IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CT-00981-SCT

SCOTT and MONA HARRISON **APPELLANTS**

vs.

MAYOR AND BOARD OF ALDERMEN OF THE CITY OF BATESVILLE, MISSISSIPPI and MEMPHIS STONE & GRAVEL COMPANY **APPELLEES**

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

APPELLEES' JOINT SUPPLEMENTAL BRIEF

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1. Whether the Court of Appeal's Decision Applied the Correct Standard of Review and Erroneously Shifted the Burden of Proof.

STATEMENT OF THE CASE

The Mayor and Board of Alderman of the City of Batesville, Mississippi ("City") granted a variance to Memphis Stone and Gravel ("MS&G") allowing it to conduct a sand and gravel operation on property currently zoned R-1 (single family residential) and C-2 (commercial district). (R. Vol. 1, p. 37). The City later amended the variance by placing several conditions on the variance to which MS&G agreed to comply. (R. Vol. 1 pp. 38-40).[1] Aggrieved by the City's decision, Appellants, Scott and Mona Harrison ("Harrisons"), appealed that decision pursuant to Miss. Code Ann. § 11-51-75. (R. Vol. 1 p. 8).

After a hearing held on March 5, 2009, the Panola County Circuit Court entered an order affirming the decision of the City. (R. Vol. 2 pp. 171-175). The Harrisons next appealed the Panola County Circuit Court's decision to the Mississippi Court of Appeals. The Court of Appeals reversed and rendered the Panola County Circuit Court's affirmation of the City's decision to grant MS&G a temporary variance. (*See* Opinion ¶ 18). Following Court of Appeal's denial of the City's and MS&G's Joint Motion for a Rehearing, this honorable Court granted the City's and MS&G's Joint Petition for Writ of Certiorari.

[1] These conditions included: (a) a two-and-one-half year time limit on the operation with review every six months; (b) restricting the operation to weekdays only from 7:00 a.m. to 5:00 p.m.; (c) the erection and construction of berms to screen the sight of the project from any neighboring property or road; (d) the watering of any objectionable dust; and (e) the imposition of fines payable to the City for any violation of the conditions. (R. Vol. 1 pp. 38-40).

SUMMARY OF THE ARGUMENT

The Court of Appeals reversed and rendered the Panola County Circuit Court's affirmation of the City's decision to grant MS&G a temporary variance. (*See* Opinion ¶ 18). In rendering its decision, the Court of Appeals improperly acted as a super zoning commission by erroneously substituting its own judgment as to the wisdom and soundness of the City's action. The Court of Appeals found that the variance constituted impermissible spot zoning. (*See* Opinion ¶ 2 and ¶ 11).

However, the City's decision granting MS&G's variance application did not constitute spot zoning. The variance in this matter is merely a temporary exception to the zoning restrictions. The City has never wished to permanently rezone the subject property. Instead, the variance allowing the mining operation is only a temporary project and is an extension of an adjacent gravel project. The City's action did not constitute spot zoning simply because it allowed an alternate use of the subject property. That is precisely the purpose of a variance.

By issuing the temporary variance, the City exercised its valid authority, pursuant to its adopted Ordinances. The City's Zoning Ordinance allows for the granting of variances. Specifically, § 1204(5) of the Ordinance provides that a variance from its literal terms may be granted:

> Upon recommendation of the planning commission, to vary or modify the application of any of the regulations or provisions of the ordinance where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance, so that the spirit of this ordinance shall be observed, public welfare and safety secured and substantial justice done.

Id. After considering numerous documents and entertaining arguments from all the interested parties, the City specifically found that the subject variance was "necessary in order to avoid practical difficulties or unnecessary hardships on the use and development" of the subject property. (R. Vol. 1 p. 37).

Finding that the City's decision constituted spot zoning, the Court of Appeals analyzed whether there was a public need or compelling reason for the variance. (*See* Opinion ¶ 11). Incorrectly placing the burden of proof on MS&G, the Court of Appeals held:

> Memphis Stone failed to show that the issue of public need was fairly debated by the Planning Commission before it voted to approve the variance request. Furthermore, Memphis Stone did not prove that it would suffer difficulties or hardship without the variance.

(*See* Opinion ¶ 17). The Court of Appeals erred when making the above findings. Substantial evidence of public need was presented by MS&G to both the Planning Commission and the City prior to the City's grant of the temporary variance. Furthermore, the City made a specific finding as to whether MS&G would suffer difficulties or hardship without the grant of the temporary variance. (R. Vol. 1 p. 37).

Furthermore, the record reflects that the City's decision was not only based on substantial evidence, but was also fairly debatable. The City carefully weighed the parties' competing interests in its decision regarding the variance. Most importantly, the City subsequently placed restrictive conditions on MS&G's variance. Such deliberate action is indicative of thoughtful and well planned decision making. Additionally, the City complied with all the necessary procedural safeguards and statutes applicable to allowing the issuance of a variance.

ARGUMENT

I. STANDARD OF REVIEW

There is a presumption of validity of a governing body's enactment or amendment of a zoning ordinance and the burden of proof is on the party asserting its invalidity. *Drews v. City of Hattiesburg*, 904 So.2d 138, 141 (Miss. 2005) (citing *Perez v. Garden Isle Community* Association, 882 So.2d 217, 219 (Miss. 2004)); *Carpenter v. City of Petal*, 699 So.2d 928, 932 (Miss. 1997). The order of a governing body of a municipality may not be set aside if its validity is fairly debatable, and such order may not be set aside by a reviewing court unless it is clearly shown to be arbitrary, capricious, discriminatory or is illegal or without substantial evidential basis. *Sanderson v. City of Hattiesburg*, 249 Miss. 656, 163 So.2d 739 (1964). If the board's decision granting a variance is founded upon substantial evidence, then it is binding upon an appellate court. *Barnes v. Board of Supervisors*, 553 So.2d 508, 511 (Miss. 1989) *see also Wilkinson County Board of Supervisors v. Quality Farms, Inc.*, 767 So.2d 1007, 1010 (Miss. 2000). Whatever may be the personal opinion of the judges of an appellate court on zoning, the court cannot substitute its own judgment as to the wisdom and soundness of the municipality's action. *Moore v. Madison County Bd. of Supervisors*, 227 So.2d 862 (Miss. 1969).

II. THE COURT OF APPEALS' DECISION DID NOT APPLY THE CORRECT STANDARD OF REVIEW AND ERRONEOUSLY SHIFTED THE BURDEN OF PROOF

The Court of Appeals' Opinion avers that the record lacks "sufficient evidence" that the issue of public need was "fairly debated." (*See* Opinion ¶ 14). However, the standard of review on appeal is not whether there is "sufficient evidence" that the issue of public need was "fairly debated." Rather, the standard of review is whether the City's decision is based upon "substantial evidence" or was otherwise "fairly debatable." On appeal, judicial review of a municipality's zoning decision is limited to determining whether there was an evidentiary basis

for the municipality's decision. It is not the role of the judiciary to reweigh the evidence, but rather to merely verify if evidence exists to support the municipality's decision.

In the case at bar, substantial evidence of public need was presented and considered by both the Planning Commission and the City by way of MS&G's variance request – and the Operations Narrative made a part of the application. (R. Vol. 1 pp. 15-30). Regardless of the weight the Court of Appeals impermissibly assigns this evidence, the fact remains that the evidence exists and was considered by the City. Thus, in accordance to long standing principles of appellate review of municipal zoning decisions, the appellate court may not reweigh this evidence and substitute its own judgment as to the wisdom and soundness of the City's action.

There is a presumption of validity of a governing body's enactment or amendment of a zoning ordinance, and the burden of proof is on the party asserting its invalidity. *Drews v. City of Hattiesburg*, 904 So.2d 138, 141 (Miss. 2005) (citing *Perez v. Garden Isle Community Association*, 882 So.2d 217, 219 (Miss. 2004). Throughout its Opinion, the Court of Appeals not only neglected to apply a presumption of validity to the City's decision, but also erroneously shifted the burden of proof to the City and MS&G in contradiction to *Childs v. Hancock County Bd. Of Supervisors*, 1 So.3d 855 (Miss. 2009). The Harrisons are the parties challenging the validity of the City's grant of the temporary variance. Thus, it is the Harrisons that bear the burden of proof on appeal. Despite the Harrisons' burden, the Court of Appeals' Opinion erroneously held that MS&G "failed to show that the issue of public need was fairly debated by the Planning Commission" and that MS&G "did not prove that it would suffer difficulties or hardship." (*See* Opinion ¶ 17).

In addition to improperly shifting the burden of proof, the Court of Appeals' above holdings do not accurately reflect long standing principles of appellate review of municipal

zoning decisions. First, there is no requirement that the City must "fairly debate" the issue of public need nor is there a requirement that the debate be contained in the record. Instead, whether or not the City's decision is "fairly debatable" is the issue to be analyzed on appeal under the deferential standard of review afforded a municipality's zoning decision. The Mississippi appellate courts have described the "fairly debatable" standard as the antithesis of "arbitrary and capricious," meaning that if a decision could be considered "fairly debatable," then it could not be considered arbitrary or capricious. *Tippitt v. City of Hernando*, 909 So.2d 1190, (¶3) (Miss. Ct. App. 2005).

The record reflects that the City's decision was "fairly debatable." For instance, following the Planning Commission's recommendation to grant the variance, the City held multiple hearings prior to rendering a final decision on the variance. All interested parties were allowed to voice their differing concerns at properly noticed public hearings, and the City ultimately placed multiple restrictions on the variance. Furthermore, the City did not unanimously approve the variance as the vote was 3-2 in favor of the variance.

Secondly, the record reflects that in accordance with the applicable ordinances, MS&G proved it would suffer practical difficulties or unnecessary hardships. The Court of Appeals points to the alleged lack of evidence contained in the record regarding difficulties and hardship. However, the City made a specific finding as to this issue. (R. Vol. 1 p. 37). The City's minutes specifically state that the City granted the variance to avoid "practical difficulties or unnecessary hardship." (R. Vol. 1 p. 37). The minutes alone are evidence that the issue of hardship was considered by the City. Again, regardless of the weight the Court of Appeals impermissibly assigns this evidence, the fact remains that the evidence exists and was considered by the City.

CONCLUSION

The City's decision does not constitute spot zoning. The variance in this matter is merely a temporary exception to the zoning restrictions. The City has never wished to permanently rezone the subject property. Regardless, even if the City's grant of a temporary variance constitutes spot zoning, substantial evidence of public need was presented by MS&G to both the Planning Commission and the City. The operation is not only a good source of local aggregate but is also a benefit to the local economy. The City considered these factors in its decision-making process. Furthermore, the City made a specific finding as to whether MS&G would suffer difficulties or hardship without the grant of the temporary variance.

In rendering its decision, the Court of Appeals improperly shifted the burden of proof, failed to apply the deferential standard to which the City's decision is entitled to, erroneously reweighed the evidence, and acted as a super zoning commission by substituting its own judgment as to the wisdom and soundness of the City's action. Accordingly, the City and MS&G respectfully request this honorable Court to make a final disposition of this case affirming the Panola County Circuit Court's affirmation of the City's decision to grant MS&G the subject temporary variance.

RESPECTFULLY SUBMITTED, THIS the 5th day of July, 2011.

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CERTIFICATE OF SERVICE

I certify that I have this day served by United States mail, postage prepaid, the above and foregoing Joint Supplemental Brief to the following:

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This, the 5th day of July, 2011.

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CERTIFICATE OF FILING

I, E. Patrick Lancaster do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the Joint Supplemental Brief of Appellees by mailing the original of said document and ten (10) copies thereof via Untied States Mail to the following:

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THIS the 5th day of July, 2011.

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