

IN THE SUPREME COURT OF MISSISSIPPI

IN RE SCOTT FAVRE, et al.

NO: 2009-CA-00764

EZ

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The 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.

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
I. NATURE OF THE CASE AND PROCEEDINGS BELOW	2
II. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED.	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT.....	6
I. STANDARD OF REVIEW.....	6
A. DECISION TO GRANT CONDITIONAL USE IS REVIEWED UNDER SUBSTANTIAL EVIDENCE STANDARD.....	6
B. ISSUE OF LAW REVIEWED DE NOVO.....	6
II. RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT COUNTY'S DECISION TO GRANT CONDITIONAL USE PERMIT.	7
A. Adequate Access	8
B. Sewer and Water Service	12
C. Other Conditional Use Requirements	13
1. Section 905.02-01.01 Said use is necessary to promote the public interest at the locations.	14
2. 905.02-01.02 Use is designed, located and proposed to be operated in a manner that public safety, health and welfare are protected.....	15
3. 905.02-01.03 Use will not cause substantial injury to other property in the neighborhood in which it is located.	15
4. 905.02-01.04 Use conforms to all district regulations for the applicable district in which it is located unless other provisions are specifically set forth in the application.....	16
5. 905.02-01.05 That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located.....	17

6.	905.03-01 Adequate ingress and egress to property and proposed structures thereon with particular reference to vehicular and pedestrian safety and convenience, traffic flow and control and access in case of fire or other disaster.....	17
7.	905.03-2 Off-street parking with particular attention to item (1) above and the economy of the county, and to noise or glare effects of the conditional use on adjoining properties generally in the district.....	18
8.	905.03-03 Refuse and service areas, with particular reference to item (1) and (2) above.....	19
9.	905.03-04 Utilities with reference to location and availability and compatibility.....	19
10.	905.03-05 Screening and buffering with reference to type, dimensions, character.....	19
11.	905.03-06 Control of any traffic safety, economic impact and compatibility and harmony with properties in the district.....	20
12.	905.03-07 Required yards and open spaces.....	20
III. COUNTY'S IMPOSITION OF CONDITIONS WAS TANTAMOUNT TO MAKING FINDINGS OF FACT.....		20
IV. A-1 DESIGNATION UNDER HANCOCK COUNTY ZONING ORDINANCE PERMITS A YACHT CLUB BY RIGHT.....		22
CONCLUSION.....		26

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>ABC Mfg. Corp. v. Doyle</i> , 749 So. 2d 43 (Miss. 1999).....	6
<i>Barnes v. DeSoto County Bd. of Supervisors</i> , 553 So. 2d 508 (Miss. 1989).....	6, 7, 20, 21
<i>City of Buffalo v. Roadway Transit Co.</i> , 303 N.Y. 453, 104 N.E.2d 96 (1952).....	23
<i>City of Olive Branch Bd. of Aldermen v. Bunker</i> , 733 So. 2d 842 (Miss. Ct. App. 1999)	6, 7, 8
<i>City of Rome v. Shadyside Memorial Gardens, Inc.</i> , 93 Ga.App. 759, 92 S.E.2d 734 (1956).....	23
<i>Columbus & Greenville Rwy. Co. v. Scales</i> , 578 So. 2d 275 (Miss. 1991).....	6, 23
<i>Currie v. Ryan</i> , 243 So. 2d 48 (Miss. 1970).....	7, 8
<i>Daniel D. Rappa, Inc. v. Engelhardt</i> , 256 A.2d 744 (Del. 1969).....	23
<i>Drennen v. Mason</i> , 133 So. 689 (Ala. 1931).....	23
<i>Faircloth v. Lyles</i> , 592 So. 2d 941 (Miss. 1969).....	7, 21, 23
<i>Gillis v. City of McComb</i> , 860 So. 2d 833 (Miss. Ct. App. 2003)	8
<i>Hearne v. City of Brookhaven</i> , 822 So. 2d 999 (Miss. Ct. App. 2002)	6, 7
<i>Hooks v. George County</i> , 748 So. 2d 678 (Miss. 1999).....	7
<i>Hutchinson v. Board of Zoning Appeals of Stratford</i> , 100 A.2d 839 (Conn. 1953)	23

<i>Johnson v. Ferguson</i> , 435 So. 2d 1191 (Miss. 1983).....	6, 7
<i>Kordick Plumbing and Heating Co. v. Sarcone</i> , 190 N.W.2d 115 (Iowa 1971)	23
<i>Miss. Sierra Club v. Miss. Dep't of Envtl. Quality</i> , 819 So. 2d 515 (Miss. 2002).....	6, 7
<i>Mississippi Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors</i> , 621 So. 2d 1211 (Miss. 1993).....	8
<i>Ridgewood Land Co. v. Moore</i> , 222 So. 2d 378 (Miss. 1969).....	21
<i>Vulcan Land, Inc. v. City of Olive Branch</i> , 912 So. 2d 198	21
STATUTES	
Miss. Code Ann. § 49-27-6.....	24
OTHER AUTHORITIES	
Hancock County. R. Ex. 8, Book 1.....	12, 15

ISSUES ON APPEAL

- I. Record contains substantial evidence to support County's decision to grant conditional use permit.
- II. County's imposition of conditions was tantamount to making findings of fact.
- III. A-1 designation under the Hancock County Zoning Ordinance permits a yacht club by right.

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND PROCEEDINGS BELOW

This is an appeal from the Circuit Court of Hancock County, which affirmed the decision of the Hancock County Board of Supervisors (hereinafter "Board") to approve Jourdan River Estates, LLC's (hereinafter "Jourdan River") preliminary site plan and request for a conditional use permit for condominiums. R. Excerpts 1. Jourdan River filed its application with the Hancock County Planning & Zoning Commission (hereinafter "Commission") detailing its proposal for Jourdan River Resort and Yacht Club, which includes 472 condominiums, a yacht club and other amenities. R. Excerpts 1; R. Ex. 8. The Commission conducted a public hearing on March 20, 2008. R. Ex. 19, Vol. 1. The Commission tabled its decision until April 3, 2008, when it reconvened and heard additional argument. R. Ex. 19, Vol. 2. The Commission unanimously approved the preliminary site plan and granted the conditional use permit. R. Ex.7.

Appellants appealed to the Board, which conducted a public hearing on May 21, 2008.¹ R. Ex. 2. Over two months later on August 4, 2008, and after reviewing a multitude of documents and exhibits submitted by Jourdan River, the Board approved the preliminary site plan and granted a conditional use permit for condominiums with specific conditions. R. Ex. BOS 8-2008. Appellants filed a Bill of Exceptions. R. 2-7. The Circuit Court of Hancock County affirmed the decision of the Board, finding "there is substantial evidence to support the Board's decision." R. 207-209. The court further opined, "The decision, although unsatisfactory to the Appellants, was fairly debatable and, thus, not arbitrary or capricious." R. 207-209.

¹The Board concluded, "But it is not likely that we will render a decision today, but we'll do so as quickly as possible. There is a tremendous amount of information that's been presented to the Board. You've seen some of the stacks, and in fairness to the Board, they would need time to review all this in order to do their job properly." R. BOS 5-2008, pp. 87-88.

II. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED.

Jourdan River submitted an application to develop 219 acres of property with low-rise condominiums, a yacht club, and various other amenities. R. Excerpts 1. Previously, Jourdan River submitted a more expansive plan, proposing 1,000 condominium units, a re-zoning of the property, and 130-slip marina.² The Board denied the zoning change. R. Ex. 19, Vol. 2, p. 6. Jourdan River then obtained new counsel, down-sized its project, and eliminated the necessity for a zoning change.³ R. Excerpts 1; R. Ex. 8. Instead of 1,000 condominiums, Jourdan River only seeks to construct 472 4-story (less than 50 feet in height) condominiums as illustrated in the application and site plan.⁴ R. Excerpts 1; R. Ex. 10. Jourdan River also opted for a yacht club, which reduced the number of mooring spaces. R. Excerpts 1; R. Ex. 8 and 10. Jourdan River used the National Oceanic and Atmospheric Administration's (NOAA) Conservation Design to plan the project and also retained a Leadership in Energy and Environmental Design (LEED) specialist to consult in the design. R. Ex. 8, Book 1.

²In 2007, Jourdan River submitted a larger-scale plan for development which required a zoning change. The Commission approved the plan; however, the Board rejected the zoning change. As a result, Jourdan River modified its development, utilizing all "by right" uses of the property under the zoning ordinance with the exception of condominiums, which requires a conditional use permit.

³The Appellants attempt to mislead this Court stating, "The entire project still consists of over 1,000 condominiums, and is estimated to result in 4,590 trips per day." Appellants' Brief, p. 4. Jourdan River reduced the number of condominiums to comply with the density requirements of the zoning ordinance. R. Excerpts 1. Jourdan River submitted a previously prepared traffic study which used information referencing two phases of the project. R. Ex. 12. The study was prepared prior to Jourdan River's decision to reduce the number of condominiums to 472. Jourdan River clearly did not apply for approval of a two-phase project consisting of 1,000 condominiums. R. Excerpts 1.

⁴The "by right" density for 219 acres under the zoning ordinance is 476 single family units or 1,904 units in a four-plex townhome configuration. (43,560 sq.ft./acre divided by 20,000 sq.ft. minimum lot size in A-1 equals 2.178 units per acre. 2.178 multiplied by 219 acres equals 476 units or 476 four-plexes, which equals 1,904 units.) Jourdan River requested approval for fewer units than it is allowed by right in A-1.

The Appellants challenged Jourdan River's right to access its property via Nicola Road.⁵ The Commission requested adequate proof of access. R. Ex. 19, Vol. 1. The deed for Jourdan River's property specifically includes an easement for access which ends at the terminus of Nicola Road.⁶ R. Excerpts 1. The fee simple owner of the property, Cinque Bambini, intended for the subject property to be accessed via a 60 foot right-of-way⁷ as is indicated in the easements reserved in Jourdan River's deeds and those of the adjoining property owners along Nicola Road. R. Ex. 8, Vol. 2. Currently, Nicola Road varies in width as determined by Hancock County's maintenance. R. Ex. 11. Hancock County commissioned a survey from the County Engineer. R. Ex. 11. The survey demonstrates the right of Jourdan River and the traveling public to access the subject property via Nicola Road. R. Ex. 11. The survey indicates that Hancock County maintained Nicola Road at least to the point where Jourdan River's easement begins. R. Ex. 11. Therefore, Jourdan River and the general public have the right to travel Nicola road to access the property. R. Ex. 11.

The Appellants, for the first time, on appeal, suggest that a survey indicates that there is less than 60 feet between the Favre and Parker property lines at one point. This fact is insignificant since there is absolutely no requirement that Jourdan River establish a 60 foot right

⁵The Appellants contend that they provided evidence at the Commission hearing that "the project was inappropriate and out of character". Appellant's Brief, p. 5. This is a bald assertion inserted into the fact section without reference to any evidence whatsoever.

⁶Appellants argue that Nicola Road stops short of Jourdan River's easement. As the former owner of all of the property, it is clear and logical that Cinque Bambini intended to connect Jourdan River's property to Nicola Road. R. Excerpts 1.

⁷Jourdan River's property adjoins the Appellants' properties. Favre accesses his property from the end of Nicola Road via an easement over Cinque Bambini's property. Parker accesses his property via the public portion of Nicola Road. Otherwise, the easement would serve no purpose at all. Parker's warranty deed (Deed Book BB-2288, p. 297) delineates the termination of Nicola Road at the precise point where Jourdan River's easement begins. R. Ex. 8, Vol. 2.

of way for the proposed project. The County only required that Jourdan River “submit plans and specifications for the construction of a road to provide ingress/egress for this development that will adequately handle the volume of traffic to the fully proposed (included (sic) all phases) as determined and approved by the County’s Engineer.” R. Ex. BOS 8-2008. Once the County Engineer approved the plans and specifications for the construction of a road, Jourdan River could commence the project.

SUMMARY OF THE ARGUMENT

This Court must determine whether substantial evidence exists to affirm the decision of the Circuit Court of Hancock County, which upheld the decisions of the Commission and the Board to approve Jourdan River’s preliminary site plan and request for a conditional use permit for condominiums. The zoning ordinance sets forth specific criteria for preliminary site plan approval and the issuance of a conditional use permit. The Appellants have not challenged the approval of the preliminary site plan, but have only taken issue with two conditional use permit requirements: adequate access and water (utilities). Next, the Appellants contend there are no findings of fact to support the three decisions below in favor of Jourdan River. Finally, the Appellants question whether the ordinance allows a yacht club as a matter of right and suggest that a yacht club does not include a place to moor boats.

Substantial evidence exists to support a finding that Jourdan River proved by a preponderance of the evidence each of the conditional use permit requirements. The Board made findings of fact by setting forth specific conditions for the project with regard to access. Jourdan River also provided substantial evidence on the provision of water and access. Additionally, the plain meaning of the term “yacht club” must include a place for the mooring of boats. Hancock County should be given deference regarding the interpretation of the term “yacht club” under its ordinance. Accordingly, this Court should not disturb the decisions below.

ARGUMENT

I. STANDARD OF REVIEW

A. DECISION TO GRANT CONDITIONAL USE IS REVIEWED UNDER SUBSTANTIAL EVIDENCE STANDARD.

When reviewing the decision to grant a conditional use permit, the “substantial evidence” standard of review applies. *Barnes v. DeSoto County Bd. of Supervisors*, 553 So. 2d 508, 510-11 (Miss. 1989); *Miss. Sierra Club v. Miss. Dep’t of Envtl. Quality*, 819 So. 2d 515, 519 (Miss. 2002); *City of Olive Branch Bd. of Aldermen v. Bunker*, 733 So. 2d 842, 844 (Miss. Ct. App. 1999). If based upon substantial evidence, a board’s decision is binding upon the appellate court. *Barnes*, 553 So. 2d at 511. “Substantial evidence” is “such relevant evidence as reasonable minds might accept as adequate to support a conclusion”, or “more than a scintilla of evidence.” *Hearne v. City of Brookhaven*, 822 So. 2d 999, 1002-03 (Miss. Ct. App. 2002)(citing *Johnson v. Ferguson*, 435 So. 2d 1191, 1195 (Miss. 1983)). The extensive record, which includes testimony of experts and lay witnesses, written expert opinions, reports, photographs, maps and other evidence, contains substantial evidence to support the decisions below.

B. ISSUE OF LAW REVIEWED DE NOVO.

Appellants contend that a question of law exists regarding the Board’s interpretation of the term “yacht club” under the zoning ordinance. Factually based decisions cannot be reversed unless unsupported by substantial evidence; however, legal errors are readily reversible and subject to *de novo* review. *Hearn v. City of Brookhaven*, 822 So. 2d 999, 1003 (Miss. 2002)(citing *ABC Mfg. Corp. v. Doyle*, 749 So. 2d 43, 45 (Miss. 1999)). In construing the language of a zoning ordinance, unless manifestly unreasonable, great weight should be given to the construction placed upon the words by the local authorities. *Columbus & Greenville Rwy. Co. v. Scales*, 578 So. 2d 275, 279 (Miss. 1991).

II. RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT COUNTY'S DECISION TO GRANT CONDITIONAL USE PERMIT.

Appellants challenge the decisions below to grant the conditional use permit for condominiums. "When [an appellate court] reviews a decision by a circuit court concerning an agency action, it applies the same standard of review that the lower courts are bound to follow." *Miss. Sierra Club v. Miss. Dep't of Envtl. Quality*, 819 So. 2d 515, 519 (Miss. 2002). The decision to grant or deny a request for a conditional use is adjudicative in nature; therefore, the reviewing court must determine whether the applicant proved by a *preponderance of the evidence* that all conditions required for the requested conditional use were satisfied. *Barnes v. DeSoto County Bd. of Supervisors*, 553 So. 2d 508, 510-11 (Miss. 1989)(emphasis added); *see also City of Olive Branch Bd. of Aldermen v. Bunker*, 733 So. 2d 842, 844 (Miss. Ct. App. 1999). If based upon substantial evidence, a board's decision is binding upon the appellate court. *Id.* Overturning a decision requires a finding that the board's decision was "unsupported by substantial evidence; was arbitrary or capricious, was beyond the agency's scope or powers; or violated the constitutional or statutory rights of the aggrieved party." *Hooks v. George County*, 748 So. 2d 678, 680 (Miss. 1999)(reversing Court of Appeals for improper review of Board's decision based upon preponderance of evidence standard which should only be employed by Board itself in reviewing claim before it). "Substantial evidence" has been defined as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion", or "more than a scintilla of evidence." *Hearne v. City of Brookhaven*, 822 So. 2d 999, 1002-03 (Miss. Ct. App. 2002)(citing *Johnson v. Ferguson*, 435 So. 2d 1191, 1195 (Miss. 1983)).

Conditional use permits are adjudicative in nature, while zoning changes are legislative acts. *Currie v. Ryan*, 243 So. 2d 48, 51-52 (Miss. 1970). For that reason, a court is prevented from substituting its judgment in the place of a board's wisdom and soundness. *Faircloth v. Lyles*, 592 So. 2d 941, 943 (Miss. 1969). It is presumed that a board exercised "wisdom and

soundness” in rendering a decision that was “fairly debatable.” *Currie*, 243 So. 2d at 51-52. “The appellate court may not re-weigh the facts nor may it substitute its judgment for that of the lower tribunal.” *City of Olive Branch Bd. of Aldermen*, 733 So. 2d 842, 845 (Miss. Ct. App. 1998). When substantial evidence exists, an agency’s decision must stand “even if there might be room for disagreement on that issue.” *Mississippi Comm’n on Env’tl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So. 2d 1211, 1216 (Miss. 1993). A decision that is “fairly debatable” is not arbitrary, capricious, discriminatory, illegal or unsupported by substantial evidence. *Gillis v. City of McComb*, 860 So. 2d 833, 835-36 (Miss. Ct. App. 2003).

Under the Hancock County Zoning Ordinance, a conditional use permit is required to construct condominiums. The zoning ordinance provides:

411.01-02 Uses Requiring Conditional Approval – The uses listed in the chart are permitted upon approval of location and the site plan thereof by the planning commission as being appropriate with regard to transportation and access, water supply, waste disposal, fire and police protection, and other public facilities, as not causing undue traffic congestion or creating a traffic hazard and as being in harmony with the orderly and appropriate development of the district in which the use is located. A “C” [in the chart of uses] indicates a use which requires planning commission approval.

R. 74. Additionally, Section 905.03 enumerates several factors that “shall be established where applicable” in order to “not adversely affect other properties in the neighborhood”. R. 90-91. Jourdan River complied with Section 905.03, exceeding its burden of proof through expert witnesses, expert or professional reports and studies, testimony and other evidence. Appellants only take issue with two requirements of Section 411.01-02 and Section 905.03: access and water service.

A. Adequate Access

The Appellants contend that Jourdan River does not have adequate access to its property and that the Commission and the Board erred when they failed to make a specific finding

regarding access. The Board approved the conditional use with specific findings pertaining to access, as follows:

1. That the developer submit plans and specifications for the construction of a road to provide ingress/egress for this development that will adequately handle the volume of traffic to the fully proposed (included (sic) all phases) as determined and approved by the County's Engineer; and
2. [and] that Crump [Road] not be used for ingress or egress to the developer except for emergency vehicles and purposes.

R. Ex. BOS 8-2008; R. Ex. 4. Section 905.03-01 provides that "adequate ingress and egress to the property and proposed structures" shall be established where applicable. R. 90-91. Before proceeding, Jourdan River is required to submit plans and specifications for the construction of a road to provide ingress/egress that will adequately handle the volume of traffic to the fully proposed level of development as determined and approved by the County's Engineer.⁸ If the condition cannot be met, then the project cannot move forward. The Board's decision to grant the conditional use was based upon substantial evidence and rational findings.

The Appellants argue that Jourdan River cannot access the property via Nicola Road. Evidence in the record establishes "access" and the "proposed access" as required under the zoning ordinance.⁹ The subject property has two means of ingress and egress. R. Ex. 8 (Site Plan, Ted Trout Architectural Rendering, Google Aerial Photograph, Neel-Schaffer Vicinity Map and Project Site Plan). To its north, the property may be accessed from Crump Road. R.

⁸It is not uncommon for a governmental body to impose conditions on a developer, hence the term "conditional use". The developer may proceed provided that the condition is or will be met. Upon meeting the condition or providing proof that the condition will be met, the developer may move forward with the project. For example, the owner of a landlocked property may be required to obtain access from an adjacent landowner prior to proceeding with the project to develop his property. The developer is not necessarily required to purchase access before filing an application.

⁹Ironically, the Appellants's adjacent property is accessed via Nicola Road and also addressed Nicola Road. Additionally, the Appellants' utilities are serviced via Nicola Road.

Ex. 10. From its south, the property may be accessed via Nicola Road. R. Ex. 10. In its application, Jourdan River presented its warranty deed, which shows that it owns a 60 foot easement that leads southward to Nicola Road. R. Ex. 8, Book 1. Cinque Bambini, the original owner of all the property in this area, including the property of the Appellants, created this 60 foot right of way as a primary ingress and egress for these properties as it developed. R. Ex. 8, Book 2. Cinque Bambini created a 60 foot right of way in 1986 when it began subdividing the property.¹⁰ R. Ex. 8, Book 2 (Warranty Deed dated April 22, 1986, from Cinque Bambini to Carl J. and Mathilde Heitzmann). The right of way is clearly marked with concrete monuments. R. Ex. 8, Book 2; R. Ex. 11.

The Appellants contend there is doubt about the position and attributes of any easement Jourdan River may possess and the rights of the public to travel along Nicola Road. Jourdan River's acquisition deed and that of its predecessor in interest, Ronald A. Mentel, show an easement (1,200 feet by 60 feet wide) from the property southward to Nicola Road.¹¹ The strongest evidence of access is the fact that Hancock County paved Nicola Road to its terminus, thus linking the public portion of Nicola Road with the easement.¹² R. Ex. 8, Book 2 (Compton

¹⁰ In Briel v. City of Natchez, this Court held that acceptance of a dedicated street may occur either by formal act or it may be inferred or implied from sufficient circumstances. 48 Miss. 423, 424 (1873). This Court stated, "When the owners of urban property have laid it out into lots with streets and avenues intersecting the same, and have sold lots with reference to such plat, it is too late for them to assume a general and unlimited control over the part thus dedicated to the public." Briel, 48 Miss. at 424 (emphasis added). Similarly, in Indianola Light, etc., Co. v. Montgomery, 85 Miss. 304, 37 So. 958, 959, the Mississippi Supreme Court upheld an implied dedication, holding that "where the owner had made a map and sold lots as laid out thereon, the failure of the city, for over ten years to use the entire strip which was laid out as a street, did not deprive it of the right to do so when necessary." In Luter v. Crawford, where no formal acceptance of the road was of record, the Mississippi Supreme Court held that the city board could not repudiate their acts of acceptance. 81 So. 2d 348, 353 (Miss. 1957).

¹¹The original owners of all this property, Cinque Bambini, specifically crafted this easement in order that the property could be accessed via Nicola Road. R. Ex. 8, Book 2.

¹²The Appellants point out that a portion of Nicola Road does not appear on the Hancock County road register map and, therefore, creates an ambiguity on the public's right to travel thereupon. Evidence in

Engineering, Nicola Road, Right-of-Way Study; Compton Engineering, Nicola Road Paving Report); R. Ex. 14. While Jourdan River presented evidence of a 60 foot right of way, it also laid to rest any issue of access. The zoning ordinance only requires proof of access. R. 90. Jourdan River does not necessarily need a 60 foot right of way. It need only comply with the zoning ordinance and the condition the Board placed upon it to have its road plan approved by the County Engineer. Neel-Schaffer Engineering supplemented its original traffic analysis with two diagrams of road cross-sections. R. Ex. 8, Book 2 (Typical Sections). These diagrams demonstrate there is sufficient width to expand Nicola Road in order to accommodate a safe driving surface and provide rights of way for utilities. R. Ex. 8, Book 2.

Coast Electric Power Association, Kiln Fire and Water District and Bellsouth utilities already utilize the right of way to provide service to the area. R. Ex. 8, Book 2. Moreover, Hancock County maintains Nicola Road and has paved it to a point located on Jourdan River's easement. R. Ex. 8, Book 2; R. Ex. 11 and 14. Hancock County commissioned a study of Nicola Road, which was performed by Compton Engineering. R. Ex. 11. This report describes Nicola Road and indicates exactly where the County has paved and maintained. R. Ex. 11. A copy of this report was submitted at the hearing before the Commission. R. Ex. 8, Book 2 (Compton Engineering, Nicola Road, Right-of-Way Study; Compton Engineering, Nicola Road Paving Report).¹³ Furthermore, the Commission and the Board reviewed the proposed cross-section of the access road (via Nicola Road), which satisfies the access requirements. R. Ex. 8, Book 2 (Typical Sections). Jourdan River also submitted a right of way comparison study to

the record shows that the County maintained and paved Nicola Road beyond the terminus indicated on the road register map.

¹³Compton Engineering, Hancock County's Engineer, completed this study entitled "Hancock County Board of Supervisors, Hancock County, MS – Nicola Road Right of Way Study and presented it to the Planning and Zoning Commission at the hearing on April 3, 2008.

demonstrate that this development's ingress and egress via Nicola Road meets or exceeds other rights of way established in Hancock County. R. Ex. 8, Book 1 (Traffic: Right of Way Comparisons).

The Board's imposed conditions pertaining to access are equivalent to a finding of fact on the issue of access, thus satisfying the requirements for a conditional use permit. The Board has the authority under the zoning ordinance to regulate a conditional use through the imposition of conditions. Jourdan River must meet the Board's requirements related to access to maintain its conditional use permit. If it complies with the conditions, then condominiums will be allowed in the final site plan. The Board's specific findings regarding access negate the Appellants' argument. The conditions pertaining to access demonstrate that the decision was not arbitrarily and capriciously rendered.

B. Sewer and Water Service

Jourdan River addressed water and sewer.¹⁴ R. Ex. 8, Book 2. Jourdan River submitted two "will serve" letters to demonstrate adequate sewer service. R. Ex. 8, Book 2. A letter from Hancock County Water and Sewer authorized Jourdan River to hook up to its system. Record Exhibit 16. At the time of the zoning hearing on March 20, 2008, the "will serve" letter was valid. The Commission rendered its decision based upon the fact that Jourdan River provided

¹⁴Jourdan River stated:

As far as potable water, we're in negotiations with Kiln Fire and Water for our drinking water. And in Mickey's (Lagasse) presentation, he's going to shed some light on the water line that's going to run down 603.

As far as the sewer and the waste treatment, we have will serve letters in place for Hancock County, but we feel that the infrastructure [in] the Kiln will be in place in time to use that. But if not, we propose and we'll pay for an eight inch force main down to the interstate and cross the interstate. We'll pay for that.

R. Ex. 19, pp. 13-14.

evidence regarding water and sewage.¹⁵

Jourdan River also presented evidence through the testimony of its consultant, Mickey Lagasse of CDM, who discussed potential alternatives for water and sewage that will be available as a result of federally funded grants to replace and upgrade infrastructure in the wake of Hurricane Katrina.¹⁶ He discussed the plans for a 16-inch main along Highway 603, which at the time was in the environmental design stage. R. Ex. 19, p. 55. Alternatively, he discussed the placement of water wells on the property. R. Ex. 19, p. 56. Jourdan River presented substantial evidence with regard to water in its proposed plans.

C. Other Conditional Use Requirements

The Appellants only attacked two conditional use requirements. Jourdan River provided substantial evidence of all the enumerated factors of Section 905. The Commission found that Jourdan River met its burden of proof. The Commission made the following findings:

Whereas, with respect to the above referenced application, this commission finds as follows based on personal knowledge, testimony, and documentary evidence heard and presented at the March 20, 2008, public hearing and the April 3, 2008 hearing:

¹⁵At the hearing before the Board on May 21, 2008, the Appellants appeared with a *letter of the same date* from Hancock County Water and Sewer apparently revoking the will serve letter. R. Ex. 17. Jourdan River had no notice of this revocation and objected to its presentation at the hearing before the Board. Subsequently, it was determined that Hancock County Water and Sewer had no authority to revoke the "will serve" letter and that any attempt to do so was not done in an open, public meeting as required by state law. Jourdan River sent a public records request pursuant to the Freedom of Information Act to Hancock County Water and Sewer requesting a copy of its Minutes, wherein such revocation was made. No response was received. The letter was unauthorized; therefore, it was not an effective revocation of the will serve letter. In follow up, Jourdan River provided two letters to Ronnie Artigues, Attorney for the Board, which demonstrated that Jourdan River had authority from the Hancock County Utility Authority for sewage and the Kiln Water & Fire Protection District for water service. R. 129-142. This information was presented to the Board before it rendered its decision over one month later. R. 129-142. The "will serve" letter has no expiration date.

¹⁶The Board was aware of the federally funded infrastructure improvements in the area since the projects require their review and approval. Water projects, as described by Mickey Lagasse, are well under construction at present. The Kiln Sewer Treatment Plant, also discussed by Mickey Lagasse, is under construction with an anticipated completion date of March 2011. Sewer lines have been installed north on Nicola Road within 1,500 feet of the Jourdan River easement.

1. Said use is necessary to promote the public interest at the location and;
2. Said use is designed, located and proposed to be operated in a manner that public safety, health and welfare are protected and;
3. Said use will not cause substantial injury to other property in the area in which it is located and;
4. Said use conforms to all district regulations in which it is located and;
5. The proposed use and development of the land will be in harmony with the scale, density, and character of the area in which it is located.

R. Ex. 7. The Commission's findings were supported by substantial evidence as will be more fully explained below.

1. Section 905.02-01.01 Said use is necessary to promote the public interest at the locations.

Section 905.02-01.01 requires proof that a conditional use is necessary to promote the public interest at the location. R. 89. The design is an important component in the promotion of the public interest. Jourdan River used the "Conservation Design" as described by the National Oceanic and Atmospheric Administration (NOAA).¹⁷ R. Ex. 19, pp. 17-20; R. Ex. 8, Book 1 (Alternatives for Coastal Development: One Site, Three Scenarios). Jourdan River also presented site studies focusing on the preservation of the property and enhancement of its natural features. R. Ex. 8, Book 1 (Endangered Species Study, Wetland Delineation, Cultural Resources Study, Yacht Basin Flushing Model and Stormwater Runoff Plan Proposal). George Carbo, AICP, stated that the public interest would be promoted in "allowing development while minimizing the impact on wetlands." R. Ex. 8, Book 1 (Opinion of George Carbo, AICP). He stated, "Grouping the units into buildings on the higher portions of the property provides a

¹⁷"Conservation Design" protects environmentally sensitive areas and surrounding wildlife habitat. It also uses less developable land and preserves more of the natural beauty and terrain as open or green space.

design that protects the public interest as well as meets the proposed flood elevations recommended by FEMA.” R. Ex. 8, Book 1 (Opinion of George Carbo). Jourdan River also presented evidence regarding the need for housing in Hancock County. R. Ex. 8, Book 1 (Need for Housing). Additionally, it showed the need for boat moorage in Hancock County and the Mississippi Gulf Coast. Record Exhibit 8, Book 1 (5-21-08)(Need for Boat Moorage). Jourdan River presented substantial evidence that the use is necessary to promote the public interest at the location.

2. 905.02-01.02 Use is designed, located and proposed to be operated in a manner that public safety, health and welfare are protected.

Section 905.02-01.02 requires that the conditional use is designed, located and proposed to be operated in a manner that public safety, health and welfare are protected. R. 89. Jourdan River presented testimony that all the condominiums will be sprinkled for fire protection. R. Ex. 19, p. 13. It also showed that fire protection wells would be drilled on site if Hancock County infrastructure is insufficient at the time of construction. R. Ex. 8, Book 1 (Project Summary). Jourdan River showed that the development would be serviced by the Hancock County Sheriff’s Department and access to the development would be controlled. R. Ex. 8, Book 1 (Project Summary); R. Ex. 19, p. 15. Jourdan River invited the Mississippi Department of Wildlife, Fisheries and Parks to moor a marine law enforcement vessel at no charge. R. Ex. 8, Book 1 (Letter to Andrew Elchos dated May 31, 2007). Jourdan River presented substantial evidence that the conditional use is designed, located and proposed to be operated in a manner that public safety, health and welfare will be protected.

3. 905.02-01.03 Use will not cause substantial injury to other property in the neighborhood in which it is located.

Section 905.02-01.03 requires that the proposed use will not cause substantial injury to other property. R. 90. The proposed development covers 219 acres. R. Excerpts 1. The

condominium units are divided into smaller units. R. Excerpts 1. The condominium units are strategically placed on uplands with the specific intent to preserve the surrounding property. R. Excerpts 1; R. Ex. 8, Book 1. Due to the vast size of the property, the condominium units will have little effect on adjacent property owners. R. Ex. 8, Book 1 (Site Plan); R. Ex. 10 (Enlarged Site Plan). The condominium units will be located over 1,000 feet from the nearest adjacent landowner. R. Ex. 8, Book 1 (Proximity to Neighbors). The preservation of natural landscape will minimize, or eliminate, any impact to surrounding neighbors. R. Ex. 8, Book 1 (NOAA Alternatives for Coastal Development: Conservation Design). The Conservation Design will be used to protect the public interest and promote smart growth. R. Ex. 19, p. 16. Vegetation buffers will be utilized to minimize the impact to surrounding landowners. R. Ex. BOS 5-2008, p. 57. The Appellants failed to present any evidence of potential injury to their properties. A fully engaged Commission and the Board did not express any concerns about potential damage to adjacent landowners. Substantial evidence exists to support a finding that the proposed use will not cause substantial injury to other property in the neighborhood.

4. 905.02-01.04 Use conforms to all district regulations for the applicable district in which it is located unless other provisions are specifically set forth in the application.

Jourdan River will comply with all applicable district regulations, including those pertaining to the condominium structures. R. 90. The condominium units will be four habitable floors (also known as low-rise condominiums) and will not exceed the 50 foot height restriction. R. Ex. 8, Book 1. All units will meet the density requirements. R. Ex. 8, Book 1. The location of the condominiums on the 219 acre tract eliminates any issue regarding set back requirements. All uses in the development conform to the applicable district regulations. R. Ex. 19, pp. 8-9. The Appellants have failed to demonstrate any non-compliance in this regard. Substantial

evidence exists to support the finding that the conditional use will conform to all district regulations.

5. 905.02-01.05 That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located.

The proposed development is in harmony with the scale, bulk, coverage, density and character of the area or neighborhood in which it is located. R. 90. According to George Carbo, “the project will provide a density no greater than a single-family development while preserving more open space.” He stated further, “The concentration of living units will present an overall better development for this property that will be in harmony with the surrounding area.” R. Ex. 8, Book 1 (Opinion of George Carbo). It is also his opinion that the project would remain in harmony with the character of the area because there will be “a significantly large amount of land on the property that remains as open space” (compared to a traditional single-family subdivision layout). R. Ex. 8, Book 1 (Opinion of George Carbo). Additionally, the proposed use does not exceed the maximum residential density requirements of the zoning ordinance. R. Ex. 19, p. 29. Furthermore, Jourdan River retained a Leadership in Energy and Environmental Design (LEED) specialist to provide consultation on the development. R. Ex. 8, Book 1 (LEED Documentation and Certification); R. Ex. 19, pp. 20-28. There is substantial evidence in the record to support a finding that the proposed conditional use is in harmony with the scale, bulk, coverage, density and character of the area or neighborhood in which it is located.

6. 905.03-01 Adequate ingress and egress to property and proposed structures thereon with particular reference to vehicular and pedestrian safety and convenience, traffic flow and control and access in case of fire or other disaster.

To address Section 905.03-01, Jourdan River submitted a Traffic Analysis and a Traffic Analysis Supplement. R. Ex. 8, Book 1 (Neel-Schaffer Traffic Analysis); R. Ex. 8, Book 2

(Neel-Schaffer Traffic Study Supplement – Trip Generation).¹⁸ According to the Traffic Study Supplement, condominiums generate the fewest number of trips per day of all residential uses.¹⁹ R. Ex. 8, Book 1. A single family home development would generate almost twice the number of trips. Single family developments produce more traffic. The Traffic Study addresses vehicular and pedestrian safety and convenience through its analysis of the placement of traffic control devices. Access in the case of fire or other disaster is addressed through the reservation of Crump Road as an emergency exit. Representatives of Neel-Schaffer presented this data and answered the Commission's questions. R. Ex. 19, pp. 39-48. The Board restricted the use of Crump Road consistent with the Traffic Analysis. Substantial evidence exists to support a finding that the proposed conditional use complies with this provision.

7. 905.03-2 Off-street parking with particular attention to item (1) above and the economy of the county, and to noise or glare effects of the conditional use on adjoining properties generally in the district.

Jourdan River presented evidence regarding off-street parking. R. Ex. 8, Book 1. Paved parking will be provided at a rate of 1.5 spaces per condominium unit. R. Ex. 8, Book 1 (Project Summary). Guest and handicapped parking will be provided as needed. R. Ex. 8, Book 1. Condominium units will be constructed on a raised, concrete deck with parking below to minimize paving. R. Ex. 8, Book 1. Low-level lighting will be utilized and all lighting in public areas will comply with county code. R. Ex. 19, p. 15. Preservation of the existing landscape and

¹⁸Jourdan River retained Neel-Schaffer Engineering to determine the safest, most effective means of ingress and egress to the property. R. Ex. 8, Book 1 (Neel-Schaffer Traffic Analysis). It was determined that Crump Road would be used as an emergency exit. *Id.* Nicola Road was selected as the main entrance because it leads to a portion of Highway 603 where the highway is four-lane and divided by a median. *Id.* A turning lane exists at this point and the median renders the intersection safer for crossing traffic. *Id.*

¹⁹The Appellants misinterpret the information by stating that this development will cause 2,400 *cars* to travel Nicola Road per day. The Traffic Study indicates that the development will generate approximately 2,400 daily *trips* during a 24 hour cycle.

use of vegetated buffers along adjacent property borders will serve as an effective sound barrier. Substantial evidence exists to support a finding that the proposed conditional use complies with this provision.

8. 905.03-03 Refuse and service areas, with particular reference to item (1) and (2) above.

Each condominium unit will be constructed on a raised deck with underground parking. R. Ex. 8, Book 1. Garbage collection and service areas will be located in this area to increase convenience and reduce visibility.

9. 905.03-04 Utilities with reference to location and availability and compatibility.

Jourdan River addressed the availability and compatibility of utilities. The Project Summary demonstrated that Coast Electric Power Association provided an acceptable proposal to loop the entire development with 3 phase power. R. Ex. 8, Book 1 (Project Summary). A Coast Electric power grid was provided. R. Ex. 8, Book 2 (Utilities on Right-of-Way). As indicated, the property can be serviced with electricity utilizing existing electrical services and connections via Crump Road or Nicola Road.

10. 905.03-05 Screening and buffering with reference to type, dimensions, character.

Jourdan River employed the Conservation Design Scenario, thus minimizing the impact to the environment and promoting open, undeveloped sections of terrain. R. Ex. 8, Book 1 (Alternatives for Coastal Development: One Site, Three Scenarios). Conservation measures go beyond those required by law, including vegetated buffers and swale drainages along roads. Jourdan River will utilize a landscape architect to create a lush setting. Existing plant species will be transplanted to assure a natural, native environment. R. Ex. 8, Book 1 (Project Summary). Boundaries between adjacent landowners will have vegetation buffers. R. Ex. 19, pp. 19-20.

11. 905.03-06 Control of any traffic safety, economic impact and compatibility and harmony with properties in the district.

Jourdan River presented a Traffic Analysis and Traffic Analysis Supplement to the Commission and the Board which addressed traffic safety. Jourdan River provided a report from the Hancock County Tax Collector which indicated the estimated tax benefit. Ex. 8, Book 1 (Tax Benefit to Hancock County). Jourdan River presented substantial evidence that this development and the environment it creates will be in harmony with the surrounding properties in the district. Though not required, Jourdan River also addressed river traffic. R. Ex. 8, Book 1 (Neel-Schaffer; Barry A. Vittor & Associates, Inc.).

12. 905.03-07 Required yards and open spaces.

Jourdan River provided substantial evidence with regard to open spaces. Jourdan River selected the Conservation Design Scenario because it protects and promotes contiguous open space by clustering structures. R. Ex. 8, Book 1. The Site Plan demonstrates that a majority of the 219 acres will be utilized as open or green space. R. Ex. 10 (Enlarged Site Plan). It is estimated that 50 to 100 acres will be preserved or utilized as a wildlife area. R. Ex. 8, Book 1 (Project Summary).

III. COUNTY'S IMPOSITION OF CONDITIONS WAS TANTAMOUNT TO MAKING FINDINGS OF FACT.

The Appellants argue that the failure to make findings of fact with respect to access violates the zoning ordinance. While detailed findings of fact are preferred, the failure to make explicit findings of fact is an insufficient basis for reversal and the decision rendered is "tantamount to a finding of fact."²⁰ *Barnes v. DeSoto County Bd. of Supervisors*, 553 So. 2d 508,

²⁰In *Barnes v. Board of Supervisors*, DeSoto County, the circuit court noted that the evidence consisted of three days of hearing, forty-four exhibits, testimony of expert and lay witnesses, which ultimately lead to the Board of Supervisor's imposition of fifteen restrictive safeguard conditions for approval of the conditional use permit. *Barnes*, 553 So. 2d 511. The Board of Supervisors reviewed the evidence,

511; *see also Faircloth v. Lyles*, 592 So. 2d 941, 945 (Miss. 1991)(recognizing the desirability of specific findings, but declining to reverse for lack of specificity where record supports factual basis for decision); *Vulcan Land, Inc. v. City of Olive Branch*, 912 So. 2d 198, 202 (holding expressed reasons are findings of fact even though not stated as such). When the administrative authority does not make specific findings of fact, the reviewing court must look to the record to determine if the decision is supported by the evidence. *Caver v. Jackson County Bd. of Supervisors*, 592 So. 2d 941, 945 (Miss. 2007)(citing *Faircloth*, 592 So. 2d at 945). The granting of a conditional use permit, while at the same time imposing conditions upon it, is tantamount to a finding of fact that the threshold issues were answered and resolved in favor of the applicant. *Barnes*, 553 So. 2d at 511. The reviewing circuit court is an appellate court only. *Id.* at 512 (citing *Ridgewood Land Co. v. Moore*, 222 So. 2d 378 (Miss. 1969)). The circuit court's review of a board's decision is restricted and narrow in scope because the actions of a board are legislative and presumed to be valid. *Id.*

Jourdan River requested a conditional use permit for condominiums. R. Excerpts 1. In granting the conditional use permit, the Board set forth a list of conditions, two of which pertained to access. The Board ordered:

including the submission of pictures, maps, plats, and also determined the credibility of the witnesses and their testimony. *Id.* at 512. The Board of Supervisors did not make specific findings of fact on each of the six factor test set forth in the zoning ordinance. *Id.* at 511. Nonetheless, after reviewing all the evidence, the Mississippi Supreme Court opined that granting the conditional use permit and imposing conditions upon the granting of that permit, is equivalent to a finding that the requirements for the conditional use were met. *Id.*

As per the Board of Supervisors, motion to approve preliminary approval for the Jourdan River Estates development subject to the following conditions: that the developer submit plans and specifications for the construction of a road to provide ingress/egress for this development that will adequately handle the volume of traffic to the fully proposed (included (sic) all phases) as determined and approved by the County's Engineer . . . [and] that Crump not be used for ingress or egress to the developer except for emergency vehicles and purposes.

R. Excerpts 2.²¹ The approval of the conditional use permit with this condition pertaining to ingress and egress is equivalent to a finding of fact regarding access. This condition demonstrates that the Board listened to and comprehended the evidence. The imposed condition is indicative of the Board's insight and well-reasoned judgment with regard to access. For these reasons, the decision of the Board should be affirmed.

IV. A-1 DESIGNATION UNDER HANCOCK COUNTY ZONING ORDINANCE PERMITS A YACHT CLUB BY RIGHT.

The subject property is zoned A-1, which allows "Yacht Clubs" by right. R. 75-79. The Appellants contend that Jourdan River cannot have a "yacht basin", "yacht club marina", or place to moor boats. They argue Jourdan River can have a yacht club (by right), but it cannot include boats, docks, or a yacht basin.

A "yacht club" is allowed by right on properties zoned A-1, C-1, C-2, C-3 and C-4, while a "marina delete yacht club" is only permitted by right on properties zoned C-2, C-3 and C-4. R. 75-79. The zoning ordinance does not define "Yacht Club"; however, in the "Interpretation and Definitions" section, it defines "Marina" as "A boat basin, harbor or dock, with facilities for

²¹While Jourdan River Estates presented evidence of 60 foot right of way, it is important to note the Planning and Zoning Commission and the Board of Supervisors did not specify a width requirement for the ingress and egress via Nicola Road. Instead, the Board of Supervisors had the wisdom and insight to require the road plan to be approved by the County Engineer.

berthing and servicing boats, including bait and fishing tackle shop and eating establishments.”
R. 70.

Jourdan River proposed a private yacht club. R. Ex. 19, p. 15. A yacht club necessarily includes a place to moor boats. The Appellants argue that a yacht club is simply “a social organization for the promotion of yachting, not as a place where boats are to be boarded and serviced.” R. Ex. 19, p. 34. The zoning ordinance was promulgated to regulate land uses, not social organizations. The zoning ordinance contemplates a “Yacht Club” as a specific use of the land.

The “marina delete yacht club” designation under the zoning ordinance is proof that a yacht club includes a marina. Otherwise, it would not be necessary to delineate a classification for marina which specifically excludes yacht clubs. The general rule in construction of zoning ordinances is to give effect to the intent of the lawmaking body. *Columbus & Greenville Rwy. Co. v. Scales*, 578 So. 2d 275, 279 (Miss. 1991)(citing *Hutchinson v. Board of Zoning Appeals of Stratford*, 100 A.2d 839, 841 (Conn. 1953); *City of Rome v. Shadyside Memorial Gardens, Inc.*, 93 Ga.App. 759, 92 S.E.2d 734, 736 (1956); *City of Buffalo v. Roadway Transit Co.*, 303 N.Y. 453, 104 N.E.2d 96, 98 (1952). In construing the language of a zoning ordinance, unless manifestly unreasonable, great weight should be given to the construction placed upon the words by the local authorities. *Columbus & Greenville Rwy. Co. v. Scales*, 578 So. 2d 275, 279 (Miss. 1991)(citing *Drennen v. Mason*, 133 So. 689, 691 (Ala. 1931); *Kordick Plumbing and Heating Co. v. Sarcone*, 190 N.W.2d 115, 118 (Iowa 1971); *Daniel D. Rappa, Inc. v. Engelhardt*, 256 A.2d 744, 746 (Del. 1969)). In the event a provision of a zoning ordinance is subject to one or more interpretations, “the best interpretation of what the wording in the ordinance means is the manner in which it is interpreted and applied by the enacting and enforcement authorities.” *Faircloth*, 592 So. 2d at 945.

At the continued hearing before the Commission on April 3, 2008, Commissioner Koenig announced the following regarding the meaning of "Yacht Club":

The only really other thing that I spoke to Ronnie [County Attorney] about was about the yacht club, and he's of the opinion that for it to be a yacht club, it would come with certain things that are implied. One, is a basin to park boats and access to and from for boats. If not it would just be a clubhouse, not a yacht club. And that would be how he would separate the difference of a yacht club and clubhouse.

R. Ex. 19, pp. 2-3. Both the Commission and County Attorney agreed that a yacht club includes a yacht basin or a place to "park" boats.²² Common sense should dictate in this instance since it is hard to imagine a yacht club without a boat basin. The language of the zoning ordinance should be given its regular meaning.

The hearing process before the Commission is the proper venue for interpretations of the zoning ordinance to occur. The Commission and the Board resolved this issue in favor of Jourdan River. In rendering its interpretation, Hancock County made a subtle, but resonating point. In an A-1 District, "clubs or lodges private" are allowed by right. Using the Appellants' definition of "yacht club", a yacht club would fit under the category of "clubs or lodges private." The Commission, relying on counsel, stated that if a yacht club did not include a place to park boats (i.e. a yacht basin), then "it would just be a clubhouse, not a yacht club." R. Ex. 19, pp. 2-3. Thus, the zoning ordinance distinguishes between a "yacht club" and a "clubhouse."

Hancock County's interpretations of "yacht club" and "marina" are also consistent with the definitions set forth under the Mississippi Coastal Wetlands Protection Act found at Miss. Code Ann. § 49-27-6. This statute defines a yacht club as a marina that restricts mooring space

²²There are currently two other yacht clubs in Hancock County, namely, Diamondhead Yacht Club and Bay-Waveland Yacht Club, which both have facilities for boat moorage. R. Ex. 8 (By Right Plat – Exemplar Section).

and docking facilities to members only of a private organization. Marinas are open to the public, but yacht clubs restrict access to members only. This important distinction is consistent with the zoning ordinance since yacht clubs are permitted in A-1 Districts. On the other hand, public marinas are only allowed in less restrictive zones such as C-2, C-3 and C-4.

Under “Water Related Uses” in the Chart of Uses, several designations, including “Boat launches,” “Concessions,” “Pier,” and “Recreational Uses”, are permitted “by right” in A-1 Districts. These by right uses are allowed whether a “yacht club” is present or not. The Chart of Uses does not specify any particular location for the moorage of boats associated with boat launches, concessions, piers, or recreational uses or yacht clubs. The yacht club will enhance the adjacent waterway and allow use by the general public. Boats could be moored in the adjacent open body of water, or a confined basin, which is a safer alternative with the least impact. Furthermore, no fueling services or repairs will be permitted at the yacht club. The permitting of such a basin is also governed by a separate regulating authority. Jourdan River has the right to moor boats under more than one designation under the Chart of Uses; therefore, the argument that boat moorage is not associated with a yacht club does not hold much water.

CONCLUSION

For the foregoing reasons, Jourdan River Estates, LLC requests this Court to uphold the decision of the Circuit Court of Hancock County and to give deference to the decisions of the Hancock County Planning and Zoning Commission and the Hancock County Board of Supervisors by affirming their decisions to approve the preliminary site plan application and issuance of a conditional use permit for condominiums to Jourdan River Estates, LLC. The record clearly demonstrates that substantial evidence exists to support the findings below. The Appellants have provided no proof that the decisions below were arbitrary or capricious. Accordingly, this Court should affirm.

Respectfully submitted this the 5th day of May, 2010.

Respectfully submitted,



JOURDAN RIVER ESTATES, LLC

By Its Attorneys

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By: 

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CERTIFICATE OF SERVICE

I, S. TRENT FAVRE, do hereby certify that a true and correct copy of the above and foregoing document has been sent via regular mail to the following:

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This 5th day of May, 2010.



S. TRENT FAVRE

CERTIFICATE OF SERVICE ON TRIAL JUDGE

I, S. Trent Favre, counsel of record to Appellee Jourdan River Estates, LLC, do hereby certify that I have this day filed a copy of the foregoing Brief of Appellee, Jourdan River Estates, LLC, by U. S. mail, postage prepaid, on the following person at this address:

Judge Jerry O. Terry
Circuit Court of Hancock County
P. O. Box 1461
Gulfport, MS 39502

This the 5th day of May, 2010.



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