

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

BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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

Appellants Scott and Mona Harrison

Appellee City of Batesville, Mississippi

Mayor Jerry Autrey

Alderman Bill Dugger

Alderman Ted Stewart

Alderman Stan Harrison

Alderman Teddy Morrow

Alderman Eddie Nabors

Former Alderman Rufus Manley

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SO CERTIFIED, this the 18th day of November, 2009.



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One of the Attorneys for Scott and Mona Harrison

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BRIEF OF THE APPELLANTS

STATEMENT OF THE ISSUES

- (1) Whether a zoning authority's approval of a variance to allow strip mining in an area zoned for residential and light commercial use constitutes impermissible "spot zoning."
- (2) Whether a zoning authority may grant a variance in the absence of any evidence of substantial hardship to the applicant.

STATEMENT REGARDING ORAL ARGUMENT

Appellants submit that the facts and legal arguments are adequately presented in the briefs and record in this case. The record in this matter is brief, and Appellants do not believe that oral argument would significantly aid the Court in its decisional process. Appellant respectfully request that the Court not schedule oral argument in this case. *See* MISS. R. APP. P. 34(a).

STATEMENT OF THE CASE

Pursuant to MISS. CODE ANN. § 11-51-75, Appellants Scott and Mona Harrison (“the Harrisons”) appealed a decision of the governing authorities of the City of Batesville, Mississippi (“the City”) to grant a variance allowing the Memphis Stone and Gravel Company (“Memphis Stone”) to operate a gravel pit in an area zoned for residential and community business use.

STATEMENT OF RELEVANT FACTS

The Harrisons own and reside upon certain residential property within the City in the vicinity of a tract of land owned by Deborah and Timothy Haire and another tract owned by James Harvey and Georgia, Billy, and Jane Seale. R. 8, 14, 37. These tracts of land, which are zoned R-1 (single family residential) and C-2 (community business), have been leased by Memphis Stone for use as a sand and gravel mine. R. 14, 15, 19-20. These tracts are immediately north of a mining operation currently run by Memphis Stone, referred to as the “Brasell Mine.” R. 15-16, 19-20. The Brasell Mine lies entirely outside the City’s municipal boundaries. R. 17.

Under the City’s Zoning Ordinance, each zoning district has certain “permitted” uses for which no special approval is required and “conditional” uses which must be approved by the Board of Aldermen. Batesville Zoning Ordinance, §§ 201, 401. Mining operations are allowed only in districts zoned for agricultural (“Agr.”) or industrial (“I-1” and “I-2”) use. § 401(14.300). Such activities are not permitted under any circumstances in R-1 and C-2 districts.

On behalf of the landowners, Memphis Stone applied to the City for a variance to allow it to operate a sand and gravel mining operation on the property. On its Variance Application, in the section marked “Reason for Request”, Memphis Stone wrote: “Owners desire to mine sand and gravel and conveyor material to existing wash plant for processing.” R. 13-14. In a subsequent

letter to the City's Code Enforcement Administrator, Memphis Stone stated that the variance was sought "in order to mine sand and gravel from [the] leased property and transport the material to our existing wash plant operation." R. 15. In an "Operations Narrative" submitted with its variance application, Memphis Stone stated that

The growth in Tate County demands a good source of local aggregate. Memphis Stone & Gravel Company believes this deposit will be an asset to the local economy and will likely be lost to future residential development if not managed as a resource for construction material.

R. 19-20.

After the City's Planning Commission recommended approval of the variance, R. 31-32, the City's Board of Aldermen granted the variance at its meeting on July 1, 2008. R. 37. The sole finding in support of approval for a mine to be placed on property zoned "single family residential" and "community business" was that the variance was "necessary in order to avoid practical difficulties or unnecessary hardship on the use and development of said property." *Id.*

At its July 15, 2008 meeting, a motion to rescind the variance was defeated, and the Mayor and Board ultimately voted to approve an amended variance that placed certain conditions upon Memphis Stone. R. 38-46. Appellants timely appealed the July 1 decision and later filed an Amended Notice of Appeal to bring the events of the July 15 within the record on appeal. R. 4-7.

After a hearing held on March 5, 2009, the Circuit Court entered an order affirming the decision of the Mayor and Board of Aldermen. R. 171-75. After the parties all filed post-judgment motions, the Circuit Court amended its original order to correct a factual discrepancy. R. 201-05. The judgment of the Circuit Court remained the same.

SUMMARY OF THE ARGUMENT

Because it effectively changes the zoning of the affected area, authorizes a use that is not in harmony with the City's Zoning Ordinance, and favors Memphis Stone to the exclusion of other landowners and interested parties, the variance granted to Memphis Stone by the City constitutes impermissible spot zoning.

The City's decision to grant the variance was arbitrary and unsupported by substantial evidence. Because the record contains no evidence that Memphis Stone would suffer any unusual difficulty or hardship if the variance application was denied, the City's decision must be reversed.

ARGUMENT

I. Standard of Review

Municipal zoning decisions must be set aside when they are arbitrary, capricious, discriminatory, illegal, or unsupported by substantial evidence. *Drews v. City of Hattiesburg*, 904 So. 2d 138, 140 (Miss. 2005). This Court has defined substantial evidence as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion or to put it simply, more than a mere scintilla of evidence." *Hooks v. George County*, 748 So. 2d 678, 680 (Miss. 1999) (internal citations omitted). In reviewing the City's decision to grant the variance, the Court may only consider the facts contained within the Harrison's Amended Bill of Exceptions. *See Falco Lime v. Mayor & Aldermen of Vicksburg*, 836 So. 2d 711, 716 (Miss. 2003).

The Court does not sit as a "superzoning" authority, and its review does not extend to an evaluation of the prudence of the City's judgment. *Caver v. Jackson County Bd. of Supervisors*, 947 So. 2d 351, 353 (Miss. Ct. App. 2007); *see also Falco Lime*, 836 at 722 ("It is not the function of the circuit court on appeal from an administrative agency to determine whether the action of the

agency is right or wrong, correct or incorrect, wise or unwise, advisable or best fitted to the situation involved.”) (quoting *County Bd. of Educ. of Alcorn County v. Parents & Custodians of Students at Rienzi Sch. Attendance Ctr.*, 168 So. 2d 814, 819 (Miss. 1964)). In other words, the City’s “[p]ower to make the order, and not the mere expediency or wisdom of having made it, is the question.” *Alcorn County*, 168 So. 2d at 819.

II. The City’s Decision Constitutes Impermissible Spot Zoning

“Spot zoning” is an example of an arbitrary and capricious zoning decision. *Modak-Truran v. Johnson*, No. 2008-CA-00104, 2009 WL 2462418, at *4 (Miss. Aug. 13, 2009). The term is often used to describe a change to a zoning scheme that reclassifies a small area for a use that is prohibited by an applicable zoning ordinance and out of harmony with such ordinance or an applicable comprehensive land use plan. *See id.*; *Fondren N. Renaissance v. Mayor of Jackson*, 749 So. 2d 974, 979 (Miss. 1999); *McWaters v. Biloxi*, 591 So.2d 824, 828 (Miss.1991).

The “one constant” in cases where zoning actions have been invalidated as impermissible spot zoning “is that they were designed ‘to favor’ someone.” *McWaters*, 591 So. 2d at 828. A zoning action “which favors a particular landowner over adjacent landowners will be viewed as an arbitrary and discriminatory use of zoning authority” unless the necessary procedural and evidentiary conditions for rezoning are met. *Modak-Truran*, 2009 WL 2462418, at *4 (quoting 2 E.C. Yokley, *ZONING LAW AND PRACTICE* § 13-4 (4th ed. 2000)). This Court has held that a municipality’s approval of a variance results in spot zoning when it allows a use of the subject property which is “not in harmony with the comprehensive or well-considered land use plan of a municipality.” *Drews v. City of Hattiesburg*, 904 So. 2d 138, 722 n.2 (Miss. 2005) (citing *McWaters*, 591 So.2d at 828). When “the use contemplated by the variance request is completely at odds with the zoning ordinance,” it “is violative of basic zoning law.” *Id.*

In *Drews*, the City of Hattiesburg granted a series of variances to allow the applicant to build a 60,000-square-foot building in a business district that was limited to buildings of 10,000 square feet. *Drews*, 904 So. 2d at 141-42. The Court held that the variances at issue were “so dramatic that they constitute a rezoning to B-3, two levels beyond the B-1 (professional business district) lots in question” and that “[t]he differences between B-1 and B-3 are so extreme that if the variances are granted, spot zoning would occur.” *Id.* at 141. Finding that “[v]ariances which are incompatible with the terms of an ordinance should not be granted,” the Court rendered judgment against the City because “the proposed variances are not minor departures from the scope and intent of the B-1 classification.” *Id.* at 141-42.

The *Drews* Court, citing a leading authority on Mississippi zoning law, also pointed out that it has long been the law in this State that variances should not be utilized to change the permissible use of a parcel: “[S]erious 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.” Robert C. Khayat & David C. Reynolds, *Zoning Law in Mississippi*, 45 Miss. L. J. 365, 383 (1974) (footnotes omitted) (quoted in *Drews*, 904 So. 2d at 141).

Even more recently, this Court found that a zoning ordinance change enacted by the City of Jackson constituted impermissible spot zoning because it favored one property owner to the exclusion of all others in the district. *Modak-Truran v. Johnson*, 2009 WL 2462418, at *4. In that case, the City of Jackson amended its zoning ordinance to create a new zoning definition for a “Bed and Breakfast Class B with Restaurant” and permitted existing Class B bed and breakfast inns to operate on-premises full-service restaurants as a matter of right and without the need to apply for a

use permit. *Id.* at *2. The only existing Class B bed and breakfast inn in the City was the Fairview Inn, a bed and breakfast inn operating in an area zoned for one- and two-family dwellings. *Id.* at *5. The ordinance effectively allowed the Fairview Inn (and only the Fairview Inn) to operate as a full-service restaurant without the need for a use permit. *Id.* In overturning the City's decision, the Court found that "the amendments significantly altered and expanded the activities previously allowed on R-2 properties, and effectively rezoned the Fairview Inn from residential to commercial property." *Id.*

The City's approval of the Memphis Stone variance was a textbook case of spot zoning. First, there can be no dispute that the variance was designed to favor Memphis Stone. It was granted at Memphis Stone's request, for the specific purpose Memphis Stone wanted, with respect to the specific area in which Memphis Stone holds a lease interest, and to the sole benefit of Memphis Stone.

Second, like the zoning actions in *Drews* and *Modak-Truran*, the variance constitutes an effective rezoning from R-1 and C-2 to Agr., I-1, or I-2. Under the City's Zoning Ordinance, mining operations are not allowed in R-1 or C-2 districts under any circumstances. This newly-allowed land use within areas set aside for residential and light commercial activity constitutes exactly "the type of dramatic physical change" this Court has consistently identified as spot zoning. *Modak-Truran v. Johnson*, 2009 WL 2462418, at *8 (Carlson, P.J., dissenting). In order to rezone property, an applicant must show by clear and convincing evidence that "(1) there was a mistake in the original zoning, or (2) that the character of the neighborhood has changed to such an extent as to justify reclassification, and there was a public need for rezoning." *City of Madison v. Shanks*, 793 So. 2d 576, 578 (Miss. 2000). The record contains no evidence to address any of these factors, much less

clear and convincing evidence, and the City made no attempt to validly amend its comprehensive land use plan or its zoning map.

Furthermore, the variance could not be more inharmonious or incompatible with the restrictions and intent of the City's Zoning Ordinance. In addition to specifically disallowing mining operations in the areas at issue, the Ordinance states that R-1 districts are "designed and intended to secure for the persons who reside there a comfortable, healthy, safe, and pleasant environment in which to live, sheltered from incompatible, and disruptive activities that properly belong in nonresidential districts." Batesville Zoning Ordinance, § 301(a). The Ordinance also states that the C-2 district "is designed to accommodate commercial development on a scale that is less intensive than that permitted in a C-1 district." Batesville Zoning Ordinance, § 302(c). Mining operations are not even permitted in the more intensive C-1 districts.

The City's approval of the Memphis Stone variance constitutes impermissible spot zoning. The variance effectively rezoned the property at issue without the requisite findings or procedural safeguards. This action was for the exclusive benefit of Memphis Stone, and it was completely inconsistent with the City's own ordinances and land use plan. The Court should reverse the judgment of the Circuit Court and render judgment in favor of the Harrisons.

III. The Record Contains No Evidence to Support the City's Decision

Whether or not the City's decision constitutes "spot zoning," it is still arbitrary and unsupported by substantial evidence. The City's Zoning Ordinance provides that a variance from its literal terms may only be granted "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance, so that the spirit of this ordinance shall be observed, public welfare and safety secured and substantial justice done." Batesville Zoning Ordinance, § 1204(5). The record contains no evidence to support any finding of hardship.

Variances may not be granted merely because the desired use of the property will be more convenient or profitable than the use for which the property is zoned or because the applicant will suffer some financial disadvantage without the variance. *Westminster Presbyterian Church v. Jackson*, 176 So. 2d 267, 272 (Miss. 1965); *Caver*, 947 So. 2d at 354. They are only appropriate when the applicant faces “some unusual hardship from the literal enforcement of the regulation different from, and greater than, that suffered by other property owners in the district” and, even then, only if “the proposed use of the property is within the spirit of the zoning regulations.” *Westminster*, 176 So. 2d at 272 (quoting 62 C.J.S. *Municipal Corporations* § 227). The purpose of the variance remedy has traditionally been to allow a landowner to seek relief from “ordinances which rendered use of the property impossible or impractical.” Khayat and Reynolds, *Zoning Law in Mississippi*, 45 MISS. L.J. at 383 (quoted in *Drews*, 904 So. 2d at 141).

There is no evidence in the record to support the City’s finding of a substantial hardship to Memphis Stone. The only proffered justifications in support the variance application are that (1) the owners “desire” to mine sand and gravel within districts in which such activities are specifically prohibited, R. 13-14, (2) “the growth in Tate County [not *Panola* County] demands a good source of local aggregate,” and (3) the gravel Memphis Stone seeks to mine is an “asset to the local economy” that “will likely be lost to future residential development” if it is not allowed to mine it. R. 19-20. Nothing in the record indicates that the Haire-Seale property has somehow been rendered unsuitable for the residential or light commercial use for which it is zoned. Memphis Stone’s “facts” are proof of any type of hardship; they merely establish that Memphis Stone would like to operate a strip mine in a residential area because it will be profitable for it to do so.

Memphis Stone will not suffer any kind of unusual hardship or difficulty greater than every other resident within the City's R-1 and C-2 districts. In fact, just the opposite is true: no other landowner within the City's R-1 and C-2 districts may operate a strip mining facility. See 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 58:5 (4th ed.):

Every zoning ordinance imposes some degree of hardship on all property to which it applies, since the restrictions of the ordinance limit the uses to which the property may be put. This degree of hardship is implicit in zoning; the restrictions on each parcel of property are compensated for by similar restrictions on neighboring property. ... Such hardship, consistent with the hardship imposed on all other pieces of property in the district, is not a ground for a variance.

Memphis Stone's lease will likely be more valuable if the variance is upheld. Likewise, the expansion of Memphis Stone's Panola County mining operations into the Haire-Seale property will be more convenient and profitable for Memphis Stone. However, variances may not be granted on the basis of convenience or potential profitability. *Westminster*, 176 So. 2d at 272; *Caver*, 947 So. 2d at 354. There is no evidence in the record to support a finding that future use of the Haire-Seale property will be rendered impossible or impractical without the variance, and the City's decision to grant Memphis Stone's variance application because Memphis Stone "desired" to expand its mining operations was arbitrary and capricious.

CONCLUSION

The City's approval of Memphis Stone's variance application constitutes impermissible spot zoning. The sole purpose of the variance was to permit a use otherwise prohibited by the Ordinance, that is, a mining operation in districts zoned for residential and community business use. The City's decision expressly conflicts with its own comprehensive land use plan and is in no way faithful to the "spirit" of its Zoning Ordinance. Furthermore, there is no evidence in the record to support the

City's findings. For these reasons, the Court should reverse the decision of Appellee, the City of Batesville, Mississippi, and render judgment in favor of Appellants Scott and Mona Harrison.

THIS, the 18th day of November, 2009.

Respectfully submitted,

SCOTT AND MONA HARRISON



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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:

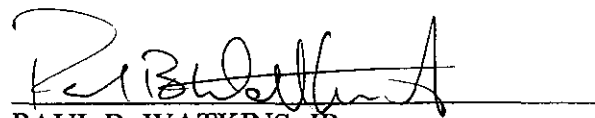
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