

IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2010-CA-00116



JACKSON COUNTY BOARD OF SUPERVISORS AND
B&B ENTERPRISES, LLC

APPELLANTS

VERSUS

CRYSTAL HAYES, CAROLE MIZE
AND AMBER HESLER

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record 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 disqualifications or recusals.

1. Honorable Robert P. Krebs, Circuit Court Judge
2. Jackson County Board of Supervisors, Appellant
3. B&B Enterprises, Appellant
4. Crystal Hayes, Carole Mize, and Amber Hesler, Appellees
5. Kathy Blackwell Parker, Attorney for Appellant, Jackson County Board of Supervisors
6. William T. Reed, Attorney for Appellant, B&B Enterprises, LLC
7. Douglas L. Tynes, Jr., Attorney for Appellees



DOUGLAS L. TYNES, JR., (MSB )

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CONSTITUTIONS

Mississippi

None

United States

None

STATUTES

Mississippi

None

TREATISES

None

RULES OF COURT

None

ORDINANCES

City

None

County

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STATEMENT OF THE ISSUE

- I. Whether the decision of the Jackson County Board of Supervisors granting B&B Enterprise's application to re-zone the subject property from R-1A to R-2 was arbitrary, capricious, discriminatory, illegal or without a substantial evidentiary basis?
- II. Whether the decision of the Jackson County Circuit Court in reversing the Jackson County Board of Supervisors was "fairly debatable"?

CONCLUSION

This Honorable Court should affirm the Circuit Court Judge.

STATEMENT OF THE CASE

On October 1, 2009, the Jackson County Circuit Court heard an appeal from a zoning decision from the Jackson County Board of Supervisors. B&B Enterprises, LLC (hereinafter ("B&B")) filed a request for a zoning change for a parcel of land on Dantzler Road in the Latimer Community. B&B asked the Planning Commission of Jackson County to re-zone the parcel from R-1A to R-4. The Planning Commission denied the request, and B&B timely appealed the decision to the Board of Supervisors. At the hearing before the Board of Supervisors, B&B amended its re-zoning request for the property to be re-zoned to R-2. The Board of Supervisors granted the request, Hayes, Mize and Hesler (hereinafter collectively referred to as "Appellees") timely appealed the

decision of the Jackson County Board of Supervisors (hereinafter “the Board”) to the Circuit Court of Jackson County. After a hearing on the matter, the Circuit Court of Jackson County reversed the decision of the Board, and held that there was not substantial evidence supporting a material change in the character of the neighborhood to justify the zoning change request on the subject property holding that the decision of the Jackson County Supervisors was arbitrary and capricious; and, the decision of the Jackson County Board of supervisors was overturned and the zoning change request was denied. Now the Jackson County Board of Supervisors appeals the Circuit Court’s decision with the Mississippi Court of Appeals seeking a reversal of the trial court’s decision, and requesting that the case be rendered.

B.
Statement of Relevant Facts

In September 2008, B&B filed a request with the Planning Commission for the Jackson County Board of Supervisors to re-zone a parcel of property that was currently zoned R-1A, single family dwellings. B&B had previously asked for and was granted the re-zoning on the property subject of this cause of action from R-1 to R-1A in June, 2006. B&B is requesting that the property be re-zoned R-2, multi-family dwellings, in this cause of action. The property is located in a low density population area. Most of the property owners own acreage and the property in the neighborhood is open undeveloped land.

The Planning Commission considered B&B’s request as well as heard objections from the

residents, including the Appellees. Following the hearing the Planning Commission denied B&B's request unanimously.

With the Planning Commission's denial in hand, B & B Enterprises then appealed the decision of the Planning Commission to the Jackson County Board of Supervisors. The Appellees went to the noticed Board meeting for the subject property and were not allowed into the meeting room or allowed to participate in the meeting. Following a brief hearing, which did not include any testimony from the residents of the surrounding parties (they were outside of the meeting room trying to get in to voice their objection) the Board approved the request unanimously.

Appellants timely filed their Notice of Appeal and Bill of Exceptions to the Circuit Court of Jackson County, Mississippi, on March 23, 2009. After a hearing, the Circuit Court ruled that the zoning change was economic driven, and not zoning driven. The Court further ruled that there was no significant change in the neighborhood to justify a re-zoning and the decision by the Board was arbitrary and capricious.

SUMMARY OF THE ARGUMENT

The trial court's ruling and Appellant's appeal are about one issue: the court finding that the Jackson County Board of Supervisors decision to re-zone property was arbitrary and capricious and that there was not a showing by clear and convincing evidence by the Applicant, B&B Enterprises, LLC, that there was a change in the character of the neighborhood and there was not a substantial need for the re-zoning.

ARGUMENT

Standards of Review

The Mississippi Supreme Court does not sit to redetermine questions of fact. Matter of City of Horn Lake, 630 So.2d 10,19 (Miss. 1993).

Review of Questions of Law

The Supreme Court employs a de novo standard of review when passing on questions of law. G.B. "Boots" Smith Construction v. Cobb, 860 So.2d 774, 776-777 (Miss.2003) (¶ ¶ 6-7). Legal conclusions are also reviewed de novo. Andrew Jackson Life Insurance Co. v. Williams, 566 So.2d 1172, 1183-1184 (Miss. 1990).

The Court will only "entertain an appeal to determine if the Order or Judgment of the lower authority: (1) was supported by substantial evidence; (2) arbitrary or capricious; (3) was beyond the power and authority to make; or (4) violated some statutory or constitutional right of the complaining party." Rule 5.03 of the Uniform Rules of Circuit and County Court (2009). To re-zone property in Jackson County, Mississippi, the person requesting the zoning change must show "by clear and convincing evidence that either: 1) There was a mistake in the original zoning, or 2) the character of the original neighborhood has changed to such an extent to justify re-zoning and in addition to either 1 or 2 above, that a public need exist for re-zoning." Section 15 of Article VII of the Jackson County Zoning Ordinances and *City of Biloxi v. Hilbert*, 597 So.2d 1276 (Miss. 1992).

The decision of the Board should be reversed if it is 'arbitrary, capricious, discriminatory, or is illegal or without a substantial basis and such the Circuit Court only reverse such Board's decision unless the issue is not 'fairly debatable'. *Edwards v. Harrison County Bd. of Supervisors*, 22 So.3d 268, 274 (Miss. 2009). An applicant "must prove by clear and convincing evidence either that (1) there was a mistake in the original zoning, or (2) the character of the neighborhood has changed to such an extent as to justify re-zoning and that a public need exists for re-zoning." *Childs v. Hancock County Bd. of Supervisors*, 1 So.3d 855, 860 (Miss. 2009).

PROPOSITION 1

WHETHER THE DECISION OF THE JACKSON COUNTY BOARD OF SUPERVISORS GRANTING B&B ENTERPRISE'S APPLICATION TO RE-ZONE THE SUBJECT PROPERTY FROM R-1A TO R-2 WAS ARBITRARY, CAPRICIOUS, DISCRIMINATORY, ILLEGAL OR WITHOUT A SUBSTANTIAL EVIDENTIARY BASIS?

The trial court did not err in finding that the Board acted in an arbitrary and capricious manner. The Appellants argue that the Board's decision was correct because there was a change in the character in the neighborhood and a public need existed.

First, there was no change in the character of the neighborhood. The original neighborhood was zoned A-1 for single family residences, and it was re-zoned for R-1A in June, 2006. (See Record at p. 5, lines 20-24, Transcript of the Jackson County Board of Supervisors Hearing, PC#5010). The neighborhood is currently zoned for single family residences in the Dantzler Road area in the Latimer community. The re-zoning application that is the subject of the cause of this action originally requested a change to R-4, but at the hearing in front of the Board of Supervisors, the Appellees asked the property to be re-zoned to R-2. (See Record at p. 3, lines 1-10, Transcript

of the Jackson County Board of Supervisors Hearing, PC#5010). B & B Enterprises' counsel cited insurance and building costs as the reasons for the requested change in zoning. (See Record at p.3-5, lines 10+, Transcript of Jackson County Board of Supervisors Hearing, PC# 5010). These reasons do not, in any way, show a change in the character of the neighborhood. Insurance costs and building costs are completely irrelevant in the determination of whether or not to grant a re-zoning request and should not have been considered by the Board. Counsel for B & B Enterprise stated that the area that is two or three miles from the requested re-zoning is not vastly different from Sangani Boulevard. (See Record at p. 4, lines 20-25, Transcript of the Jackson County Board of Supervisors, PC #5010). The problem with that argument is that area Mr. Reed referred to is not in the same neighborhood as the subject property. According to the counsel for B&B, this area is two or three miles away from the subject property. As a result, it is not in the same neighborhood as the subject property and should not have been considered in the Board's decision. There was never any evidence presented whatsoever concerning any change in the character of the neighborhood that is the subject of this approval.

The Appellant's cite in there brief the reason for the change in the neighborhood was that there were duplexes build close to the subject property. Appellant, B&B, did not cite this as a reason to the Board in his presentation to the board. (See Record, Transcript of the Jackson County Board of Supervisors Hearing PC#5010). Further, it was stated in all the hearings that the duplexes were sitting empty and that a special exception was used to build them. There was no testimony as to how close the duplexes were to the area. Appellant, B&B, did not ask for a special exception, it asked for a re-zoning of the property. A mobile home park nearby was also cited by B&B as a reason for a change in the character of the neighborhood. The mobile home

park was zoned R-4 and not R-1 or R-1A. (See Record, p. 3, lines 12-24, Transcript of the Planning Commission Hearing PC#5010).

A resident, Ms. Wallace, also spoke at the Planning Commission meeting against the re-zoning of the subject property. (See Record at p.8, lines 17+, p. 46, lines 1-15, Transcript of Planning Commission Hearing, PC# 5010). She lived one block south of the proposed zoning change. She stated there were no trailers in the area. She stated that where the duplexes were located was across the street and you could have trailers in the area before, but not on her street. She stated the roads were terrible and there was no infrastructure to sustain a higher density level traffic. Ms. Mize stated in the same hearing that the side of Dantzler Road that is being requested to be re-zoned is all acreage. (See Record at p.8-12, lines 17+, Transcript of Planning Commission Hearing, PC# 5010). She stated that all the way down Dantzler Road to Tucker Road was nothing but acreage. The Board cites, in its brief in this matter, that one objector to the proposed re-zoning stated that her husband watched the area grow from wooded area to multiple homes. The property in the neighborhood was zoned R-1A so there could be multiple homes. That certainly would not be a change in the character of the neighborhood. The objector also stated that the trailer park that was referred to was a temporary thing (referring to the need immediately after the storm) when approved and was not suppose to be permanent, and is no longer needed. (See Record at p. 8-12, lines 17+, Transcript of Planning Commission Hearing, PC#5010). Mr. Ritch, another objector to the proposed re-zoning, stated that the multi-family dwellings were not anywhere close to where the proposed zoning changes would be. (See Record at p.16-17, lines 25+, Transcript of Planning Commission Hearing, PC# 5010). All this comes to one conclusion, there was clearly no change in the character of the neighborhood.

Counsel for B&B stated that increased traffic flow through the area is a significant change in the character of the neighborhood and was a change in the character of the neighborhood. (See Record at p.3-5, lines 10+, Transcript of Jackson County Board of Supervisors Hearing, PC# 5010). That says nothing about the change in the use of the land that is in the neighborhood. It just quantifies that there may be increased number of people driving through the area which could be for multiple reasons, and not a change in the character of the neighborhood. As Judge Krebs pointed out, the area was and still is open land and there has been no significant change in the area. (See Record at p.16-17, Transcript of Circuit Court hearing)

Second, a public need does not exist for re-zoning the property from R-1A to R-2. Simply put, the neighborhood next to the one seeking a re-zoning has 10 duplexes that are vacant. There is no need. There was nothing submitted to the Planning Commission or the Board except a statement by B&B's attorney that since Katrina there is a need for housing north of I-10. (See Record at p.3-5, lines 10+, Transcript of Jackson County Board of Supervisors Hearing, PC# 5010). His statement was a self-serving statement that was not backed up by fact or by any proof. B&B cited increased insurance cost as a reason for the public need for higher population density. B&B made absolutely no showing or proof that there was a need for additional housing, it did not provide any affidavits from people or testimony from anyone that there was a need for this type of housing or any figures from local insurance agents. There was no statements from B&B or its representative that people have approached him saying that there was a need for duplexes in this area. Duplexes would be rental properties. There is certainly not a need for new rental property in Jackson County.

The Appellant cites, in its brief, the fact that the Appellees were not in the Boardroom at the time of the hearing before the Board at the time it rendered its decision. The fact of the matter is that the Appellees were outside the boardroom, but were prevented from going into the board room to object by someone who purported to be working for the Jackson County Board of Supervisors. ((See Record at p.5-7, lines 23+, Transcript of Circuit Court hearing). To not allow the someone in the board room to object and then to use the fact that they were not present in the boardroom to object and using that as an argument why they can't further object would be akin to slapping lady justice in the face. A thorough review of the record would show that at least two of the Supervisors stated that they did not see any objectors at the hearing and based there decision on the fact that there were none present and assumed that there were no objectors. The record seems to show that the Supervisor McKay and Supervisor Barton thought that the objectors to the re-zoning did not object to the project since it was being re-zoned to R-2 instead of R-4, which was clearly not the case. (See Record at p.8-9, lines 8+, Transcript of Jackson County Board of Supervisors Hearing, PC# 5010).

PROPOSITION 2

WHETHER THE DECISION OF THE JACKSON COUNTY CIRCUIT COURT IN REVERSING THE JACKSON COUNTY BOARD OF SUPERVISORS 'FAIRLY DEBATABLE'?

Zoning decisions appealed to Circuit Court which appear to be "fairly debatable" are not to be disturbed on appeal. *City of Biloxi v. Hilbert*, 597 So.2d 1276, 1280 (Miss. 1992). A

Circuit Court's decision will be upheld if it clearly appears the decision is arbitrary, capricious, discriminatory, illegal or is not supported by substantial evidence. *Id.* The Circuit Court must look at the Jackson County Board of Supervisors decision to grant the re-zoning request and see if it clearly appears that the applicant, B&B, showed by clear and convincing evidence that there was a change in the character of the neighborhood had changed to such and extent as to justify re-zoning and a public need existed. If they didn't show that, then the Circuit Court must reverse the decision of the Board. If the issue of whether or not there has been clear and convincing evidence that character of the neighborhood has change is 'fairly debatable', then the Circuit Court shouldn't reverse the Board's decision. In the present case, B&B clearly did not meet its burden of proof of clear and convincing evidence to the Board of Supervisors. It is clear from the record that there was not clear and convincing evidence to necessitate a re-zoning of the area. The record clearly showed that there was not a change in the character of the neighborhood and the record is completely absent of clear and convincing evidence that the neighborhood had change. B&B made a number of self serving statements with no supporting evidence which did not show by clear and convincing evidence that the neighborhood had change. As a result, whether or not the Applicant, B&B, met its burden of proof is not fairly debatable and the Board's decision was arbitrary and capricious.

In sum, the Circuit Court's decision is clearly supported by the evidence in the record to find that there was no substantial change in the character in the neighborhood and that the Jackson County Board of Supervisor's decision was arbitrary and capricious. Therefore, the Mississippi Supreme Court should affirm the circuit court's ruling that the Board's decision to grant the re-zoning request was arbitrary and capricious.

CONCLUSION

Based on the foregoing arguments and the record, the Appellees maintain that the Board acted in an arbitrary and capricious manner when it granted the zone change from R-1A to R-2. It is clear that the Applicant, B&B, did not meet its burden of proof of clear and convincing evidence that the character of the neighborhood had changed or that there was a need for the change. The decision by the Jackson County Board of Supervisors was clearly arbitrary and capricious. As such, Crystal Hayes, Carol Mize and Amber Hesler respectfully request that this Court affirm the Circuit Court's decision.

Respectfully submitted, this the 26th day of October, 2010.

Crystal Hayes, Carole Mize and Amber Hesler,
Appellees

BY:


DOUGLAS L. TYNES, JR., Attorney for
Appellees

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CERTIFICATE OF SERVICE

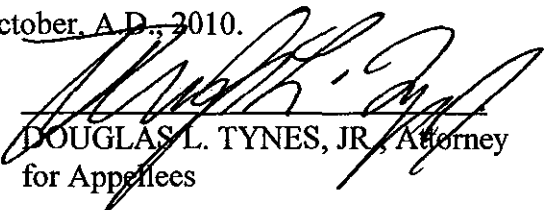
I, DOUGLAS L. TYNES, one of the attorneys for the Appellees, Crystal Hayes, Carole Mize, and Amber Hesler, do hereby certify that I have this day mailed, postage prepaid by U.S. Mail, a true and correct copy of the above and foregoing Brief of Appellee to:

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Honorable Robert P. Krebs
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Trial Court Judge

SO CERTIFIED, this the 26th day of October, A.D., 2010.


DOUGLAS L. TYNES, JR., Attorney
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