning of the Subject Property and the residential areas of the City. (Vol. 2, Ex. 16).

In an appearance before the Mayor and Board of Aldermen, Stephen Surles, Director of the Union County Development Association, the local Chamber of Commerce and Economic Development for New Albany and Union County, Mississippi, stated there was a great need for additional industrial zoning in this area, particularly in light of the decision of Toyota to locate at Blue Springs, Mississippi, and that the agricultural lands along the edges of the city limits were the best candidates for this. Mr. Surles was supporting Industrial zoning in addition to that which was already shown on the City’s Official Zoning Map. (Vol. 2 CP at 161)(R.E. 6).

The City has relied on the 1997-2025 Comprehensive Plan in making zoning decisions which will enhance the City's development, and the 2001 Official Zoning Map has governed development of the City since its adoption in 2001. It is not enough for Bostwick to claim that only the Subject Farr Property zoning should be invalidated. Invalidation of the 2001 Official Zoning Map and the City's July 21, 2001 Ordinance invalidates any and all rezoning that was accomplished by the adoption of the City's current Official Zoning Map.

3. The Mississippi Department of Environmental Quality

The City and the Mississippi Department of Environmental Quality ("MDEQ") clearly relied on the fact that the Subject Property was zoned Industrial during the six months of hearings that were held on the Property before Lehman-Roberts received an environmental permit. See, e.g., Vol. 2, Ex. 13. MDEQ held hearings over a six month period in both the City and in Jackson. MDEQ requested and received an official opinion from the City that the City deemed the Subject Property to be zoned Industrial (Vol. 2, Ex. 13 at 14-15)(R.E. 15) before the MDEQ went forward with granting the permit.

4. Property Owners Whose Property Was Rezoned Pursuant to Adoption of the 2001 Official Zoning Map.

Bostwick seeks to invalidate the City's adoption of the 1997-2025 Comprehensive Plan and the 2001 Official Zoning Map which was incorporated into the 1997 – 2025 Comprehensive Plan on the grounds

- that there was no notice of the meeting at which the 1997-2025 Comprehensive Plan was adopted on April 21, 1997,
- that there was no notice of the meeting at which the 2001 Official Zoning Map was presented for discussion and adoption,

- that the minutes of the meeting at which the 2001 Official Zoning Map was adopted were not signed;
- that the City ignored both state law and its own zoning ordinances when it adopted the 2001 Official Zoning Map and
- that there was not a legitimate Comprehensive Plan in effect in 2001, thus voiding the zoning ordinance that was adopted without reference to a Comprehensive Plan.

Appellee Brief at 28-37.

While Bostwick variably seeks to isolate the Subject Farr Property as the only beneficiary of what it considers the invalidly-adopted Comprehensive Plan and Zoning Map, in fact the 2001 Official Zoning Map, which was incorporated into the 1997 – 2025 Comprehensive Plan, rezoned multiple properties without a petition from the property owners.

Chris Watson, a professional planner engaged by the City to redraw the 1997 Official Zoning Map to scale and to add to the map the annexed areas, testified that a large portion of the property shown on the pre-2001 Zoning Map as Agricultural (A-1) was now zoned Commercial on both sides of Munsford Drive and that the rezoning had occurred as a result of the City's adoption of the 2001 Official Zoning Map. (Vol. 2 CP at 160)(R.E. 6)(Vol. 1, Ex. K at 125)(R.E.B. 6).

The Maps which are Exhibit 16 to the City's August 29, 2008 hearing (Vol. 2, Ex. 16) represent the City's current and former Official Zoning Maps. A comparison of the Maps confirms Watson's testimony that the City rezoned multiple properties through the adoption of the 2001 Official Zoning Map without petitions for rezoning from the property owners. These are the properties which have relied on the City's adoption of the 2001 Zoning Ordinance and Comprehensive Plan.

It is thus disingenuous to point solely to the Subject (Farr) Property and claim that no one relied on the rezoning effect of the City's adoption of the 2001 Official Zoning Map which was incorporated into the 1997-2025 Comprehensive Plan.

The City and all of the property owners on either side of Munsford Drive and Munsford Drive Extended relied on the fact that those properties were rezoned from Agricultural to Commercial. The professional economic developers opined that the City needed more commercial and industrial property in the Munsford Drive area because of the future construction of the Toyota plant several miles away on Highway 78. If the Circuit Court's invalidation of the City's adoption of the 2001 Official Zoning Map is not reversed, then there are no Commercial or Industrial areas along Munsford Drive or Munsford Drive Extended, and all of those property owners, who have relied on their property being Commercial and/or Industrial are left with Agricultural property, and the City has no areas in which to develop the tax base that the 1997-2025 Comprehensive Plan committees and professional developers claimed the City needed thirteen years ago.

F. Appellee Bostwick Has Benefitted from the Adoption of the 2001 Official Map

Appellee Bostwick clearly did not rely on the zoning of the Subject Property and apparently assumes everyone else should be judged by his standards. In the testimony that the Appellees added to the Bill of Exceptions and that Lehman-Roberts sought to exclude as being outside the record of the evidence before the City at the August 29, 2008 hearing, (R.E.B. 11) Bostwick testified that he could not remember as far back as 2001 when the City adopted the Official Zoning Map in question; that he rarely read the newspaper, and that the first time he had ever looked at the City's Official Zoning Map was when "that asphalt plant thing came up." (Vol. 1, Ex. B at 13-14, 18)(R.E.B. 11).

Q All right, sir. If you will, let's go back to July of the year 2001.

Page 14

A Whoa. I don't remember that far back.

Q Are you aware that there was a – several meetings, in effect, of the mayor and the board of aldermen of the City of New Albany regarding the adoption of a new zoning map?

A No, I was not.

Q Based on your answer, I assume you did not attend any of those meetings in July of 2001 regarding that zoning map?

A No, sir.

Q Are you aware that there was a publication in the New Albany Gazette on the front page of the paper that had a picture of the zoning map as it was intended to be revised and an article concerning a public hearing?

A I never saw that particular article or piece in the paper. But I don't read the paper that much. But I understand that yes, that did happen.

Q Did you own your undivided interest in the subject property in 1996?

A I think so.

Q Okay. Were you aware that the Morris property to the north of your property was rezoned in '96?

A No.

Q So since you didn't know about it, I assume then that you didn't file any objection to that?

A Correct.

Q And if – and I'll – "if" means I'm asking you to assume something that you may not know. But if the zoning map was changed in '96 to reflect a rezoning

Page 18

request by Mr. Morris, I assume you didn't object to the map as it was changed or after it was changed?

A I didn't know the map was changed. The first -- if I might interject here, the first time I ever looked at the zoning map was after this asphalt plant thing came up.

Q Sure.

A I had never paid any attention to the zoning map before that.

(Vol. 1, Ex. B at 13-14, 18)(R.E.B. 11).

Appellee Bostwick did not even know that his own property fronting on Munsford Drive had been rezoned Commercial pursuant to the City's adoption of the 2001 Official Zoning Map. According to the testimony at the hearing, Appellee Robin Bostwick confirmed that his property had been changed from Agricultural to Commercial without

his requesting or petitioning the City to rezone his property. (See Vol.1, Ex. K at 88-89) (R.E.B. 6). The City was entitled to consider in its decision-making that Appellee Bostwick, who is claiming that the City's 2001 action was invalid, has at the same time benefitted by the City's 2001 action – a rezoning of his Property from Agricultural to Commercial without the need to petition the City for a rezoning of the property, just as multiple other property owners have benefitted and now rely on the validity of that action.

The City was likewise entitled to rely on the fact that the Appellees lived closer to two newly industrially zoned sites than they did to the Subject Property, and they never objected to those properties being rezoned Industrial. (Vol. 2 CP at 161)(R.E. 6).

CONCLUSION

Riverside Traffic Systems, Inc. and Booker Farr, as well as all of the property owners who had their property rezoned by the 2001 Zoning Ordinance, have and had a right to rely on the zoning shown on the 2001 Official Zoning Map. For at least eleven years prior to the City's 2008 hearing on the Bostwick rezoning request, Booker Farr's Subject Property was classified as I-1 Industrial on the City's Official Zoning Maps, and the City and Farr relied on the Industrial classification of the Subject Property. The City did not act arbitrarily and capriciously and without substantial evidence when it found that (1) there was no mistake in the Official Zoning Map and that (2) the Subject Property was legally zoned Industrial.

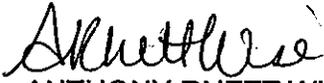
Under the law and the facts, the Circuit Court's decision reversing the City's September 15, 2008 zoning decision must be overturned and the City's original decision reinstated.

This the 10th day of May, 2010.

Respectfully submitted,

RIVERSIDE TRAFFIC SYSTEMS, INC.,
BOOKER FARR, APPELLANTS

By Their Attorney,
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By: 
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CERTIFICATE OF SERVICE

I, Anthony Rhett Wise, attorney for Appellants Riverside Traffic Systems, Inc. and Booker Farr, do hereby certify that I have this day filed the Reply Brief of Appellants Riverside Traffic Systems, Inc. and Booker Farr with the clerk of this Court and have mailed, via United States mail, postage prepaid, a true and correct copy of the Reply Brief of Appellants Riverside Traffic Systems, Inc. and Booker Farr to the following:

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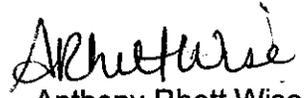
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This the 10th day of May 2010.


Anthony Rhett Wise