2009-CA-01833-RT

Table of Contents

Table of Authorities 1

Statement of Issues 2

Statement of the Case 2

Argument 4

A. Standard of Review 4

B. The Lower Court Incorrectly Held That the Board's Decision Was Based on Substantial Evidence and Was Not Arbitrary and Capricious 4

1. The Bill of Exceptions filed by McKee is the Only Proper Record on Appeal 6

2. The Doctrine of *Res Judicata* Does Not Apply to McKee's Rezoning Attempt 10

3. McKee Proved by Clear and Convincing Evidence that Enough Change Had Occurred in the Neighborhood to Justify Rezoning 11

C. The Lower Court Incorrectly Held that the Board's Decision Did Not Violate McKee's Due Process Rights 13

1. The Lower Court Incorrectly Applied Mississippi Code Section 17-1-17 (1972) 13

2. The Board's Denial of McKee's Request Without a Public Hearing Violated McKee's Constitutional Due Process Rights 15

Conclusion 16

Table of Authorities

CASES

Byram 3 Development, Inc. v. Hinds County Bd. of Sup'rs, 760 So.2d 841 (2000) 13

Cowen v. Gulf City Fisheries, Inc., 381 So.2d 158 (Miss. 1980) 11

Estate of Myers v. Myers, 498 So.2d 376 (Miss 1986) 3, 6

In re Petition of Carpenter, 699 So.2d 928 (Miss. 1997) 15, 16

McWaters v. City of Biloxi, 591 So.2d 824 (Miss. 1991) 12, 13

Thrash v. Mayor and Commissioner's of the City of Jackson, 498 So.2d 801,Miss. 1986) 15

Westminster Presbyterian Church v. City of Jackson, 176 So.2d 267 (Miss. 1965) 10, 11

Yates v. Mayor and Commissioners of the City of Jackson, 244 So.2d 724 (Miss. 1971) 10, 11

STATUTES

Mississippi Code §17-1-17 (1972) 13, 14

Mississippi Code Annotated §11-51-75 (1972) 6, 7

RULES

Uniform Rules of Circuit and County Court Practice Rule 5.02 4

COMES NOW, Plaintiff/Appellant George C. McKee (hereinafter, McKee), and files this, his Reply Brief to Appellee City of Starkville's Brief and responds to Appellee's Brief as follows:

STATEMENT OF THE ISSUE

McKee agrees with Appellee City of Starkville's (hereinafter City) characterization of the Statement of the Issue.

STATEMENT OF THE CASE

McKee disagrees with the City's characterization of the origins of this case. Any attempt to date this case back to 2004 is nothing but yet another bad faith attempt, knowingly put forth by the City in an attempt to distract from the merits of the case. McKee does not, and never has, deny or try to hide the fact that he applied for a similar rezoning in 2004, that said rezoning request was denied, and that McKee filed suit relative to that rezoning – a suit that McKee later declined to pursue in an effort to work with the City based on its concerns and recommendations made in denying the 2004 rezoning application.

McKee cannot emphasize enough that the matter currently before this Court is related only to the 2008 rezoning application – which is not the same as the 2004 application. When the 2004 application was denied, the City cited concerns over the two separate and distinct lots being included in one application[1]. McKee's 2008 application took those concerns into account and therefore only included one lot.

The City has completely misrepresented City Planner Griffith's remarks. The City cites

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1 "...the character of the neighborhood you are talking about two different areas because you see, he didn't separate them out. The R2 in front, the big white house on Washington Street, when you encompass, now you are encompassing two separate streets, in two separate areas...the reluctance back then because he tried to tie both of them together because the feeling was that the white house in the front is a separate distinct area than the one in the back area of the 0.75 he is trying to rezone today." (R 79-80).

the record at pages 35 and 78-79 as indicating that Griffith stated that only two zoning changes had occurred over the past twenty-seven years. The record is entirely lacking in any such remarks and in fact, in his staff report (R 35) Griffith listed no less than three specific re-zonings that have occurred since the inception of the current zoning,[2] while also indicating a general transition in the character of the neighborhood. The record at 78-79 shows Griffith referring to said staff report when questioned about prior re-zonings

McKee made it abundantly clear in earlier filings (R 61, 96-98, 127-128) that he did in fact present a Bill of Exceptions to the Mayor for his signature via first class mail, email, and facsimile means – a fact which is certified to in the Certificate of Service at the end of McKee's Bill of Exceptions. As an inactive member of the Mississippi State Bar, McKee takes offense to any implication that the facts contained in said Certificate of Service are other than as stated. Furthermore, for the sake of argument, even assuming McKee did not present the Mayor with a Bill of Exceptions, why would the City have taken the time (at the taxpayer's expense) to prepare and file an Answer and its own Bill of Exceptions rather than simply filing a Motion to Dismiss?

Furthermore, twenty-three (23) months into this case, the City is for the first time saying it never received the Bill of Exceptions, when up until this point it only ever argued that McKee failed to present a Bill of Exceptions bearing the Mayor's signature. Never once was the issue of the validity of the original service of the Bill of Exceptions raised in the Circuit Court below. Because that issue was not properly preserved, all references in the City's brief alleging non-receipt of Appellant's Bill of Exceptions on April 23, 2008, should be stricken. (See *Estate of Myers v. Myers*, 498 So.2d 376, 378 (Miss 1986), "One of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review

2 The following rezonings are specifically listed by City Planner Griffith as evidence of changed conditions: (1) the 1981 rezoning to R-5 of the properties to the north and west, (2) the early 1990's development of the shopping center to the southwest, (3) the 1996 rezoning to R-5 of the property to the south.

matters on appeal that were not raised at the trial court level.") In its brief the City also points out that it did not include language from the transcript of the meeting of the Board of Aldermen in its own Bill of Exceptions because the transcript "was not ready at the time the Bill of Exceptions was filed" (City's Brief at 5, footnote 3). Ironically, although the record is required, the City never prepared the record or transcript, as required under Rule 5.02 of the Uniform Rules of Circuit and County Court Practice[3], following the filing of the Complaint by McKee, yet throughout the appellate process, the City cites the transcript of the verbal testimony that was prepared by Appellant from the DVD recording of the proceeding, which is part of the record in this case (Exhibit C to McKee's brief in Support of Motion for Partial Summary Judgment). It was McKee, on his own time and at his own expense, who had to prepare the transcript of the meeting of the Board of Aldermen because the City, in addition to failing to sign the properly presented Bill of Exceptions, also failed to prepare the record.

ARGUMENT

A. Standard Of Review

McKee agrees with the City's characterization of the standard of review.

B. The Lower Court Incorrectly Held That The Board's Decision Was Based On Substantial Evidence and Was Not Arbitrary and Capricious

McKee agrees, as he has throughout this case, with the burden on any applicant with respect to the requirements that must be satisfied to change a zoning classification. McKee acknowledges that he must show a change in the character of the neighborhood and a public need for the rezoning. McKee met these requirements to the satisfaction of the Planning & Zoning Commission, as evidenced by the facts contained in the Staff Report (R 12, 14-15) and the unanimous recommendation for approval McKee received from the Commission (R 75-76).

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3 "In appeals on the record it is the duty of the lower court or lower authority to make and preserve the record of the proceedings sufficient for the court to review."

However, as McKee has pointed out numerous times (R 61-63, 96-98), the City continues its bad faith mis-characterization of the location of the subject property. In it's unexplainable Bill of Exceptions, the City tried to place the subject property on Washington Street (R 37) – which it is not. As McKee made abundantly clear (R 61-63), and as shown on the locater map (R 48), the subject property has absolutely no street frontage on Washington Street and would not even be accessed from Washington Street, if the rezoning were granted. The City continues to try to place the subject property on Washington Street in an attempt to distract from the fact that the entire block on which the subject property sits, with the exception of this subject property and one additional parcel, is already zoned R-5, the zoning classification sought.

Moreover, if McKee really wanted to change the character of the neighborhood, all he would have to do is build out his apartments on the 3.6 acres of R-5 land that he already owned to the North of the property sought to be rezoned, (R 48, 64), land that does, in fact, face Washington Street. As stated in the City's Brief, page 6, the Alderman making the comments relative to changes in the neighborhood made his comments based on his own familiarity with the area; however these comments by Alderman Davis were made in bad faith because he was well aware of McKee's ownership of the entire area and well aware that McKee could legally have chosen to build his apartments right up to Washington Street on land already zoned R-5, a feat that would have a much more changing effect on the neighborhood. Moreover, based on Alderman Davis's imminent familiarity with the area, he would also have known that McKee also owned the lot on which lay "the Big White House", but had chosen not to attempt re-zoning any part of that lot. The transcript of the meeting (R 78-82), as well as the video of the meeting which is part of the record in this case, clearly show that Alderman Davis had a pre-determined agenda, that his remarks before the rest of the Board members were calculated to mislead and confuse, and, based on his imminent knowledge of the area, as stipulated by the City's brief, page

6, those remarks were made in bad faith. Both the transcript and the video show Alderman Davis interrupting both Planner Griffith and Alderman Lincoln in their attempts to correct his bad faith misrepresentations and explain the location of the parcel and extent of the changed conditions. These bad faith misrepresentations by then Alderman Davis, could have effectively been rejoined, explained and refuted by Appellant McKee, had he been given any notice and opportunity to be heard at this critical stage of the proceedings. Had McKee been afforded the opportunity to be present, he could have stood up before the Board of Aldermen with a map of the area and explained exactly why Alderman Davis's comments were false and misleading.

1. The Bill of Exceptions Filed By McKee Is the Only Proper Record on Appeal

McKee fully agrees with the City's characterization of the requirements of Mississippi Code Annotated §11-51-75 (1972) and the requirements on both parties. McKee also agrees that he filed his Appeal and Complaint, including the Bill of Exceptions, on April 25, 2008 and that same day served a copy on the Mayor. However, the City once again tries to distract from the issues at hand by now saying, for the first time in this matter, that there is no proof the Mayor *received* McKee's Bill of Exceptions (City's Brief at 10). As shown by the record, that is utterly and truly false. If the City would simply read the Certificate of Service included in McKee's Bill of Exceptions (R 7-11), it would see that on April 23, 2008, within the ten day period prescribed by §11-51-75, McKee served his Bill of Exceptions on the Mayor via (1) first class mail, (2) facsimile, and (3) email - as well as (4) first class mail to Hon. Rodney Favor, who was City Attorney on that date. What more is a person to do?

Additionally, had the matter been raised before the Circuit Court below, evidence could have been presented relative to phone calls confirming that the Bill of Exceptions was received. As stated above, pursuant to *Estate of Myers v. Myers,* 498 So.2d 376, 378 (Miss.1986), these allegations must be stricken because, "One of the most fundamental and long established rules of

law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level."

Naturally, the affidavit filed by McKee's process server does not address previous attempts to serve the Mayor with the Bill of Exceptions because McKee served the Bill of Exceptions on the Mayor himself, via four different means, as stated above. Nevertheless, failure of the affidavit to address service of the bill of exceptions is in no way evidence that a bill of exceptions was not properly served. This is yet another attempt by the City to distract from the issues. Quite frankly the City knows it acted in bad faith in denying McKee's application and is now trying to cover up its failure to follow proper procedure by manufacturing another scenario, in bad faith yet again, that just didn't happen.

As pointed out earlier, if McKee had truly failed to serve a Bill of Exceptions within the prescribed period, why would the City not have filed a motion to dismiss immediately? Why would it have taken the time to prepare an answer and its own bill of exceptions when nothing in the language of §11-51-75 even so much as suggests that the City should or could prepare its own bill of exceptions? Common sense says that the City's story does not add up. Additionally, the reason the Mayor has to sign any Bill of Exceptions, is so that a plaintiff has the opportunity to set forth the facts as he or she perceives them, and the Mayor has an opportunity to mark any changes as he or she sees fit – providing *both* parties an opportunity to set forth the facts they feel are relevant to the matter. However, in this case, the City prepared and filed its own bill of exceptions, in bad faith, which McKee never had the opportunity to respond to before it was filed. Now the City would somehow like to rewrite procedure and have its own bill of exceptions accepted in its entirety as established fact. In prior filings (R 61-63), McKee has already pointed out the numerous misrepresentations and distortions of fact in the City's Bill of Exceptions (R 37-53), that were made in bad faith.

These misrepresentations and distortions contained in the City's unlawful Bill of Exceptions were just so grossly inaccurate that they bear repeating:

1. In paragraph 1, the City states that "The properties to the North on the same side of the street are all residential homes and residential homes are on the East side of the street, which is across the street *and they are all zoned R-2*" [em added] - in fact, the map clearly shows (R 48), and based on their familiarity with the area, they were well aware and knew that all residences north of the subject property were located on R-5 zoned lots.

2. In paragraph 2 of the City's unlawful Bill of Exceptions, it is stated that "the subject property is a residential 2-story home and has been that way for over 20 years." In fact, the evidence shows that the subject property is a vacant lot with no structure on it.

3. In paragraph 3, the City says "The properties in and around the subject property have not been changed or re-zoned in at least the last 10 years...". In fact, the evidence shows that the property adjacent to the subject property has been developed into apartments by McKee within the past 10 years (R 35).

4. In paragraph 4, the City states "The Appellant had previously sought to re-zone this subject property on July 16, 2004"... In fact, the evidence shows that the parcel sought to be re-zoned in 2004 was a larger tract of property that included the subject tract (R 32).

5. Paragraph 5 contains the most egregious and blatant of bad faith. Therein, the City asserts, "The Appellant then perfected his Appeal to the Mayor and Board of Alderman and after a public hearing regarding re-zoning of the request of the Appellant, the Board voted 7 to 0 to overturn the recommendation of the Planning and Zoning Commission to deny the request for a zoning change from R-2 to R-5..." Honestly? Why then did the City assert on page 2 of their *Brief of Appellee*, that the vote was 5-2, not 7-0? Why would McKee appeal from a unanimous favorable ruling of the Planning and Zoning Commission, recommending approving his request?

He didn't. This is just laughable and absurd, because no one subsequently, has even remotely suggested that this is what actually happened. This was merely an attempt to mislead the court into thinking that McKee had filed an appeal from the Planning and Zoning Commission so there would be no question of what standard of review the Board of Aldermen would apply, and whether they would have qualified immunity.

Yet, in its brief at page 10, the City absurdly argues that their unsanctioned "Bill of Exceptions Filed by Starkville and Signed by the Mayor is the Only Proper Record on Appeal". Contra to what was stated by the City, the Planning and Zoning Commission voted to approve, not deny the change from R-2 to R-5. As for the ridiculous reference to a mobile home park (which was never even once mentioned at the meeting, as shown by the transcript), had McKee been afforded notice of the hearing and an opportunity to be heard, he could have explained that a mobile home park on the property defied any logic whatsoever because, if he wanted to have a mobile home part, he could put it on the other 3.6 acres of already zoned R-5 property, property that actually does front on Washington Street, that he already owned in this block.

6. In paragraphs 7, 8 and 9, the good Mayor renders what can only be termed a legal analysis, predicated on the foregoing erroneous facts. Clearly, the Mayor, a layman, did not file this bizarre document, replete with its inaccuracies, and ending with a legal brief, that was filed along with the other legal pleadings of the City. The then-City Attorney, Hon. Rodney Favor, did. What is more perplexing is why the City, in its "Brief of Appellee" continues to this day to insist that the "Bill of Exceptions Filed by Starkville and Signed by the Mayor is the Only Proper Record on Appeal". This was not a thoughtless, trivial error by one attorney – this is a bad faith filing that was initiated by the City and its representatives.

7. Even the attached order of the Board of Aldermen falsely and incorrectly refers to McKee's zoning change as "request of Mr. George McKee for a zoning change from an R-1

(single family) zone to an R-5 (multi-family, high density zone)...". In fact, the request approved by the Planning and Zoning Commission was from zone R-2 to R-5.

In this case, the evidence is unmistakable in showing a pattern and practice of bad faith on the part of the City of Starkville. The breadth, the numerousness and the seriousness of the mistakes perpetuated by the City in its "Bill of Exceptions", unsanctioned though it is, shows that the City's strategy, in this instance, was to deny, in bad faith, the receipt of Appellant's Bill of Exceptions, then to file a false and misleading "Bill of Exceptions" in Circuit Court, thereby depriving Appellant McKee of the mechanism required by the law, I. E., that the Mayor signs the Bill of Exceptions, files a record and both sides have an opportunity to make their case on equal terms in the Court filings.

It is furthermore easily apparent that had McKee waited more than 10 days from the Aldermen's decision on Apirl 15, 2008, then the City would have just said, "sorry" we didn't receive your "Bill of Exceptions" and therefore, we won't forward it. Given the City's pattern of bad faith, McKee had no choice but to also file his complaint within the 10 days from Apirl 15 that was alloted for the Bill of Exceptions. The City has vindicated this decision by refusing to follow the law, even after the Bill of Exceptions was filed in Court on April 25.

2 The Doctrine of *Res Judicata* Does Not Apply to McKee's Rezoning Attempt

The City's reliance on *Yates v. Mayor and Commissioners of the City of Jackson*, 244 So.2d 724 (Miss. 1971) and *Westminster Presbyterian Church v. City of Jackson*, 176 So.2d 267 (Miss. 1965) as supporting its argument that the relevant time period for establishing changed conditions in this matter is four years (City's Brief at 11-12) is misplaced. The holding in *Westminster* did not limit the relevant time frame to the period since earlier applications. In *Westminster*, the Church had applied numerous times for the same rezoning, but never challenged the denial of those applications. Then, in its fourth application, the Church itself, as

the applicant, limited the relevant time period for consideration to the time that had lapsed since the denial of its second application. The Court in turn based its ruling on that limited time period that was established by the applicant - but in no way held that the earlier application period was the only relevant period to consider. *Westminster* at 501-503.

McKee further argues that *Yates* is distinguishable because the 2008 application at issue in this matter is not the same as the 2004 application. As McKee has already stated, the 2004 application was similar, but is not the same as the current application, and more specifically, the subject property comprises only a part of the prior application The zoning application must be viewed in its entirety, considering both the property sought to be rezoned as well as the classification sought.

Furthermore, as stated in *Cowen v. Gulf City Fisheries, Inc.*, 381 So.2d 158, 162 (Miss. 1980), four identities must be met for the doctrine of res judicata to apply: "(1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the action, and (4) identity of the quality or character of a person against whom the claim is made." In applying this standard, the Court found that the four identities had not been met because the subject parcel in that matter, although similar to the subject parcel in an earlier matter, was not the same. Similarly, because McKee's 2008 application does not encompass the same property as his 2004 application, and the issues that were raised relative to the 2004 application are different than those currently before the court because the subject property is not the same, the four identities have not been met.

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

The only expert on zoning that was relied on by the Board was it's own expert, City Planner Ben Griffith. According to expert Griffith, as contained in his detailed staff report,

McKee clearly satisfied the requirement of establishing a change in neighborhood conditions, as evidence by the Staff Report of City Planner Ben Griffith (R 12, 14-15) and the findings of the Planning and Zoning Commission (R 75-76). These changes include the multiple re-zonings described above. The City's attempt to refer to the contents of its Bill of Exceptions as established fact is entirely without merit, as there is no basis whatsoever to justify the City's filing of its own Bill of Exceptions. The only evidence before the Board was the overwhelming support in favor of the rezoning.

As noted above, the City cites the record at pages 35 and 78-79 as indicating that Griffith stated that only two zoning changes had occurred over the past twenty-seven years. The record is entirely lacking in any such remarks and in fact, in his staff report (R 35) Griffith listed no less than three specific rezonings that have occurred since the inception of the current zoning,[4] while also indicating a general transition in the character of the neighborhood. The record at 78-79 shows Griffith referring to said staff report when questioned about prior rezonings.

McKee has already outlined this argument more fully in his earlier brief and will not belabor the point here. The City has failed to offer any logical explanation for completely disregarding the evidence before it, absolutely all of which was in support of McKee's application. The City has also completely failed to address, much less rebut, the precedent established in *McWaters v. City of Biloxi*, 591 So.2d 824 (Miss. 1991), which was addressed by McKee in his brief at pages 10-13, because there simply is no explanation for the City's argument that granting the rezoning would cause a change in the neighborhood when the entire block, with the exception of the subject parcel and one other, is already zoned R-5[5].

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4 The following rezonings are specifically listed by City Planner Griffith as evidence of changed conditions: (1) the 1981 rezoning to R-5 of the properties to the north and west, (2) the early 1990's development of the shopping center to the southwest, (3) the 1996 rezoning to R-5 of the property to the south.

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C. The Lower Court Incorrectly Held that the Board's Decision Did Not Violate McKee's Due Process Rights

As McKee has shown in earlier filings, as well as below, his due process rights were violated under both State and United States Constitutions. Accordingly, the Court should reverse the Circuit Court's decision finding that McKee's due process rights were not violated.

1. The Lower Court Incorrectly Applied Mississippi Code §17-1-17 (1972)

As it did throughout its brief, the City makes unsupported conclusory statements with regard to Mississippi Code §17-1-17 (1972). McKee can certainly read the plain text of the statute, as can the Court. What the City misses, however, is that McKee is very much challenging the way the Board applied the statute. McKee and the City clearly have a different interpretation of what it means to "act upon." The City follows the same circular logic that the Circuit Court did in saying that to "act upon the recommendation" means to "act upon" the recommendation. The City attempts to support this interpretation by saying that it is "consistent with the rule that the Commission is merely an advisory committee" and citing *Byram 3 Development, Inc. v. Hinds County Bd. of Sup'rs*, 760 So.2d 841 (2000) as somehow supporting its position. Unfortunately for the City, *Byram 3* does not stand for the proposition for which it is cited – it in no way addressed §17-1-17 and the hearing requirements contained therein. *Byram 3* has nothing to do with the due process hearing requirements at issue in this matter and the City has failed to cite any case law to show that its interpretation of the statute is correct.

McKee certainly agrees that the Commission is an advisory committee, and has pointed

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"A refusal to rezone lots 8 and 10 (owned by Mosley) from R1-A to either R-3A or R-O would appear to be arbitrary since this parcel is surrounded on three sides by properties which were rezoned in 1981 from R1-A to either R-3A or R-O." *McWaters v. City of Biloxi*, 591 So.2d 824 at 827. - Not only is McKee's property surrounded on three sides by R-5 zoning, which is the classification sought by McKee, but the *entire block* is already zoned R-5 with the exception of the subject property and one adjacent parcel that fronts Washington Street – a fact that was expressed by City Planner Griffith when he recommended approval to the Board (R 81-82).

out throughout this matter that the commission *recommended* approval of his application. McKee is in no way challenging the role of the Commission and its hierarchy to the Board of Aldermen. McKee is instead asking the Court for its interpretation of "act upon" and whether aggrieved parties are somehow entitled to "extra" due process before a final vote. McKee merely contends, as he has all along, that if the Board is not going to follow the recommendation of the Commission, a properly noticed hearing needs to be held before a final vote can be taken. The City agrees in its brief that no such notice was given (City's Brief at 18).

Whether or not McKee attended the meeting of the Board of Aldermen is, quite frankly, irrelevant to whether or not his due process rights were violated. The decision of the Board was supposed to be based on the record before it – which consisted in its entirety of a unanimous recommendation for approval from the Commission. If that recommendation was not going to be followed, a properly noticed hearing should have been held prior to a final vote by the Board. To demonstrate the point, §17-1-17 states that the Mayor and Board of Aldermen "*may act* upon the recommendation of the planning and zoning commission..." [emphasis added]. Under the City's interpretation of the statute, the discretion involves whether or not the City even takes the matter up. Thus, the logical inference of the City's argument is that it is **actually** the law of Mississippi and Starkville that is unconstitutional because the only thing that can trigger a public hearing is a written request by someone who is **aggrieved** by the decision of the Planning and Zoning Commission. I. E., How can anyone be aggrieved if the P and Z votes unanimously in their favor?

Therefore, in McKee's situation, where there is no aggrieved party, the City *may* act, but it does not have to act at all – it could theoretically just sit on McKee's application, never vote on it, and, since there would be no aggrieved party, no one could ever be entitled to a public hearing. This would make the Section 17-1-17 unconstitutional because one receiving a unanimous

favorable vote of the Planning and Zoning Commission would have no right to a public hearing prior to denial by the Board of Aldermen, but one receiving unanimous rejection by the Planning and Zoning Commission would have far more rights, i.e., the right to contest denial by the Board of Aldermen. Clearly, the one receiving unanimous approval would not have equal protection of the law, under the Mississippi Constitution and the U. S. Constitution. This would create a patently absurd situation whereby one denied by the P and Z, on a close vote, could have a better chance of approval by the Board of Aldermen than one given unanimous P and Z approval.

2. The Board's Denial of McKee's Request Without a Public Hearing Violated McKee's Constitutional Due Process Rights

Once again, in its brief the City makes unsupported statements and misses the point. The City cites *Thrash v. Mayor and Commissioner's of the City of Jackson*, 498 So.2d 801, 808 (Miss. 1986) for the very same reason that McKee did – which is that constitutional due process requires that a party seeking rezoning is required to be given "the opportunity to be heard at all critical stages of the process." The City again fails to address the real issue – which is that the final vote by the Board of Aldermen is a critical stage of the process, for which a properly noticed hearing must be held.

The City goes to great lengths to distinguish *In re Petition of Carpenter*, 699 So.2d 928 (Miss. 1997), all of which miss the point. Certainly the factual background of Carpenter is distinguishable – after all, if there were a case perfectly on point with the facts in this matter there would be no need for the Court's interpretation in this matter. The whole basis for the holding in *Carpenter* is that Carpenter was denied the opportunity to respond to opposition to his application, and that denial of an opportunity to respond was a violation of his due process rights.

McKee absolutely agrees with the City that "*Carpenter* makes clear that opposition to a rezoning request is what triggers the due process protections of additional notice" (City's Brief at

21). However, the City is saying that the extent of one's due process rights depends on who is opposing an application – that a party is somehow only entitled to "extra" due process, i.e. a properly noticed hearing, if opposition comes from a third party. The holding in *Carpenter* was in no way limited to such situations. McKee argues that opposition is just that, opposition, regardless of who the opposing party is. The fact that the opposition comes from a Board member does not somehow limit or remove McKee's due process rights to respond to that opposition. If anything, opposition from someone such as a Board member, who has voting power to determine the outcome of an application, should certainly be given the same due process protection outlined in *Carpenter*. Thus, if one accepts the legal analysis presented by the City, then the City would be entitled to base its overruling of the Planning and Zoning Commission on false and misleading testimony by partisan members of the Board of Aldermen, testifying as de facto witnesses, and since the person winning the hearing before the Planning and Zoning Commission would never have any opportunity to request a public hearing, he or she could never have an opportunity to establish the truth because he or she could never be a "party aggrieved" under the law.

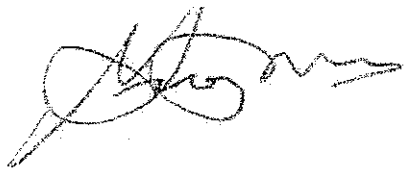
Again, whether or not McKee attended the meeting is irrelevant to the determination that his due process rights were denied. If opposition to his application was made at the meeting, regardless of the source of the opposition, McKee was entitled to a properly noticed hearing prior to the Board's vote.

CONCLUSION

Based on the evidence set forth herein, the Court has ample factual and legal basis to reverse and render this case finding for the Appellant on all issues. Relative to the issue of deprivation of due process, both under Mississippi law and Federal law, the Court should order this matter set for hearing on such damages, both consequential and punitive, as to which

Appellant may be entitled under law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, John C. Crecink, Jr., do hereby certify that I have this date mailed on behalf of George McKee, postage fully prepaid by first class mail, a true and correct copy of this Appellant's Reply Brief to the following:

Hon. Christopher J. Latimer
P.O. Box 1366
Columbus, Mississippi 39703-1366

Hon. Lee J. Howard
Post Office Box 1344
Starkville, MS 39759

This the 9th day of March, 2010

John C. Crecink, Jr.
MSB No. 07828
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CERTIFICATE OF FILING

I, John C. Crecink, Jr., do hereby certify that I have this date mailed on behalf of George McKee, postage fully prepaid by first class mail, one original and three copies of the Reply Brief of Appellant to the Clerk of the Supreme Court of Mississippi at the following address:

Supreme Court of Mississippi
Office of the Clerk – Attn: Kathy Gillis
Post Office Box 249
Jackson, Mississippi 39205-0249

This the 9th day of March, 2010

John C. Crecink, Jr.
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