2009-CA-01833 - T

Certificate of Interested Persons

2009-CA-01833 McKee v. City of Starkville, Mississippi

The undersigned 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 Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. City of Starkville, Mississippi

Respectfully submitted,

George C. McKee, *Pro Se*
MSB No. 2665

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Statement of Issues

Plaintiff/Appellant George C. McKee designates the following issues, pursuant to Mississippi Supreme Court Rule 10(b)(4), which are intended to be presented on appeal:

I.

Did the Circuit Court of Oktibbeha County err by holding that the Board of Aldermen's decision was supported by substantial evidence and was not arbitrary and capricious?

II.

Did the Circuit Court of Oktibbeha County err by holding that Appellant McKee's due process rights were not violated?

Statement of the Case

COURSE OF PROCEEDINGS BELOW

On April 23, 2008 Appellant McKee filed a Bill of Exceptions[1] with the office of the Mayor regarding the April 15, 2008 decision of the Board of Aldermen denying his application for rezoning. Appellant McKee then filed an Appeal and Complaint on April 25, 2008.

Appellee, City of Starkville, then filed its Answer and Affirmative Defenses[2] , and as a part thereof, filed its own so called "Bill of Exceptions"[3], hereinafter Bill of Exceptions #2, executed by the Mayor of Starkville, Hon. Robert D. Camp, but no record of the case in accordance with statute, *Mississippi Code Annotated* §11-51-75 (1972). McKee then filed a Motion for Partial Summary Judgment and brief in support thereof on March 13, 2009. The City of Starkville filed a Motion to Strike and/or Dismiss, and McKee filed a response to said Motion to Strike and/or Dismiss. Both sides then submitted Briefs, and on September 9, 2009 the Oktibbeha County Circuit Court entered an order Affirming the Board of Aldermen's decision. Appellant McKee filed a timely Motion for Reconsideration, which was denied on October 13, 2009. Appellant McKee then filed a timely Notice of Appeal.

This is an appeal from the final judgment entered on September 9, 2009, affirming the

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1 There is but one Bill of Exceptions sanctioned by the statute, Miss. Code Ann. §11-51-75 (1972), and that is the Bill of Exceptions originally filed by McKee with the City on April 23, 2008. Why the City Appellee, herein, chose to compose and attach a second document entitled "Bill of Exceptions" to it's Answer and Affirmative Defenses appears to have been done for the purpose of confusion, obfuscation, and based on the false statement, contained therein, that "The Appellant [McKee] then perfected his Appeal to the Mayor and Board of Aldermen", (R 38) appears to have been a brazen attempt by the City of Starkville to mislead the Circuit Court into thinking that this matter was before the Board of Aldermen as an appeal by McKee, rather than as a perfunctory and non-evidentiary approval of a Planning and Zoning Commission matter.

2 In his signed Answer and Affirmative Defenses, City Attorney Favor gratuitously, but falsely stated, "It is admitted that the Board of Alderman voted to overturn the vote of the Planning and Zoning Commission and deny the ***Appeal*** [R 24] [emp added] In fact, there was no appeal from the Planning and Zoning Commission because it had unanimously approved McKee's application.

3 Appellant has already made it abundantly clear that the Mayor had no authority whatsoever to refuse to sign Appellant's Bill of Exceptions and instead file a bill of exceptions on behalf of Appellee. (RE 24-25, R 97-98).

Board of Aldermen's denial of McKee's rezoning application, and an October 13, 2009 Order Denying Plaintiff's Motion for Reconsideration.

STATEMENT OF THE FACTS

In February 2008, Appellant McKee applied to the Starkville Planning and Zoning Commission to re-zone Parcel Number 102-A-00-191.00, consisting of approximately 0.75 acres of land at the rear of S. Washington Street, Starkville, Mississippi, from R-2 to R-5 (application RZ 08-03)[4]. In a Staff Report dated April 3, 2008, Starkville City Planner Ben Griffith noted that the area surrounding the subject parcel has been transitioning from single-family, owner-occupied dwellings to more dense residential uses and rental properties (RE 10, R 15). The properties to the North and West of the subject property were rezoned to R-5 in 1981, and the property to the South of the subject parcel was rezoned to R-5 in 1996 (RE 8, R 12).

At the Planning and Zoning Commission's regularly scheduled meeting on April 8, 2008, Appellant McKee satisfactorily answered the questions of the Commission, no public comments were received, and the Planning and Zoning Commission voted unanimously to recommend approval of the request to the Mayor and Board of Aldermen based on changing conditions in the neighborhood being consistent with R-5 zoning (RE 15-16, R 75-76). Subsequently, the Board of Aldermen denied the application at its April 15, 2008 meeting – the only evidence presented before the Board being the recommendation by City Planner Ben Griffith to approve the application, along with evidence of the unanimous approval of the Planning and Zoning Commission.

In the so called "Bill of Exceptions" that was filed by and executed by the Mayor of the City of Starkville , aforesaid, the Mayor misrepresented to the Court:

"The Appellant [McKee] then perfected his Appeal to the Mayor and Board of

4 See locator map, (RE 13, R 48). The subject parcel includes only such property that is more than 160' from South Washington Street.

> Aldermen 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, finding that there had not been a change in the area to warrant the re-zoning..." (R 38).

In actuality, this matter was not before the Board of Aldermen on any appeal whatsoever, much less an appeal buy the McKee. Rather, the matter was merely being presented to the Board of Alderman in accordance with Starkville City Ordinance 1999-3. The unanimous approval by the Planning and Zoning Commission was actually overturned by a 5 to 2 vote of the Board of Aldermen (RE 23, R 89), with no notice of hearing to McKee whatsoever.

STANDARD OF PROOF

Because the Circuit Court's role in an appeal of a decision of the Board of Aldermen is that of an appellate court, rather than as a trier of fact, the burden currently on the McKee is the same as it has been throughout the prior proceedings. That is, the decision of the Circuit Court, and ultimately the Board of Aldermen, must be upheld unless it is "arbitrary, capricious, discriminatory, or beyond the legal authority of the city board, or unsupported by substantial evidence." *City of Vicksburg v. Cooper*, 909 So.2d 126, 129 (Miss.App. 2005); *Mathis v. City of Greenville,* 724 So.2d 1109, 1112 (Miss. App. 1998).

Summary of the Argument

I.

The Circuit Court incorrectly found that the Board had substantial evidence before it when it considered McKee's rezoning application simply because the Board had a meeting (R 4, RE 137). The Court failed to look at the substance of the evidence presented and considered at the meeting, which consisted only of the recommendation of approval from City Planner Ben Griffith. Furthermore, the Board's decision that an R-5 zoning of the subject property would be inappropriate was arbitrary and capricious because the entire block, with the exception of the subject property and one adjacent parcel, is already zoned R-5. (*McWaters v. City of Biloxi*, 591 So.2d 824, 827 (Miss. 1991) - "A refusal to rezone lots 8 and 10 (owned by Mosley) from R1-A to 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.")

Without substantial evidence to support its conclusion, and because the decision was in conflict with established precedent, the board acted arbitrarily and capriciously when it denied McKee's rezoning application.

II.

The Circuit Court incorrectly applied the plain meaning of *Mississippi Code Annotated* §17-1-17 (1972) when it found that the Board was not required to conduct a public hearing prior to voting on the rezoning application. Under the Circuit Court's interpretation of §17-1-17, because the Commission recommended approval of McKee's unopposed rezoning application, the Board of Aldermen was not required to hold a public hearing because it was "acting upon" the Commission's recommendation whether it acted in agreement or disagreement with the Commission (RE 5, R 138) – meaning that because McKee received unopposed, unanimous approval from the Commission, he had to stand by helplessly while the Board considered the

application, without having any opportunity to be heard by the Board prior to its vote – a vote which was the final decision regarding the application. Such an interpretation is clearly in violation of McKee's due process right to be heard at all critical stages of the process. *In re Petition of Carpenter*, 699 So.2d 928, 931 (Miss. 1997).

McKee requests oral argument in this matter due to the outright denial of his due process rights at the meeting of the Board of Aldermen. McKee was denied the opportunity to correct misrepresentations made by members of the Board - misrepresentations that were then furthered by the false and misleading filings of the City of Starkville, as will be shown in the following argument. McKee has been denied the opportunity to be heard at multiple stages of this process and therefore requests oral argument in this matter.

Argument

The Circuit Court of Oktibbeha County erred in finding that the Board of Aldermen's decision was supported by substantial evidence and was not arbitrary and capricious.

While McKee recognizes that the Board has broad authority, that authority is not unlimited. Although the members of the Board are free to use their own common knowledge and familiarity with the area, they are not free to blatantly ignore the evidence before them. Nor are they allowed to interject other incorrect evidence or unsupported opinions[5].

In *City of Olive Branch Bd. of Aldermen v. Bunker* 733 So.2d 842, 844 (Miss.Ct. App. 1998) the Mississippi Court of Appeals noted that the Court may not reverse the Board's decision unless the decision was

> "unsupported by substantial evidence; was arbitrary or capricious; was beyond the [Board's] scope or powers; or violated the constitutional or statutory rights of the aggrieved party."

McKee will show that the Board's decision (1) was not based on substantial evidence, (2) was arbitrary and capricious, and in the next section will show (3) that his statutory rights were violated, and (4) that his constitutional due process rights were violated – each of which provides a separate basis for the Court to reverse the Circuit Court's upholding of the decision of the Board of Aldermen. Precedent for such a reversal can be found in *City of Petal v. Dixie Peanut Co.*, 944 So.2d 835 (MS 2008), in which the Court of Appeals of Mississippi affirmed the Forrest County Circuit Court's reversal of the mayor and Board of Aldermen's decision after finding that the Board acted arbitrarily and capriciously, and in violation of Dixie's due process rights when no notice was provided to Dixie regarding the meeting at which the Board acted.

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[5] At the meeting of the Board of Aldermen, Alderman Davis falsely stated that the property in question was the same as had been considered previously, but in fact it was only the rear part of what was considered previously (RE 17-19, R 78-80). Alderman Davis's assertion was directly contra to what was contained in the staff report which stated, "In 2004, the applicant requested a similar rezoning which included the house at 514 S. Washington Street and the request was denied." (RE 8, 14, R 12, 71).

SUBSTANTIAL EVIDENCE

The Circuit Court found that the Board had substantial evidence before it when it considered the rezoning application simply because it had a meeting (R 4, RE 137). The Circuit Court fails to point to any evidence that would support the Board's conclusion because no such evidence exists. Under the Circuit Court's reasoning, the mere act of meeting constitutes substantial evidence, regardless of whether any evidence was actually presented at the meeting. In reality, the only evidence before the Board at the April 15, 2008 meeting was the recommendation of approval from City Planner Ben Griffith (RE 17-19, R 78-82). Mississippi Courts have defined substantial evidence as:

> "...such relevant evidence as reasonable minds might accept as *adequate* to support a conclusion..." (*Vulcan Lands, Inc. v. City of Olive Branch*, 912 So.2d 198 at 201 (MS 2005), citing *Hearn v. City of Brookhaven* 822 So.2d 999 (MissCt.App. 2002). [Emphasis added]

The facts of this case clearly demonstrate that the decision of the Board of Aldermen was not supported by substantial evidence. The only evidence whatsoever before the Board was the Planning & Zoning Commission's unopposed, unanimous recommendation in support of the re-zoning. The favorable recommendation by the Commission was made after lawful notice and a due process hearing that afforded all parties an opportunity to object, and at which not even a single objection was lodged (RE 15-16, R 75-76). Reasonable minds would agree that based on an unopposed, unanimous recommendation for approval by the Commission, and absent any other evidence whatsoever opposing the application, approval from the Mayor and Board of Aldermen would follow – that is, unless the members of the Board blatantly ignore the evidence before them.

At the hearing of the Board of Aldermen, the only additional discussion of the proposed re-zoning was among the members of the Board, and was based on speculation by and among

themselves only, as to whether neighborhood conditions had changed enough in the prior four years to warrant a re-zoning[6]. However, based on precedent, a narrow four-year window of time is an inadequate and improper period of time for the consideration of significant changes. (See *McWaters v. City of Biloxi*, 591 So.2d 824, 827 (1991), "Evidence that nearby property has been re-zoned supports a finding by the city council there has been a material or substantial change in the neighborhood *since the inception* of the comprehensive zoning plan.", citing *Martinson v. City of Jackson*, 215 So.2d 414, 418 (Miss. 1968). [emphasis added]). McWaters makes it clear that the relevant time period to examine in determining whether a neighborhood has changed enough to warranty a rezoning, is to look back to the inception of the zoning plan. McKee has identified numerous neighborhood changes that justify approval of his rezoning application, changes that were confirmed by the Planning and Zoning Commission and are contained in its April 3, 2008 Staff Report (RE 8-10, R 12, 14-15).

The Circuit Court simply failed to look at the evidence before the Board and erroneously concluded that since it had a meeting at all, there was sufficient evidence to support the decision. However, the record is completely lacking in *any* evidence whatsoever in opposition to the application, much less substantial evidence that would support the Board's decision. The only explanation for the decision of the Board is that the Board members blatantly ignored the evidence before them.

ARBITRARY & CAPRICIOUS

Based on precedent, McKee can also show that the decision of the Board was arbitrary

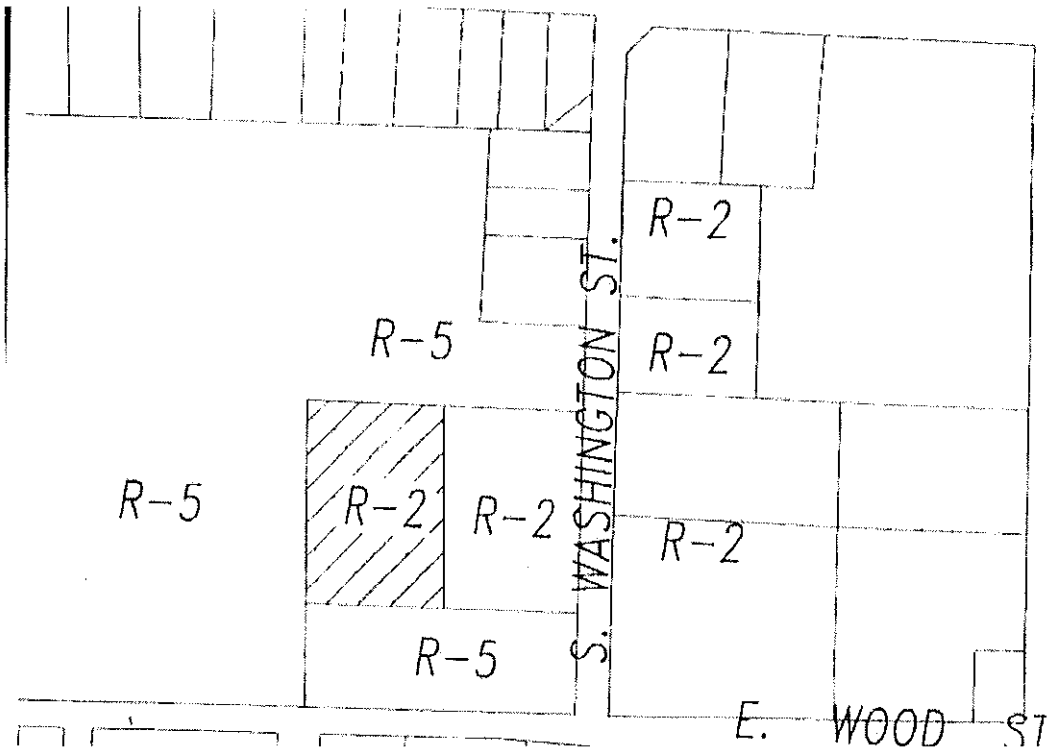
6 In 2004 Appellant submitted a similar, yet different, rezoning application which was denied. Appellant has made it abundantly clear that the rezoning application filed in 2008 is not the same as the 2004 application. Although the classification sought is the same, the parcel of land that is the subject of the 2008 application is different. This point was explicitly made by Alderman Lincoln during the meeting of the Board of Aldermen (RE 17-19, R 78-80). Furthermore, the April 3, 2008 Staff Report of Starkville City Planner Ben Griffith noted specific changes in the neighborhood (RE 8-10, R 12, 14-15), and the Planning and Zoning Commission agreed that neighborhood conditions had changed when it voted unanimously to approve the application at its April 8, 2008 meeting (RE 15-16, R 75-76).

and capricious. In McWaters, the Mississippi Supreme Court found that:

> "A refusal to rezone lots 8 and 10 (owned by Mosley) from R1-A to 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 (RE 20-21, R 81-82). Therefore, following the precedent of McWaters, the Board's refusal to re-zone McKee's property to R-5 was clearly arbitrary since this parcel is already surrounded on three sides by properties currently zoned R-5. After all, how could rezoning McKee's parcel of land to R-5 be inappropriate for the neighborhood when the entire block, with the exception of two parcels, is already zoned R-5?

(subject property shaded)



The City has tried to contend, and the Circuit Court blindly followed, that the application was denied because if granted, the rezoning would "create a change in the character of the neighborhood." (RE 4, R 137). This is entirely unfounded and merely an attempt by the City and Circuit Court to hide behind the deference afforded to their decisions. If the entire block, with the exception of the subject parcel and one adjacent parcel, is already zoned R-5, how could rezoning the 0.75 acre subject parcel possibly *create* a change in the character of the neighborhood? Granting the rezoning would actually bring the subject parcel into conformity with the already changed nature of the neighborhood.

Furthermore, the Mayor's own comments at the meeting of the Board of Aldermen acknowledge that the decision of the Board of Aldermen was arbitrary. As the transcript of the meeting shows, following the 5 to 2 vote to deny the request, the Mayor expressed disbelief that Board Members who say the Board ought to follow the recommendation of the Planning &

Zoning Commission voted in opposition on this application[7] (RE 21, R 82). This is further evidence that the decision of the Board was arbitrary and capricious.

The Circuit Court of Oktibbeha County erred in finding that Appellant McKee's due process rights were not violated.

STATUTORY VIOLATION

Mississippi Code Annotated §17-1-17 (1972) and Starkville City Ordinance 1999-3 state "it shall not be necessary for the Mayor and Board of Aldermen to hold a public hearing on the proposed amendment; the Mayor and Board of Aldermen may act upon the recommendation of the planning and zoning commission" (RE 22, R 83). According to the plain language and construction of the ordinance, the discretion to hold a public hearing applies only when the Mayor and Board of Aldermen act upon the recommendation of the Planning & Zoning Commission – not against the recommendation.

The Circuit Court incorrectly applied the plain meaning of §17-1-17 when it found that the Board was not required to conduct a public hearing prior to voting on the rezoning application. The Court stated that the Board need not have a public hearing if it is "acting upon" the recommendation of the Planning and Zoning Commission, and then continued to say that "acting upon" refers to "listening to the recommendation" and "acting upon that information" (R 5, RE 138) – a thoroughly unenlightened and circular interpretation of "acting upon."

Under the Circuit Court's interpretation of §17-1-17, because the Commission recommended approval of McKee's unopposed rezoning application, the Board of Aldermen was not required to hold a public hearing because it was "acting upon" the Commission's recommendation whether it acted in agreement with or against the Commission's

7 "I can't believe this. Somebody that opposed to it saying we ought to follow the P & Z's...uh...go to the next item."

recommendation – meaning that because McKee received unopposed, unanimous approval from the Commission, he had to stand by helplessly while the Board considered the application, without having any opportunity to be heard by the Board prior to its vote. How the Circuit Court can reconcile its interpretation with any elementary understanding of due process is baffling.

According to the Circuit Court, only parties who are aggrieved by the recommendation of the Commission are entitled to a public hearing before the Board and the due process that accompanies it – even if those aggrieved parties already had an opportunity to be heard before the Commission. Therefore, according to the Circuit Court, aggrieved parties are entitled to an "extra" due process hearing before that Board that is not available to McKee because he had a successful hearing before the Commission. This interpretation defies the plain language of the statute and basic common sense.

The Circuit Court has effectively held that in *every* situation where there was no opposition at the Commission level, there would never – I repeat never – be a situation where the Board would be required to hold a public hearing because it would *always* "act upon" the Commission's recommendation, whether it agreed or disagreed with the Commission's recommendation. Ironically, under the Circuit Court's interpretation, McKee would have been better off had the Commission disapproved his application, thereby making him an aggrieved party. Then at least he would have been entitled to a public hearing before the Board where he could have responded to the concerns of the Board members prior to their vote.

CONSTITUTIONAL VIOLATION

The Mississippi Constitution, the United States Constitution, Amendments V and XIV, and Section 42 USC Section 1983 entitle the Plaintiff to procedural and substantive due process with respect to the subject re-zoning application. McKee made the following argument abundantly clear in his earlier filing (RE 26-27, R 131-132), which the Circuit Court never

addressed and seemingly never read. McKee, however, feels the argument merits repeating. The Mississippi Supreme Court has previously stated that with respect to re-zoning proposals, the essence of a party's due process rights is:

> (1) reasonable advance notice of the substance of the re-zoning proposal, together with (2) the opportunity to be heard at all critical stages of the process. *Thrash v. Mayor and Commissioners of the City of Jackson*, 498 So.2d 801, 808 (Miss. 1986).

In the case of *In re Petition of Carpenter*, 699 So.2d 928, the Mississippi Supreme Court applied the Thrash standard in when it found that Carpenter's due process rights had been violated when, without any notice to Carpenter or his attorney, the Mayor and Board of Aldermen voted to deny Carpenter's appeal of the denial for his petition for a variance. The Court found that Carpenter had:

> "not received a full and fair opportunity to respond to the concerns raised by the opponents to his variance at the February 1, 1994 meeting". *Supra*, at 931.

Citing Thrash, the Court stated that Carpenter was denied:

> "the opportunity to be heard at *all critical stages* of the process." *Supra*. [emphasis added]

The precedent established by this very court is abundantly clear, yet it has been ignored by both the Circuit Court and the City. A hearing before the Board of Aldermen is clearly a critical stage of the rezoning process, as it is the final consideration of a rezoning application. Under Carpenter, McKee was not afforded "a full and fair opportunity to respond to the concerns raised" and was therefore denied "the opportunity to be heard at all critical stages of the process." The transcript of the meeting of the Board of Aldermen demonstrates the importance of the Thrash standard as it was applied by the Mississippi Supreme Court in Carpenter. At the meeting, in addition to multiple misstatements of fact, there was misinformed discussion among the members of the Board as to the differences between McKee's 2004 and 2008 applications

(RE 17-21, R 78-82). Because McKee was afforded no notice that the matter would even be under discussion, he was denied the opportunity to correct these misrepresentations prior to the Board's vote. As the Court noted in *City of Petal v. Dixie Peanut Co.*, 944 So.2d 835, 840 (2008),

> "whenever a person's life, liberty or property interests may be affected by legal proceedings the notice must be reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to *present their objections*." [emphasis added]

In fact, not only was McKee not provided any notice, he was told by Planner Griffith that the meeting was a mere formality and that McKee need not attend. Apparently Planner Griffith understands that the Board can only "act upon" – as in agreement with – the Commission's recommendation, unless it has a hearing. Because no public hearing was held prior to the Board's vote at that critical stage in this case, the vote by the Board of Aldermen was in violation of McKee's due process rights under the Mississippi Constitution, the United States Constitution, Amendments V and XIV, and Section 42 USC §1983, and such violations provide a basis for the Court to reverse the decision of the Board of Aldermen.

Conclusion

McKee has never argued, and is not arguing, that he is entitled to the rezoning sought as of right. McKee is instead asserting that he has a right to the due process of law, and that requires both substantive due process , i.e., that any decision by the Board of Aldermen not be arbitrary and capricious and be based on substantial evidence, and procedural due process, i.e., that McKee have the opportunity to be heard at a critical stage in the process.

McKee has never once said that the Board of Aldermen was required to approve his application; he simply argues that the Board had two options: (1) follow the recommendation of the Planning and Zoning Commission and approve the application without a public hearing; or (2) conduct a properly noticed public hearing prior to voting on the matter. Because the Board did not have substantial evidence to support its decision, because it acted arbitrarily and capriciously, and because it failed to afford McKee the due process of law to which he is entitled, the decision of the Board should be reversed and McKee's request for R-5 zoning on the subject property should be granted.

Not only has McKee suffered damages due to the initial denial of his due process rights by the Board of Aldermen, but he has since had to endure this lengthy and onerous litigation asserting his due process rights. From the onset, the false statements by the Board members and the false and misleading filings by the City of Starkville - including but not limited to the City's unexplainable Bill of Exceptions - have been nothing but a distraction from the issues at hand. Accordingly, McKee requests that the Court, in addition to reversing the decision of the Board of Aldermen, grant additional relief, including but not limited to punitive and compensatory damages McKee may be entitled to under the United States Constitution, and Section 42 U.S.C. 1983.

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 Brief to the following counsel of record:

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

This the 22nd day of January, 2010

John C Crecink Jr

John C. Crecink, Jr.
MSB No. 07828
19 Page Avenue
Starkville, Mississippi 39759
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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 Brief of Appellant and four copies of Appellant's Record Excerpt 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 22nd day of January, 2010

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