IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS

GEORGE C. McKEE — APPELLANT

VERSUS — CAUSE NO: 2009-CA-01833

CITY OF STARKVILLE, MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

(1) Honorable Lee J. Howard, *Circuit Court Judge of Oktibbeha County, Mississippi;*

(2) Honorable Christopher J. Latimer, Columbus, Mississippi, Mitchell, McNutt & Sams, *Attorney for Appellee;*

(3) Honorable George C. McKee, Louisville, Colorado, *Pro Se Appellant;*

(4) Honorable John C. Crecink, Jr., Starkville, Mississippi, *Local Counsel for Appellant;*

(5) Honorable Rodney Faver, Starkville, Mississippi, *Former General Counsel of City of Starkville, Mississippi;*

(6) Honorable Dalton McAlpin, Starkville, Mississippi, *Former Interim General Counsel for City of Starkville, Mississippi;*

(7) Dan Camp, Starkville, Mississippi, *Former Mayor of City of Starkville, Mississippi;*

(8) Sumner D. Davis, III, Rodney Lincoln, P.C. McLaurin, Jr., Richard Corey, Matt Cox, Roy A. Perkins, Janette Self, Starkville, Mississippi, *Aldermen for City of Starkville, Mississippi at time of Appellant's Petition for Re-Zoning.*

Respectfully submitted, this the 24th day of February, 2010.

CHRISTOPHER J. LATIMER, MS Bar [redacted]
ATTORNEY FOR APPELLEE

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I.
STATEMENT OF THE ISSUE

Whether the lower court erred in affirming the Board of Aldermen's decision to deny Appellant's re-zoning request.

II.
STATEMENT OF THE CASE

Appellant, George C. McKee ("McKee"), contests the ruling of the Oktibbeha County Circuit Court that affirmed the Starkville Board of Aldermen's ("the Board"), denial of McKee's re-zoning request.

The origin of this case dates back to 2004. It has spawned two lawsuits, the latter of which is before this Court on appeal. In 2004, McKee first tried to rezone the property in question, a tract of land on Washington Street in Starkville, from R-2 (single family, duplex) to R-5 (multi-family, high density, including mobile homes). (R. 38, 78-80; McKee's R.E. 17-19). The Board found that the neighborhood had not changed enough to justify the rezoning and, as a result, denied McKee's request. (R. 38). McKee sued Starkville over its denial but eventually dropped the case. (*Id.*).

Four years later, McKee returned with an application to re-zone the same property in the same manner. This time, he sought to rezone only one of the two lots involved in his 2004 petition.[1] Starkville's Planning and Zoning Commission (sometimes "the Commission") heard this request on April 8, 2008, and recommended

[1] The City of Starkville's case locator map illustrates this. (R. 48, McKee's R.E. 13). In 2004, McKee attempted to re-zone both lots shown to the East of Washington Street from R-2 to R-5. (R. 38, 78-80; McKee's R. E. 17-19). In 2008, McKee returned with an attempt to re-zone only the rear lot – the shaded lot on the locator map – but again seeking a change from R-2 to R-5. (*Id.*).

approval. (R. 38). There was no contest to that recommendation, and the Board took up the matter at its next regularly scheduled meeting of April 15, 2008. (*Id.*).

During the Board meeting, the Aldermen debated whether the character of the neighborhood had changed enough to justify re-zoning. (R. 78-82, McKee's R.E. 17-21). Starkville's City Planner advised the Board that the only change to the neighborhood over the past four years was some additional development to an apartment complex owned by McKee, which was located behind, and to the Southwest, of the subject property. (R. 78, McKee's R.E. 17). The City Planner also informed the Board that only two zoning changes had occurred in the neighborhood over the past twenty-seven years, and that all of the properties across the street from the subject property had remained R-2 over that time. (R. 35, 78-79). Other debate and discussion ensued between the Aldermen over whether the character of Washington Street and the surrounding neighborhood had changed enough to justify the proposed rezoning. (R. 78-82). After this discussion, the Board voted five to two to deny McKee's request. (R. 46-47). It determined that the subject property was still consistent with R-2 zoning, the character of the neighborhood had not changed enough to justify the proposed change to R-5, and that a change to R-5 would create a change in the character of the neighborhood due to the conditional uses of mobile homes and mobile home parks allowed under R-5. (R. 38-39).

Instead of presenting a Bill of Exceptions to the Mayor for his signature, McKee filed an Appeal and Complaint in Oktibbeha County Circuit Court. (R. 3-6). This pleading purported to appeal the Board's decision and also sought compensatory and

punitive damages. (*Id.*). Attached to the Appeal and Complaint was a Bill of Exceptions that was not signed by the Mayor because it was never presented to the Mayor before McKee filed it. (R. 7-11).

Starkville responded by filing an Answer and Affirmative Defenses. (R. 19-26). Since Starkville had no opportunity to review McKee's Bill of Exceptions before it was filed, it filed its own Bill of Exceptions. This Bill was signed by the Mayor on May 23, 2008. (R. 37-40). Attached to Starkville's Bill of Exceptions were the case locator map, photographs of the subject property and the neighborhood, the minutes from the Board's denial of McKee's request, and an explanation of the structures permitted under R-2 zoning as opposed to R-5 zoning. (R. 41-53). McKee then filed a Motion for Partial Summary Judgment (R. 54-90), which Starkville opposed. (R. 91-95).

The lower court requested final briefs from the parties and then issued an order affirming the Board's decision. (R. 136-139). It held that the Board's decision was supported by substantial evidence, was not arbitrary and capricious, and did not violate McKee's due process rights. (Id.). McKee then perfected this appeal.

III.
SUMMARY OF THE ARGUMENT

Zoning decisions rendered by government authorities carry a presumption of validity. *Faircloth v. Lyles*, 592 So.2d 941, 943 (Miss. 1991). A Mississippi court may not substitute its judgment in the place of the board of aldermen's wisdom and soundness used in reaching their decision. *Id.* So long as the governing body's decision is "fairly

debatable," a court is without authority to supplant the municipality's legislative action. *McWaters v. City of Biloxi*, 591 So.2d 824, 827 (Miss. 1991).

For McKee's application for rezoning to be approved, he had to prove by clear and convincing evidence either that: 1) there was a mistake in the original zoning, or 2) the character of the neighborhood had changed to such an extent as to justify rezoning and that a public need existed for the rezoning. *City of Hattiesburg v. McArthur*, 24 So.3d 367, 370-71 (Miss. App. 2009) (citing *Childs v. Hancock County Bd. of Supervisors*, 1 So.3d 855, 859 (Miss. 2009)). McKee failed to meet his burden to show that the character of Washington Street and the surrounding neighborhood had changed to such an extent as to justify rezoning.

The Starkville Board of Aldermen "acted legislatively" to "look out the window" to determine whether McKee's request would comport with the character of the neighborhood. *Thrash v. Mayor and Commissioners of the City of Jackson*, 498 So.2d 801, 805 (Miss. 1986). Starkville's Bill of Exceptions[2] established the following based on the Board's view:

i. The area covered by the rezoning application was still consistent with R-2 zoning.

ii. R-5 zoning is intended to be comprised of multifamily dwellings and mobile homes, or mobile home parks, permitted under special conditions. The change to R-5 was not consistent with the character of the neighborhood. The neighborhood had not changed enough

[2] The Bill of Exceptions filed by Starkville and signed by the Mayor is the only proper record on appeal. McKee's Bill of Exceptions, filed without the Mayor's signature and without giving the Mayor an opportunity to sign it, violated Mississippi Code Annotated § 11-51-75 (1972). The Mayor's signature is a mandatory prerequisite for filing, *Pruitt v. Zoning Bd. of City of Laurel*, 5 So.3d 464, 469 (Miss. App. 2008), and McKee failed to meet that requirement.

to justify R-5.

iii. A switch to R-5 would actually create a change in the character of the neighborhood.

See R. 38. This Court need not look further than Starkville's Bill of Exceptions, and the lower court's ruling based on that Bill of Exceptions, to affirm the lower court's decision that the Board based its vote on substantial evidence and did not act arbitrarily or capriciously.

But even if this Court were to look further, the actual transcript from the Board's discussion of this issue provides additional evidence that the Board's decision was based on substantial evidence, and was not arbitrary or capricious.[3] The City Planner presented his staff report and testified that only one change had occurred to the neighborhood in the past four years.[4] Further, only two zoning changes in the

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[3] A transcript of the Board's discussion appears in the lower court record on pages seventy-eight (78) through eighty-two (82). McKee attached this transcript as part of his Record Excerpts. Starkville's Bill of Exceptions referenced the discussion by the Board that appears in the transcript but did not attach the transcript because the transcript was not ready at the time the Bill of Exceptions was filed. In sum, despite the fact that the transcript was never attached to a proper Bill of Exceptions, Starkville does not shy away from its contents. The Board's discussion, as reflected in the transcript, provides further proof that the Board's decision was based on "substantial evidence" and was "fairly debatable."

[4] The time period from 2004, when McKee first tried to rezone this property, until 2008, when he sought to rezone this property again, is the relevant period to gauge whether enough change in the neighborhood had occurred to justify McKee's proposed rezoning because the doctrine of *res judicata* applies. *Yates v. Mayor and Commissioners of the City of Jackson*, 244 So.2d 724 (Miss. 1971); *Westminster Presbyterian Church v. City of Jackson*, 176 So.2d 267 (Miss. 1965). "(W)here a change is sought and denied, the city must apply the doctrine of *res judicata* to the facts that then existed when considering a petition to rezone the same property to the same classification." *Yates* at 725. McKee's argument that *res judicata* should not apply based on the distinction that in 2004 he attempted to rezone two adjacent lots, whereas in 2008, he attempted to rezone just one of them is a distinction without a difference that is not supported by law.

neighborhood had occurred over the past twenty-seven years. *See* R. 35, 78-79. Moreover, all of the properties across the street from the subject property had remained R-2 during that time. *See* R. 48.

Further, one Aldermen commented, based on his own familiarity with the area, that the neighborhood had not changed enough to allow him to vote to grant the rezoning request. He expressed his fear that if the Board granted the change from R-2 to R-5, that would actually encourage a change in the neighborhood. *See* R. 80-81, McKee's R.E. 19-20. Another Aldermen confirmed that the reason McKee wanted the subject property rezoned was to expand "up to the back of the big white house" on Washington Street the apartment complex that McKee owned. *See* R. 81, McKee's R.E. 20. After this discussion, the Board voted five to two to deny McKee's request.

"An act is arbitrary when it is done without adequate determining principal; not done according to reason or judgment, but depending upon the will alone, - absolute in power, tyrannical, despotic, non-rational, - implying either a lack of understanding of or a disregard for the fundamental nature of things." *McGowan v. Miss. State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992). Nothing in the record shows that the Board acted tyrannically, despotically, irrationally, or with a "lack of understanding of or a disregard for the fundamental nature of things." The lower court correctly held that the Board's decision was based on "substantial evidence" and "fairly debatable." This Court should affirm the lower court's ruling.

In order for a due process violation to have occurred in the context of rezoning,

this Court must find that there was either a violation of state law or of the United Sates Constitution. *Thrash v. Mayor and Commissioners of City of Jackson*, 498 So.2d 801, 807-808 (Miss. 1986). Neither exists here. Accordingly, this Court should affirm the lower court's decision that McKee's due process rights were not violated.

Mississippi Code Annotated § 17-1-17 (1972) governs zoning changes. It states that a hearing to consider a zoning change may be held before "an advisory committee of citizens," such as Starkville's Planning and Zoning Commission. *Id.* If that happens, it is not necessary for the governing body to hold such a hearing. *Id.* The governing body may simply act upon the recommendation of the advisory committee. *Id.* That is, unless a party is aggrieved by the recommendation of the advisory committee. *Id.* In that case, the aggrieved party is entitled to a full hearing before the governing body with due notice. *Id.*

The lower court correctly held that Starkville did not violate the statute because McKee was not a "party aggrieved" by the recommendation of the Commission. Accordingly, he was not entitled to a public hearing before the Board. Nevertheless, either McKee, or anyone acting on his behalf, could have attended the meeting and addressed the Board while it considered McKee's request.[5] There is no evidence that the Board limited feedback, oral argument, or any presentation of evidence to the Board. *See* R. 78-82; McKee's R.E. 17-21.

Further, the lower court correctly held that no public hearing was necessary for

[5] All of Starkville's Board meetings are open to the public and allow for citizen input and comments in compliance with Mississippi's Open Meetings Act. *See* Miss. Code Ann. § 25-41-1 *et. seq.*

the Board to "act upon the recommendation" of the Commission. *See* R. 138. The phrase "act upon" refers to "the Board listening to the recommendation of the Commission and acting upon that information, **whether in agreement or disagreement** with the recommendation." *Id.* (emphasis added). The lower court's interpretation of "act upon" is correct because it is consistent with the rule that the Commission is merely an advisory committee. *Byram 3 Development, Inc. v. Hinds County Bd. of Sup'rs,* 760 So.2d 841, 843 (2000). The Board was entitled to adopt or reject the Commission's recommendation. *Id.*

Finally, the Board's denial of McKee's request without a public hearing did not violate McKee's Constitutional Due Process rights. "(T)he essence of due process rights" for parties seeking or opposing a zoning change "is reasonable advance notice of the substance of the rezoning proposal together with the opportunity to be heard at all critical stages of the process." *Thrash v. Mayor and Commissioner's of the City of Jackson,* 498 So.2d 801, 808 (Miss. 1986). This standard was met. McKee had ample notice regarding the hearing before the Commission. *See* R. 34. He appeared at that hearing and was given an opportunity to present all of the evidence he felt necessary to support his request. He was also aware that the Board would take up the matter during its next regularly scheduled meeting, and that he had every right to attend. Opposition to the Commission's recommendation is what triggers the due process protections of additional notice and a public hearing before the Board under Mississippi Code Section 17-1-17. *See also In re Petition of Carpenter,* 699 So.2d 928, 931 (Miss. 1997). McKee was given a full and fair opportunity to present his view at all stages. But in the face of no

opposition to the Committee's recommendation, he simply chose not to attend the Board meeting. McKee's voluntary absence at this meeting does not rise to the level of a constitutional violation under *Thrash, Carpenter* or any other law.

IV.
ARGUMENT

A. Standard of Review.

This Court's standard of review in zoning matters is well-settled:

> The classification of property for zoning purposes is a legislative rather than a judicial matter. The order of the governing body may not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or without substantial evidentiary basis. The action . . . of rezoning carries a presumption of validity, causing the burden of proof upon the individual . . . asserting its invalidity. On appeal, (this Court) cannot substitute (its) judgment as to the wisdom or soundness of the board's action . . . Where the point in controversy is 'fairly debatable,' (this Court) has no authority to disturb the action of the zoning authority.

City of Hattiesburg v. McArthur, 24 So.3d 367, 370-71 (Miss. App. 2009) (citing *Childs v. Hancock County Bd. of Supervisors*, 1 So.3d 855, 859 (Miss. 2009)).

B. The Lower Court Correctly Held That the Board's Decision to Deny McKee's Rezoning Request Was Based on Substantial Evidence and Was Not Arbitrary and Capricious.

For McKee's application for rezoning to be approved, he had to prove by clear and convincing evidence either that: 1) there was a mistake in the original zoning, or 2) the character of the neighborhood had changed to such an extent as to justify rezoning and that a public need existed for the rezoning. *Id.* McKee has never alleged, and does not allege now, that there was a mistake in the original zoning. Therefore, the first

element does not apply. As for the second, McKee failed to meet his burden to show that the character of Washington Street and the surrounding neighborhood had changed to such an extent as to justify rezoning the subject property.

1. The Bill of Exceptions Filed by Starkville and Signed by the Mayor is the Only Proper Record on Appeal.

McKee's Bill of Exceptions, without the Mayor's signature, violated Mississippi Code Annotated § 11-51-75 (1972). It states that "(a)ny person aggrieved by a . . . decision of . . . municipal authorities of a city . . . may appeal within (10) days from the date of adjournment at which session the . . . municipal authorities rendered such . . . decision, and may embody the facts, judgment and decision in a bill of exceptions which **shall be signed by the person acting as president of the . . . municipal authorities.**" (emphasis added). The Mayor's signature is a mandatory prerequisite for filing. *Pruitt v. Zoning Bd. of City of Laurel*, 5 So.3d 464, 469 (Miss. App. 2008). McKee failed to meet that requirement.

In the normal course of events, if a municipality is dissatisfied with the facts contained in the Bill of Exceptions, the Mayor corrects it and then forwards it, along with the corrections, to the Circuit Clerk. *Reed v. Adams*, 111 So.2d 222, 224-225 (Miss. 1959). Starkville was not afforded that opportunity because McKee filed his Bill of Exceptions before presenting it to the Mayor. The Proof of Service shows that the Appeal and Complaint, including the Bill of Exceptions, was served on the Mayor's office on April 25, 2008, the day of filing. *See* R. 18. No proof exists showing that the

Mayor received the Bill of Exceptions earlier than that filing.[6] The Bill of Exceptions filed by Starkville is the only proper record concerning the issue on appeal.

2. The Doctrine of *Res Judicata* Applies to McKee's Rezoning Attempt.

The doctrine of *res judicata* applies to rezoning decisions. It controls how far back the Board could look to determine whether McKee had met his burden of showing that the character of the neighborhood had changed enough to justify the change from R-2 to R-5. *Yates v. Mayor and Commissioners of the City of Jackson*, 244 So.2d 724 (Miss. 1971); *Westminster Presbyterian Church v. City of Jackson*, 176 So.2d 267 (Miss. 1965). Based on the doctrine of *res judicata*, the relevant timeframe began in 2004, when McKee first tried to rezone this property, and ended in 2008, when he sought to rezone this property again. "(W)here a change is sought and denied, the city must apply the doctrine of *res judicata* to the facts that then existed when considering a petition to rezone the same property to the same classification." *Yates* at 725. Stated otherwise, when the same person, seeks to rezone the same property, in the same way, *res judicata* applies. *Id.* Since the Board turned down McKee's request in 2004, on grounds that the neighborhood had not changed enough to justify the proposed rezoning, McKee's burden in this case was to prove, by clear and convincing evidence, that the required change had occurred between the time period of 2004 to 2008. Any changes to the neighborhood prior to 2004 could not be considered, as the Board had already determined that issue.

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[6] The affidavit filed by McKee's process server in this case that purports to attest to her attempt to serve process on the Mayor is silent as to any previous attempts to serve the Mayor with McKee's Bill of Exceptions. (R. 106).

McKee argues that *res judicata* should not apply because the property he sought to rezone in 2008 was not the same property as he sought to rezone in 2004. He attempts to make the distinction that in 2004 he attempted to rezone two adjacent lots, whereas in 2008, he attempted to rezone just one of them. This is a distinction without a difference. What would have made a difference is if McKee had sought a different zoning classification in 2008. Then, *res judicata* would not apply. *Yates* at 726. But McKee did not do that. Instead, he attempted to rezone property that he had sought to rezone previously, and he sought to rezone it the same way. The subject property still had the same Washington Street address as it had in 2004. The adjacent parcel was still zoned R-2. The fact that McKee was no longer trying to rezone the adjacent parcel is immaterial. McKee has failed to cite any law as to why *res judicata* should not apply simply because he is now seeking to rezone only one of two adjacent lots on Washington Street that he previously sought to rezone as a package deal.

3. McKee Failed to Prove By Clear and Convincing Evidence that Enough Change Had Occurred in the Neighborhood to Justify Rezoning.

The Starkville Board of Aldermen "acted legislatively" to "look out the window" to determine whether McKee's request would comport with the character of the neighborhood. *Thrash v. Mayor and Commissioners of the City of Jackson*, 498 So.2d 801, 805 (Miss. 1986). Starkville's Bill of Exceptions established the following based on the Board's view:

> iv. The area covered by the rezoning application was still consistent with R-2 zoning which is consistent with higher density single family residential properties and, under special circumstances, duplexes.

v. R-5 zoning is intended to be comprised of multifamily dwellings and mobile homes, or mobile home parks, permitted under special conditions. The change to R-5 as requested was not consistent with the character of the neighborhood. The neighborhood had not changed enough to justify the proposed rezoning.

vi. A change to R-5 would actually create a change in the character of the neighborhood due to the potential for the permitted conditional uses under R-5 zoning.

See R. 38. In upholding the Board's vote, the lower court specifically referenced the Board's determination that "a change to R-5 zoning (i.e. zoning comprised of multifamily dwellings and mobile homes) would create a change in the character of the neighborhood." *See* R. 137. This Court need not look further than Starkville's Bill of Exceptions, and the lower court's ruling based on that Bill of Exceptions, to affirm the lower court's decision that the Board based its vote on substantial evidence and did not act arbitrarily or capriciously.

But even if this Court were to look further, the actual transcript from the Board's discussion of this issue provides additional evidence that the Board's decision was based on substantial evidence, and that it did not act arbitrarily or capriciously in denying McKee's request. During the hearing before the Board, the City Planner presented his staff report and testified regarding his knowledge of the facts involved in McKee's request. His staff report stated that the only change that had occurred in the neighborhood from 2004 to 2008 was the expansion of the Brownsville Station Apartments. These apartments were owned by McKee, and located to the Southwest of the subject property. *See* R. 32. Aldermen Davis questioned the City Planner on this

point. The City Planner confirmed that no other change had occurred. *See* R. 78-79. Accordingly, this evidence, on which McKee relies so heavily, was actually evidence of too little change.

Further, even if the doctrine of *res judicata* did not apply, the City Planner's staff report and the discussion by the Board revealed that only two changes to the neighborhood's zoning had occurred over the past twenty-seven years. *See* R. 35, 78-79. Moreover, all of the properties across the street from the proposed rezoning had remained R-2 during that time. *See* R. 48. Therefore, whether *res judicata* applies or not, the issue of whether the neighborhood had changed enough to justify McKee's rezoning request was, at a minimum, "fairly debatable."

Aldermen Cox then commented based on his own familiarity with the area. His comments were entirely proper because a Board can consider not only information obtained at the hearing, but also its own common knowledge and familiarity with the area. *Fondren North Renaissance v. Mayor and City Council of Jackson*, 749 So.2d 974, 976 (Miss. 1999). Aldermen Cox stated that:

> I believe that the burden of proof is on the applicant and I don't think that you can prove a change in condition in the neighborhood when you look at Washington Street. And Washington Street, which is the address of this property, uh, has remained residential, the properties, uh, on whichever direction, on the North of it, across the street from it. Uh, and I don't think that the applicant has proven a change in the condition and I would fear, uh, that the City's action would actually, uh, encourage a change in, in the neighborhood if we were to grant approval.

See R. 80-81, McKee's R.E. 19-20. This comment aligns directly with a basic tenet of

zoning in that "preserving an existing residential area is a valid goal." *Saunders v. City of Jackson*, 511 So.2d 902, 906 (Miss. 1987).

Further, Aldermen McLaurin, Jr., sought and received confirmation from the City Planner that the reason McKee wanted the subject property rezoned was to expand "up to the back of the big white house" on Washington Street the apartment complex that McKee owned. *See* R. 81, McKee's R.E. 20. Finally, the Mayor confirmed with the City Planner that the Planning and Zoning Commission had recommended approval of McKee's request. *See.* R. 82, McKee's R.E. 21. The Board then voted five to two to deny McKee's request.[7]

Zoning decisions rendered by government authorities carry a presumption of validity. *Faircloth v. Lyles*, 592 So.2d 941, 943 (Miss. 1991). A Mississippi court may not substitute its judgment in the place of the board of aldermen's wisdom and soundness used in reaching their decision. *Id.* So long as the governing body's decision is "fairly debatable," a court is without authority to supplant the municipality's legislative action. *McWaters v. City of Biloxi*, 591 So.2d 824, 827 (Miss. 1991). If the decision is one which could be considered "fairly debatable," then it cannot be considered arbitrary or capricious. *Id.*[8]

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[7] After the vote, the Aldermen moved to the next item, as they were not required to make specific findings of fact to justify their decision. *Faircloth v. Lyles*, 592 So.2d 941, 943 (Miss. 1991).

[8] McKee has relied on *McWaters* for his argument that if property bearing a certain zoning classification is bordered on three sides by properties bearing different, but identical, zoning classifications, and the Board denies a rezoning request for the same classification as the one attached to the bordering properties, then the Board's action is, *per se*, arbitrary and capricious. *McWaters*, however, does not state such a rule. In *McWaters*, the Mississippi Supreme Court analyzed the zoning classification of three bordering properties as merely one of fifteen factors

"An act is arbitrary when it is done without adequate determining principal; not done according to reason or judgment, but depending upon the will alone, - absolute in power, tyrannical, despotic, non-rational, - implying either a lack of understanding of or a disregard for the fundamental nature of things." *McGowan v. Miss. State Oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992). Nothing in the record shows that the Board acted tyrannically, despotically, irrationally, or with a "lack of understanding of or a disregard for the fundamental nature of things." Rather the Board considered substantial evidence as well as the members' own knowledge and familiarity with the area. It determined that the subject property was still consistent with R-2 zoning, that the neighborhood had not changed enough to justify a change in zoning, and that the proposed rezoning could adversely change the character of the neighborhood. *See* R. 38-39.[9]

McKee has failed to carry his burden that the Board's denial of his rezoning application was arbitrary, capricious, discriminatory, illegal or unsupported by substantial evidence. The lower court correctly held that the Board's decision was based on "substantial evidence" and "fairly debatable." This Court should affirm the lower court's ruling.

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the Circuit Court considered on the way to affirming the action of the Biloxi City Council. The zoning classification of the three bordering properties was a factor, but not a dispositive one.

[9] Granted, evidence was discussed and considered that McKee argues weighs in favor of his request, such as the Commission's recommendation for approval. And apparently that evidence gained some traction with at least two Board members because they voted to approve McKee's request. But they were in the minority. There could hardly be better proof than the split vote that the Board's decision was "fairly debatable."

C. The Lower Court Correctly Held That the Board's Decision to Deny McKee's Rezoning Request Did Not Violate McKee's Due Process Rights.

In order for a due process violation to have occurred in the context of a rezoning request, this Court must find that there was either a violation of state law or of the United Sates Constitution. *Thrash v. Mayor and Commissioners of City of Jackson*, 498 So.2d 801, 807-808 (Miss. 1986). Neither exists here. Accordingly, this Court should affirm the lower court's decision that McKee's due process rights were not violated.

1. The Lower Court Correctly Applied Mississippi Code Section 17-1-17 (1972).

Mississippi Code Annotated § 17-1-17 (1972) governs zoning changes. It states that "(z)oning regulations . . . may, from time to time, be . . . changed . . . upon at least fifteen (15) days' notice of a hearing . . . ." *Id.* It further holds that a hearing to consider a zoning change may be held before "an advisory committee of citizens," such as Starkville's Planning and Zoning Commission. *Id.* Further, "if the hearing is held before the advisory committee . . . it shall not be necessary for the governing body to hold such hearing . . . ." *Id.* In that case, the governing body "may act upon the recommendation of the . . . advisory committee." *Id.* "Provided, however, that any party aggrieved with the recommendation of the . . . advisory committee shall be entitled to a public hearing before the governing body of the city, with due notice thereof . . . ." *Id.*

Starkville did not violate the statue because it followed the statute to the letter. Starkville properly and timely noticed the hearing on McKee's rezoning request before the Commission. *See* R. 34. The Commission properly and timely heard McKee's

application, at which time it recommended approval of McKee's request. *See* R. 38. Since McKee was not a "party aggrieved," and no other party filed an objection, the Board acted in accordance with the statute by taking up the matter at its next regularly scheduled meeting. *See* R. 46-47. Likewise, since McKee was not a "party aggrieved," and no other party filed an objection, Starkville did not re-notice the issue as a separate hearing. Rather, the Board took up the issue as it appeared on that meeting's agenda. *Id.*; R. 78-82; McKee's R.E. 17-21. McKee, or anyone acting on his behalf, could have attended the meeting while the Board considered McKee's request. The Board's meeting was open to the public.[10] Either McKee, or anyone acting on his behalf, could have addressed the Board at that time. *Id.* There is no evidence, and McKee does not allege, that the Board limited feedback, oral argument, or any presentation of evidence to the Board as it considered McKee's request. *See* R. 78-82; McKee's R.E. 17-21. Despite having every right and opportunity to attend the meeting in which the Board considered McKee's request, McKee did not appear.

On these facts, the lower court correctly held that the Board did not violate § 17-1-17. It reasoned that McKee was not entitled to a public hearing because he was not an aggrieved party under the statute. *See* R. 138. Only a "party aggrieved" is "entitled to a public hearing before the governing body of the city." Miss. Code Ann. § 17-1-17. Since McKee was not an aggrieved party following the meeting of the Planning and Zoning Commission, he was not entitled to a public hearing before the Board.

Additionally, the lower court noted that no public hearing was necessary for the

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[10] In compliance with Mississippi's Open Meetings Act. *See* Miss. Code Ann. § 25-41-1 *et. seq.*

Board to "act upon the recommendation" of the Commission. *See* R. 138. The lower court determined that the phrase "act upon" refers to "the Board listening to the recommendation of the Commission and acting upon that information, **whether in agreement or disagreement** with the recommendation." *Id.* (emphasis added). The lower court's interpretation of "act upon" is correct because it is consistent with the rule that the Commission is merely an advisory committee. *Byram 3 Development, Inc. v. Hinds County Bd. of Sup'rs*, 760 So.2d 841, 843 (2000). The Board was entitled to adopt or reject the Commission's recommendation. *Id.*

Moreover, McKee has failed to cite any case law to show how Starkville violated § 17-1-17. *See* R. 138. Indeed, McKee's real problem appears to be with the statute itself, not with the way the Board applied it. In the absence of a violation of § 17-1-17, or case law construing it, McKee's statutory argument fails, and this Court should affirm the lower court.

2. The Board's Denial of McKee's Request Without a Public Hearing did not Violate McKee's Constitutional Due Process Rights.

"(T)he essence of due process rights" for parties seeking or opposing a zoning change "is reasonable advance notice of the substance of the rezoning proposal together with the opportunity to be heard at all critical stages of the process." *Thrash v. Mayor and Commissioner's of the City of Jackson*, 498 So.2d 801, 808 (Miss. 1986). The record reflects that this standard was met. McKee had ample notice regarding the hearing before the Commission. *See* R. 34. He appeared at that hearing and was given an opportunity to present all of the evidence he felt necessary to support his request. He

was also aware that the Board would take up the matter during its next regularly scheduled meeting, and that he had every right to attend.[11] McKee was given a full and fair opportunity to present his view at all stages. He simply chose not to attend the Board meeting. McKee's voluntary absence at this meeting does not rise to the level of a constitutional violation under *Thrash* or any other law.

Further, McKee's reliance on *In re Petition of Carpenter*, 699 So.2d 928 (Miss. 1997), is misplaced due to the distinguishable facts of that case. In *Carpenter*, the applicant sought a variance to place a mobile home on his land. On January 18, 1994, the applicant and his attorney made a presentation to the Board of Aldermen in support of the variance. The Board voted to take the matter under advisement. *Id.* at 930.

At the next scheduled meeting of the Board, on February 1, 1994, a petition was presented to the Board that contained thirty-five signatures in opposition to the applicant's request. Notably, neither the applicant, nor his attorney, had received notice of this opposition before the meeting. At the same meeting, and still with no notice of this opposition being provided to the applicant or his counsel, the Board voted to deny the request. *Id.*

The Mississippi Supreme Court cited *Thrash* and held that the applicant's due process rights had been violated. *Id.* at 931. But, the Court based its decision "(i)n light of the petition opposing the applicant's variance presented at the February 1, 1994 meeting . . . ." *Id.* It was because of this petition in opposition to the applicant's request

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[11] Starkville's City Planner vigorously opposes McKee's contention in his appellate brief that the City Planner told McKee that the Board's meeting "was a mere formality and that McKee need not attend."

that the Court held that "he did not receive a full and fair opportunity to respond to the concerns raised by the opponents to his variance at the February 1, 1994 meeting." *Id.*

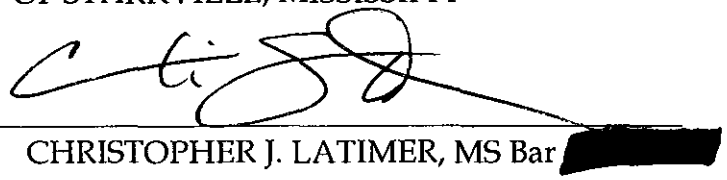
The facts of *Carpenter* do not exist here. No party opposed McKee's request from the time the Planning and Zoning Commission met until the time the Board considered the issue. No party contested McKee's request during the Board's meeting on the issue. *Carpenter* makes clear that opposition to a rezoning request is what triggers the due process protections of additional notice. This is consistent with the express wording of Mississippi Code Section 17-1-17 that calls for fifteen days notice and publication should any party be aggrieved following a determination by the Commission. The type of opposition necessary for additional notice did not exist in this case. Further, even in the absence of such opposition, McKee had every right to attend this Board meeting, make comments before the Board, and monitor the Board's discussion on the matter. The fact that he chose not to attend the meeting and take advantage of that opportunity does not amount to a constitutional violation.

V.
CONCLUSION

For all of the above reasons, and any others this Court deems appropriate, it should affirm the lower court in its entry of the Order Affirming the Board of Alderman's Decision.

Respectfully submitted, this the 24th day of February, 2010.

CITY OF STARKVILLE, MISSISSIPPI

BY: 

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CERTIFICATE OF SERVICE

I, the undersigned, Christopher J. Latimer, do hereby certify that I have this day mailed, postage prepaid, U.S. Mail, a true and correct copy of the foregoing **Brief of Appellee, City of Starkville, Mississippi** to:

Honorable Lee J. Howard
Circuit Court Judge
Post Office Box 1344
Starkville, Mississippi 39760

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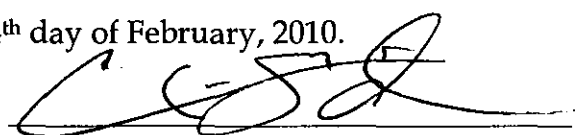
SO CERTIFIED, this the 24th day of February, 2010.



CHRISTOPHER J. LATIMER

CERTIFICATE OF FILING

The undersigned, an employee of Mitchell, McNutt & Sams, P.A., certifies that on 2/24/10, she deposited with the Federal Express trailer, addressed to the clerk of the Mississippi Supreme Court, the original and three copies of the Brief of Appellee, City of Starkville, Mississippi.

Kim Morgan

ADDENDUM

Mississippi Code Annotated §17-1-17.

"Zoning regulations, restrictions and boundaries may, from time to time, be amended, supplemented, changed, modified or repealed upon at least fifteen (15) days' notice of a hearing on such amendment, supplement, change, modification or repeal, said notice to be given in an official paper or a paper of general circulation in such municipality or county specifying a time and place for said hearing. The governing authorities or any municipal agency or commission, which by ordinance has been theretofore so empowered, may provide in such notice that the same shall be held before the city engineer or before an advisory committee of citizens as hereinafter provided and if the hearing is held before the said engineer or advisory committee it shall not be necessary for the governing body to hold such hearing but act upon the recommendation of the city engineer or advisory committee. Provided, however, that any party aggrieved with the recommendation of the city engineer or advisory committee shall be entitled to a public hearing before the governing body of the city, with due notice thereof after publication for the time and as provided in this section . . . ."