

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-00981

SCOTT and MONA HARRISON

APPELLANTS

VS.

MAYOR AND BOARD OF ALDERMEN
OF THE CITY OF BATESVILLE, MISSISSIPPI

APPELLEES

and

MEMPHIS STONE AND GRAVEL COMPANY

INTERVENOR

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND
JUDICIAL DISTRICT OF PANOLA COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

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ARGUMENT

In their briefs to this Court, neither the City of Batesville, Mississippi (“the City”) nor Memphis Stone and Gravel Co. (“Memphis Stone”) has identified *even a scintilla* of record evidence that Memphis Stone would have suffered any type of hardship in the absence of a variance. Instead, they argue only that Memphis Stone would stand to realize an economic advantage if the variance is upheld.

In attempting to justify the decision of the City to allow a strip mine to operate in an area zoned for residential and light commercial use, the City and Memphis Stone argue that the decision was “fairly debatable” because the Appellants Scott and Mona Harrison (“the Harrisons”) were allowed to voice their opposition prior to that decision. Because (1) the City’s decision to grant Memphis Stone a variance was an example of “spot zoning” that favored Memphis Stone to the exclusion of all other landowners and (2) there was no evidence in the record to support a finding of hardship sufficient to support a variance under this Court’s jurisprudence and the City’s own ordinances, the Court should reverse the decision of the Circuit Court.

I. Procedural Issues

The City and Memphis Stone assert at numerous points in their briefing that the City followed appropriate procedures and allowed all parties an opportunity to be heard during the consideration of Memphis Stone’s variance application. City Brief, at 3-4, 8-9, 13; Memphis Stone Brief, at 3-4, 7-9, 17. The Harrisons have never challenged the adequacy of the City’s procedure, notice, or hearings related to this matter, and these issues have no bearing on the issues of zoning law upon which this appeal is based. No amount of “procedural due process,” City Brief, at 11, can compensate for the complete lack of evidence to support the variance granted by the City.

II. The Variance Granted by the City Constitutes Spot Zoning

This case presents the same issues addressed by the Supreme Court in *Drews v. City of Hattiesburg*, 904 So. 2d 138 (Miss. 2005), less than five years ago. As in *Drews*, the variance applicant seeks to use property for use prohibited by a local zoning ordinance. As in *Drews*, the requested zoning action favors one particular landowner over other adjacent landowners. As in *Drews*, the requested use of the land at issue is a dramatic departure from the otherwise-permitted uses. As in *Drews*, the City's action effectively rezones the subject property from a less intensive district (R-1 and C-2) to a more intensive district (I-1 or I-2).

Citing no authority whatsoever, both the City and Memphis Stone assert that *Drews* does not apply because the operation of the proposed strip mine in this case will only be "temporary." See City Brief, at 10 ("In the instant case, however, the variance requested was a temporary exception to the zoning restrictions and evidenced by a demonstration of public need."); Memphis Stone Brief, at 10 ("The variance in this matter is merely a temporary exception to the zoning restrictions."). This misleading distinction is of no consequence. Nothing in *Drews*, the City's zoning ordinance, or any other Mississippi authority indicates that the City may grant a variance that is incompatible with its zoning ordinance so long as the land use permitted under the variance is characterized as "temporary."

Furthermore, the requested land use at issue is not temporary. Memphis Stone seeks to operate a *strip mine* on the subject property. When the mining operation is complete, the subject property will be a gaping hole in the ground, or at best a reclaimed strip mine. The City's contention that Memphis Stone intends to "restore the land to its original state" is incorrect. City's Brief, at 15. Memphis Stone's own representative called such a restoration "impossible", and the Memphis Stone

brochure in the record simply shows a spent gravel pit filled with water. R. 18; 84-85.¹ The record *does*, on the other hand, show evidence of the large-scale destruction of property that goes along with a mining operation. R. 26-27. Appellees' contention that an open-pit strip mine is a "temporary" use of residential and commercial property is factually and logically untenable. *See Modak-Truran v. Johnson*, 18 So.3d 206, 210 (Miss. 2009) ("This Court has recognized that the name given a municipal act does not dictate its nature."). Neither the City nor Memphis Stone can seriously dispute that the variance at issue will dramatically change the permitted uses on the subject property or that the proposed strip mine is "completely at odds with the zoning ordinance". *Drews*, 904 So. 2d at 138.

Drews is directly on point, and Appellees are unable to meaningfully distinguish its holdings. Furthermore, although the Supreme Court's most recent discussion of spot zoning discussed an impermissible text amendment to a zoning ordinance rather than an impermissible variance, portions of the opinion could have been written about the situation at bar:

Spot zoning is defined as "***a small island of relatively intense use surrounded by a sea of less intense use.***" 2 E.C. Yokley, *ZONING LAW AND PRACTICE* § 13-2 (4th ed. 2000). The term has been used to describe a zoning ordinance which is amended to "***reclassify[] one or more tracts or lots for a use prohibited by the original zoning ordinance and out of harmony therewith.***" *Drews v. City of Hattiesburg*, 904 So. 2d 138, 141 (Miss.2005) (quoting *McWaters v. City of Biloxi*, 591 So. 2d 824, 828 (Miss.1991)).

Whether an action will be void for impermissible spot zoning is determined by the particular circumstances of each case. *Id.* Spot zoning has been held to be invalid "when it is ***primarily for the private interest of the owner of the property affected, and not related to the general plan for the community as a whole.***" 2 Yokley, *supra* § 13-3. In other words, a zoning amendment which ***favors a particular landowner over adjacent landowners will be viewed as an arbitrary and discriminatory use of zoning authority*** unless there is "substantial evidence of change in the neighborhood

¹In fact, when the Circuit Court mistakenly found that the property would be restored to its original condition, Memphis Stone and the City jointly (and successfully) petitioned the Circuit Court to amend its judgment and remove that finding. R. 171-180, 201-205.

in order to justify the rezoning of a small tract as an amendment in keeping with the comprehensive plan.” *Id.* at § 13-4.

Modak-Truran, 18 So. 3d at 210-211 (emphasis added).

Memphis Stone’s contention that the “purpose of a variance” is to “allow[] an alternate use” of a piece of property is simply not correct. Memphis Stone Brief, at 10. The *Drews* Court held that:

Variances which are incompatible with the terms of an ordinance should not be granted:

Variances were conceived initially as a means for granting relief from height, bulk, and location restrictions in the ordinances which rendered use of the property impossible or impractical. No conceptual problems arise when the variance is granted to authorize minor departures from the terms of the ordinance; e.g. to permit a landowner to place the structure on his lot nearer the lot line than is permitted by the set-back or side-yard requirements. Such relief does not authorize a use inconsistent with the ordinance and, consequently, does not constitute rezoning under the guise of a variance.... Bulk variances afford relief to the landowner who proves unnecessary and unique hardship, but does not request relief which offends the spirit of the ordinance.

On the other hand, ***serious questions arise when a variance is granted to permit a use otherwise prohibited by the ordinance***; e.g., a service station or quick-stop grocery in a residential district. The most obvious danger is that the variance will be utilized to by-pass procedural safeguards required for valid amendment.

Drews, 904 So. 2d at 141 (citing Robert C. Khayat & David L. Reynolds,

Zoning Law in Mississippi, 45 Miss. L.J. 365, 383 (1974)) (emphasis added).

Memphis Stone did not seek a variance because a height, bulk, or location restriction in the City’s ordinance rendered the use of its property impossible or impractical. Instead, it sought a variance to allow a use otherwise prohibited by the City’s Zoning Ordinance – a strip mine in an area zoned for residential and light commercial use.

Similarly, the City argues that the variance was properly granted because “not all lands are suitable for a single use and unforeseen changes in City plans may occur”. City’s Brief, at 7. If the City wishes to change the permitted uses in a particular area, it must follow the appropriate

procedures to validly amend its zoning ordinance. See *Bridge v. City of Oxford*, 995 So. 2d 81, 83 (Miss. 2008) (“Before property is reclassified from one zone to another, there must be proof either, (1) that 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 public need exists for rezoning. Furthermore, an applicant seeking rezoning must prove by clear and convincing evidence either (1) or (2) above.”) (citing *Town of Florence v. Sea Lands, Ltd.*, 759 So.2d 1221, 1223-1224 n.1 (Miss. 2000)). The City may not “bypass the safeguards provided by the rezoning process” by purporting to grant a variance changing the permitted land uses in a particular area. *Drews*, 904 So. 2d at 142.

Citing *Cockrell v. Panola County*, 950 So. 2d 1086 (Miss. Ct. App. 2007), both Memphis Stone and the City also argue that the City’s decision did not constitute spot zoning because it was justified by a “public need or compelling reason.” City Brief, at 6; Memphis Stone Brief, at 6-7. In *Cockrell*, Panola County sought to *rezone* a tract of property based on findings of change in character of the area and public need. *Id.* at 1092-96. While it is true that, in a *rezoning case*, the existence of a public need can weigh against a finding of spot zoning, the challenged decision in this case is not a rezoning. See City Brief, at 10 (“It has never been the intent of the city to re-zone the subject 18 acres.”). Even if the record reflected evidence of public need (and it does not), a finding of public need does not justify the issuance of a variance.

III. The Variance is Unsupported by Substantial Evidence

This Court must reverse the City’s decision if the record does not reflect substantial evidence of an unnecessary and unique hardship justifying the variance. *Drews*, 904 So. 2d at 140; *Caver v. Jackson County Bd. of Supervisors*, 947 So. 2d 351, 353-54 (Miss. Ct. App. 2007). Variances may not be granted based solely on proof of convenience or economic benefit to the applicant. See *Westminster Presbyterian Church v. Jackson*, 176 So. 2d 267, 272 (Miss. 1965); *Caver*, 947 So. 2d

at 354. *Neither the City nor Memphis Stone has pointed to any record evidence to support a finding that Memphis Stone would suffer an unnecessary hardship in the absence of a variance.*

As the Harrisons pointed out in their primary Brief, the record reflects only that Memphis Stone operates a nearby strip mine outside of the City limits, that Memphis Stone “desires” to use the subject property for a strip mine, and that Memphis Stone would profit from that mine. Harrisons’ Brief, at 9-10; City Brief, at 8 (“Based on the nature of the property, the location of the current identical mining operation directly to the South, the location of the operation on the border of the City limit line, the economic evidence provided by MS&G, and the temporary nature of the variance, the City granted MS&G’s request.”); Memphis Stone Brief, at 9 (“The City decided to grant MS&G a temporary variance allowing it to expand its mining operation on property that not only abuts an existing similar operation, but is located on the edge of town.”). None of these facts constitutes a “hardship” to Memphis Stone.

The City and Memphis Stone are correct that *Westminster Presbyterian Church v. Jackson*, 176 So. 2d 267, 272 (Miss. 1965), was a rezoning case. However, neither Appellee disputes that, under Mississippi law, a variance may not be granted for convenience of a landowner or because a proposed land use could be more profitable with a variance. *Westminster*, 176 So. 2d at 272; *Caver v. Jackson County*, 947 So. 2d 351, 354 (Miss. Ct. App. 2007). Nonetheless, the entirety of Memphis Stone’s argument in favor of a variance before the City was that the variance would allow a more convenient (because of the property’s proximity to another strip mine outside the City) and profitable (because of the potential for the extraction of marketable raw materials) use of the property by Memphis Stone.

Citing *Barnes v. DeSoto County*, 553 So. 2d 508 (Miss. 1989), Memphis Stone and the City conflate the standards for approval of a conditional use permit (sometimes called a “special

exception”) with the standards for approval of a variance. In that case, Memphis Stone was granted a conditional use permit to operate a gravel mine. Importantly, ***Memphis Stone was not granted a variance***. Rather, DeSoto County’s zoning ordinance allowed conditional use permits for “uses authorized by this ordinance,” including mining operations. *Id.*, at 509. In the instant case, a mining operation is not an allowed use, *either permitted or conditional*, in the City’s R-1 or C-2 zoning districts. Mining operations are conditional uses only in areas zoned for agricultural and industrial use.

DeSoto County’s zoning ordinance provided that conditional use permits could be granted only upon consideration of six factors: (1) traffic congestion, (2) fire hazards, (3) effect on character of the neighborhood, (4) effect on welfare of the County, (5) effect on utilities and other facilities, and (6) conflict with the comprehensive plan. *Id.* at 511. Memphis Stone was required to meet a much different burden in order to justify a variance in this case. Variances must be supported by substantial evidence of unusual hardship to the applicant and adherence to the spirit of the City’s zoning ordinance. *See* Batesville Zoning Ordinance, § 1204(5); *Drews*, 904 So. 2d at 140; *Westminster Presbyterian Church*, 176 So. 2d at 272; *Caver*, 947 So. 2d at 354. In this case, the record contains no such evidence.²

CONCLUSION

While the Harrisons are well aware of the deference typically granted to municipal zoning decisions, this case presents a rare exception to the rule. Recent Mississippi law establishes that

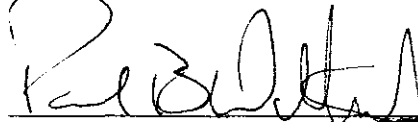
²Memphis Stone cites dicta from Justice Carlson’s concurring opinion in *Perez v. Garden Isle Community Ass’n*, 882 So. 2d 217 (Miss. 2004), for the proposition that a “conditional use permit” (or a “special exception”) is the same thing as a “variance.” Memphis Stone, at 12-13 n.3. This is incorrect. As noted above, the evidence required to support these two zoning decisions is quite different. Furthermore, to the extent that the City and Memphis Stone argue that the variance is justified by the placement of restrictive conditions upon it, City Brief, at 9; Memphis Stone Brief, at 9, this suggestion is unsupported by Mississippi law.

zoning authorities may not circumvent the heightened standard of proof for a rezoning by changing the permitted use of a piece of property using a different procedural mechanism. In this case, the City used a variance to change the permitted uses of the property at issue from residential and light commercial use to heavy industrial use. The City has drastically changed the character of the property, and Memphis Stone presented absolutely no evidence that it will suffer a "hardship" if it is not allowed to operate a strip mine on the property. This zoning decision is not fairly debatable; it is unsupported by substantial evidence and constitutes an arbitrary exercise of the City's zoning authority, which serves only to promote an economic, business interest over the interest of adjoining landowners. These property owners have the right to rely upon the City's zoning regulations. This Court should reverse the judgment of the Circuit Court and strike down the variance.

THIS, the 2^d day of February, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul B. Watkins, Jr., one of the attorneys for Appellants, do certify that I have this date delivered by United States mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief of Appellants to:


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