IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-00981

SCOTT and MONA HARRISON	APPELLANTS
VS.	
MAYOR AND BOARD OF ALDERMEN OF THE CITY OF BATESVILLE, MISSISSIPPI	APPELLEES
and	
MEMPHIS STONE AND GRAVEL COMPANY	INTERVENOR

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

APPELLANTS' SUPPLEMENTAL BRIEF

In July 2008, Appellee the City of Batesville, Mississippi ("the City") granted Intervenor Memphis Stone and Gravel, Inc. ("Memphis Stone") a variance to operate a strip mine in an area within the City zoned for residential and light commercial use. The Court of Appeals correctly held that the City's decision was unsupported by substantial evidence in the record and constituted impermissible spot zoning. For both of these reasons, this Court should affirm the decision of the Court of Appeals.[1]

1. Memphis Stone has no standing to pursue this appeal

Scott and Mona Harrison ("the Harrisons") appealed an official decision of the zoning authorities of the City of Batesville under MISS. CODE ANN. § 11-51-75. Memphis Stone, as a

[1] The Harrisons incorporate by reference all arguments made in their Response to the Petition for Writ of Certiorari and all arguments made before the Court of Appeals.

third party to the Harrison's appeal, has no standing to intervene or otherwise participate as a party in this appeal. *City of Jackson v. United Water Services, Inc.*, 47 So. 3d 1160, 1165 (Miss. 2010) (holding that "no constitutional provision, statute, or court rule permits intervention" by a third party in an appeal under § 11-51-75).[2] Memphis Stone should be dismissed as a party to this appeal, and the Court should not consider any argument that it has raised during the pendency of the Harrison's appeal.

2. Relevant facts

The Harrisons rely largely on the concise statement of facts set forth in pages 1-3 of their Response to the Joint Petition for Writ of Certiorari filed in this matter. However, a few undisputed facts bear repeating here. First, the City's zoning ordinance does not permit mining activities in the zoning districts at issue (R-1 and C-2) *under any set of circumstances*. Strip mining is neither a permitted use nor a conditional use in these districts.

Second, the record contains the following evidence, *and only the following evidence*, in support of Memphis Stone's variance application:

- On its Variance Application, in the section marked "Reason for Request", Memphis Stone wrote: "Owners desire to mine sand and gravel and conveyor material to existing wash plant for processing." R. 13-14.
- In a subsequent letter to the City's Code Enforcement Administrator, Memphis Stone stated that the variance was sought "in order to mine sand and gravel from [the] leased property and transport the material to our existing wash plant operation." R. 15.

[2] Standing is a jurisdictional issue which may be raised by any party or the Court at any time. *Desoto Times Today v. Memphis Pub. Co.*, 991 So. 2d 609, 611 (Miss. 2008); *City of Madison v. Bryan*, 763 So. 2d 162, 166 (Miss. 2000).

- In an "Operations Narrative" submitted with its variance application, Memphis Stone stated that:

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

R. 19-20.

Finally, Memphis Stone's own representative told the City's Board that it would be "impossible" to restore the land to its prior state, and the Memphis Stone brochure in the record simply shows a spent gravel pit filled with water. R. 18; 84-85. The record also shows evidence of the large-scale destruction of developable land caused by Memphis Stone's mining operations. R. 26-27.

4. Standard of Review

Because this case involves the *adjudicative* act of granting a variance as opposed to the *legislative* act of passing a zoning ordinance, the initial burden rests with the applicant to establish by a preponderance of the evidence that they have met the necessary elements or factors to obtain a variance. *See Barnes v. Board of Sup'rs, DeSoto County*, 553 So. 2d 508, 511 (Miss. 1989). On appeal, the City's decision may not stand if it is unsupported by substantial evidence in the record. *Id.*

5. The variance constitutes impermissible spot zoning

This Court has addressed the issue of "spot zoning" several times in recent years. That term describes a zoning action (whether it be a rezoning, a variance, or even a mere amendment to the text of a zoning ordinance) that is "not in harmony with the comprehensive or well-considered land use plan of a municipality," *Drews v. City of Hattiesburg*, 904 So. 2d 138, 141

n.2 (Miss. 2005). Spot zoning generally creates "a small island of relatively intense use surrounded by a sea of less intense use" and "primarily for the private interest of the owner of the property affected, and not related to the general plan for the community as a whole." *Modak-Truran v. Johnson*, 18 So. 3d 206, 2010-11 (Miss. 2009) (citing 2 E.C. Yokley, ZONING LAW AND PRACTICE § 13-2, 13-3 (4th ed. 2000)).

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

The *Drews* Court also cited a leading authority on Mississippi zoning law in pointing out that variances should not be utilized to change the permissible *use* of a parcel: "***[S]erious questions arise when a variance is granted to permit a use otherwise prohibited by the ordinance***; e.g., a service station or quick-stop grocery in a residential district. The most obvious danger is that the variance will be utilized to by-pass procedural safeguards required for valid amendment." Robert C. Khayat & David C. Reynolds, *Zoning Law in Mississippi*, 45

MISS. L. J. 365, 383 (1974) (footnotes omitted) (emphasis added) (quoted in *Drews*, 904 So. 2d at 141).

The proposed use of the Haire-Seale property for a mining operation is a dramatic departure from the residential and light commercial use allowed by the City's ordinances. The only districts in which such operations are allowed are industrial districts, and the City has effectively rezoned the subject property for that use. The proposed mining operations could not be more incompatible with the residential and light commercial uses designated by the ordinance. The City's own ordinance states that R-1 districts are "designed and intended to secure for the persons who reside there a comfortable, healthy, safe, and pleasant environment in which to live, sheltered from incompatible, and disruptive activities that properly belong in nonresidential districts." Batesville Zoning Ordinance, § 301(a). Strip mining is such an incompatible and disruptive activity.

The City and Memphis Stone have no answer to *Drews*. The only distinction they have ever tried to make is to argue that the variance granted by the City in this case was "temporary." However, nothing in *Drews*, the City's zoning ordinance, or any other Mississippi authority indicates that the City may grant a variance that is incompatible with its zoning ordinance so long as the land use permitted under the variance is characterized as "temporary." *See Modak-Truran v. Johnson*, 18 So. 3d at 210 ("This Court has recognized that the name given a municipal act does not dictate its nature."). Indeed, nearly any land use could be described as "temporary" if one considers that most structures can be demolished. Even by this loose standard, though, the proposed land use at issue here is not temporary. It is true that Memphis Stone will cease its operations on the property once it has extracted all the useful raw materials

from it. However, as noted above, the record reflects that the subject property can never be restored after the completion of the proposed mining operation. Appellees' contention that a strip mine is a "temporary" use of residential and commercial property is factually and logically untenable.

6. The variance is not supported by substantial evidence

Even if the City's decision did not constitute impermissible spot zoning, it was invalid because it is not supported by substantial evidence. The City's Zoning Ordinance provides that a variance from its literal terms may be granted only "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance, so that the spirit of this ordinance shall be observed, public welfare and safety secured and substantial justice done." Batesville Zoning Ordinance, § 1204(5). The record contains no evidence that Memphis Stone will suffer any type of hardship absent the variance.[3]

Variances may not be granted merely because the desired use of the property will be more convenient or profitable than the use for which the property is zoned or because the applicant will suffer some financial disadvantage without the variance. *Westminster Presbyterian Church v. Jackson*, 176 So. 2d 267, 272 (Miss. 1965); *Caver v. Jackson County*, 947 So. 2d 351, 354 (Miss. Ct. App. 2007). Variances are appropriate only where the applicant faces "some unusual hardship from the literal enforcement of the regulation different from, and greater than, that suffered by other property owners in the district" and, even then, only if "the

[3] In their cert petition, the City and Memphis Stone urged the Court to assume that the City's decision was based on some unidentified body of evidence that was not preserved in the record. Even if such a body of evidence existed outside the record (and, to the knowledge of the undersigned, it does not), this Court may not consider evidence outside the Harrisons' Bill of Exceptions, which was certified by the City's Mayor in accordance with MISS. CODE ANN. § 11-51-75. *See Falco Lime, Inc. v. City of Vicksburg*, 836 So. 2d 711, 716 (Miss. 2002) ("Because the action is an appeal, the circuit court sits only as an appellate court, and may consider no evidence presented outside the bill of exceptions.").

proposed use of the property is within the spirit of the zoning regulations." *Westminster*, 176 So. 2d at 272 (quoting 62 C.J.S. *Municipal Corporations* § 227). The purpose of the variance remedy has traditionally been to allow a landowner to seek relief from "ordinances which rendered use of the property impossible or impractical." Khayat and Reynolds, *Zoning Law in Mississippi*, 45 MISS. L.J. at 383 (quoted in *Drews*, 904 So. 2d at 141).

The record contains absolutely no evidence that Memphis Stone will suffer a hardship without the variance. As noted at the outset, Memphis Stone has established only that it wishes to mine sand and gravel in a convenient and potentially profitable location. Nothing in the record indicates that the Haire-Seale property has somehow been rendered unsuitable for the residential or light commercial use for which it is zoned. Memphis Stone will not suffer any kind of unusual hardship or difficulty greater than every other landowner within the City's R-1 and C-2 districts. In fact, just the opposite is true: no other landowner within the City's R-1 and C-2 districts may operate a strip mine within those districts. *See* 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 58:5 (4th ed.):

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

The City's zoning ordinance forbids the type of activity in which Memphis Stone wishes to engage. The Harrisons and other similarly situated landowners have the right to rely upon the terms of the ordinance. The City's decision has turned the ordinance on its head and infringed upon the Harrison's justified expectations about the nature of land use near their property.

5. *Court of Appeals opinion*

The Court of Appeals correctly held that the City's variance constituted spot zoning, that it favored Memphis Stone to the exclusion of all other landowners, and that the record contained no evidence of a hardship to Memphis Stone. However, with all due respect to the Court of Appeals, its analysis begs clarification in certain respects.

First, the Court of Appeals did not need to "determine whether Memphis Stone proved that there was a public need or a compelling reason for the variance." *Harrison v. City of Batesville*, No. 2009-CA-00981-COA, 2010 WL 4188264, at *4, ¶ 11. While the Court of Appeals was certainly correct to analyze whether the variance at issue favored Memphis Stone to the exclusion of other landowners, the City's ordinance does not require a finding of "public need" in order to justify a variance. Rather, public need is one of two prongs of the proof necessary for a *rezoning* based on a change in character of the area. *See, e.g., Thomas v. Board of Sup'rs of Panola County*, 45 So. 3d 1173, 1181 (Miss. 2010). The case cited by the Court of Appeals, *Cockrell v. Panola County Bd. of Sup'rs*, 950 So. 2d 1086, 1098 (Miss. Ct. App. 2007), involved a challenged rezoning action and did not hold that a variance must be supported by proof of public need. While a rezoning action *can* constitute impermissible spot zoning, *see, e.g., Collins v. Mayor and Council of City of Gautier*, 38 So. 3d 677, 683 (Miss. Ct. App. 2010), the City did not rezone any property in this case.[4]

The Court of Appeals also held that "the record lacks sufficient evidence to indicate that the issue of public need was fairly debated prior to approval of the variance request." *Harrison*, 2010 WL 4188264, at *5. As the Court of Appeals correctly stated earlier in its opinion, the

[4] Neither the City nor Memphis Stone has ever argued that the City's decision could otherwise be supported under this Court's standards for rezoning.

appropriate inquiry is whether the point at issue was "fairly debatable," not whether it was "fairly debated." *Id.* at *2. The issue was not whether the matter was actually *debated* before the City's Board, but rather whether there was substantial evidence in the record to support the City's decision itself. Of course, where a finding is unsupported by substantial evidence, the resulting decision is not fairly debatable. *See Childs v. Hancock County Bd. of Sup'rs*, 1 So. 3d 855, 861 (Miss. 2009) (holding that zoning authority's decision was fairly debatable *because* the Board had substantial evidence before it).

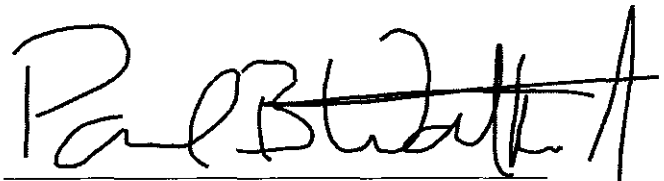
These points in no way impact the Court of Appeals' ultimate decision. The variance is still a textbook example of spot zoning, as it allows a use flatly prohibited by the City's zoning ordinance and completely at odds with the spirit of the ordinance. The variance was still clearly designed to favor Memphis Stone. There is still no evidence in the record, much less *substantial* evidence, to support a finding that Memphis Stone faces some hardship that justifies the variance. For all these reasons, this Court should affirm the decision of the Court of Appeals.

CONCLUSION

The City's zoning ordinance prohibits mining activities in the R-1 and C-2 districts. The City granted Memphis Stone a variance to allow such a use. This variance stands at stark odds with the language and intent of the City's zoning ordinance. The record contains no evidence that Memphis Stone would suffer any hardship in the absence of the variance. For all these reasons, this Court should affirm the decision of the Court of Appeals and render judgment in favor of the Harrisons.

THIS, the 6th day of July, 2011.

Respectfully submitted,
SCOTT AND MONA HARRISON



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CERTIFICATE OF SERVICE

I, Paul B. Watkins, Jr., one of the attorneys for Appellants, do certify that I have this date delivered by United States mail, postage fully prepaid, a true and correct copy of the above and foregoing Response to Joint Motion for Rehearing to:

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THIS, the 6th day of July, 2011.

PAUL B. WATKINS, JR.