

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-CA-00274**

ROUNDSTONE DEVELOPMENT, LLC

APPELLANT

V.

**THE CITY OF NATCHEZ, MS. AND THE
MAYOR AND BOARD OF ALDERMEN
OF NATCHEZ, MS**

APPELLEES

BRIEF OF APPELLEES

Submitted by:

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CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluated possible disqualifications or recusal:

1. The City of Natchez, MS and Board of Aldermen (Appellees);
2. Everett T. Sanders, Esq., Chester Ray Jones and Sanders Law Firm (Counsel for The City of Natchez, MS and Board of Aldermen);
3. Roundstone Development, LLC (Appellant);
4. Dale Danks, Jr. , Michael V. Cory, Jr., and Danks, Miller & Cory (Counsel for Roundstone Development, LLC); and

RESPECTFULLY SUBMITTED, this the 4th day of January, 2011.

BY: _____
EVERETT T. SANDERS
Attorneys for Appellees

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STATEMENT OF ISSUES

- I. Was the City of Natchez and the Planning Commission's decisions to delay approval of Appellants site plan and subdivision applications subject to it acting on Appellant's rezoning application arbitrary, capricious, illegal or unsupported by the evidence?
- II. Was the action of the City of Natchez and the Planning Commission in denying Appellant's rezoning request arbitrary, capricious, illegal or unsupported by the evidence?
- III. Did the Appellant demonstrate that any action on the part of the City of Natchez was discriminatory in nature and was in violation of Title VIII of the Civil Rights Act of 1968?
- IV. Whether the Court below erred in denying Roundstone's Motion to Strike and Motion for a Judgment on the Pleadings?

STATEMENT OF THE CASE

Audubon Terrace, LLC submitted a Site Plan Review Application¹ signed by Clifton Phillips to the City of Natchez on August 14, 2007 and a Subdivision Application executed by Andrew Smith² seeking approval to develop the Audubon Terrace subdivision were submitted on September 2, 2007. (R 348) The development was to consist of single family rental homes for the first fifteen (15) years. At the expiration of 15 years, the homes would be offered for sale to the tenants or other individuals qualifying to purchase such property. The approximate price of these houses will be \$65,000.00 which could be financed over a thirty (30) year period. (R 329)

On February 10, 2006 Andrew Smith,² Planning Director, sent a letter to David Strange, Neighborhood Development Alliance, LLC re: Zoning Verification, Neighborhood Development Alliance, LLC, Audubon Terrace Subdivision, Phase I wherein he indicated that the permitted use for the site in which Strange had expressed an interest was zoned R-1(Single Family). (R113)

On December 21,2006 Dennis Story sent a similar letter to David Strange, Neighborhood Development Alliance, LLC re: Zoning Verification, Neighborhood Development Alliance, LLC, Audubon Terrace, LLC indicating the same zoning as Smith. (R 114)

On February 16, 2007, Captain Kenneth Mascagni executed a deed conveying his interest in parcels A, C and D to Audubon Terrace, LLC, a Mississippi Limited Liability Company and on

¹The application indicated the property involved in the proposed development had a R-1 and O-L zoning.

²Andrew Smith was the City Planner for Appellees and later went to work for Appellants in connection with the Audubon Terrace development

March 5, 2007 Henry Joseph Mascagni executed the same deed which was recorded on May 15, 2007.

The Baton Rouge Group, Inc., Noland E. Biglane and Joe Fortunato also executed a deed to Audubon Terrace, LLC, a Mississippi Limited Liability Company, which was recorded May 15, 2007, conveying their interest in certain parcels of property that are a part of the Audubon Terrace development.

On May 16, 2007 Walter Huston sent a letter to SunAmerica Housing Fund (#1509) A Nevada Limited Partnership, c/o SunAmerica Affordable Housing Partners, Inc. re: Audubon Terrace, Natchez, Mississippi (the "Project") indicating that the project had a R-1 zoning. (R 108)

On June 16, 2007, the Illinois Central Railroad conveyed to Audubon Terrace, LLC of 1800 Valley View Lane, Suite 300, Dallas, Texas a parcel of property which is part of the Audubon Terrace proposed development.

At the August 28, 2007 meeting of the Mayor and Board of Aldermen, Dennis Story, City Planner reported that the Audubon Terrace Development plans had been submitted but were incomplete and were not considered by the Site Plan Committee. He further stated that when the plans for development are submitted, they will be reviewed by the Site Plan Review Committee and then submitted to the Planning Commission. The Mayor and Board formally accepted the Petition of the residents of the Old Washington Road area objecting to the Audubon Terrace Development.(R 243)

At its' September 11, 2007 meeting, Andrew Smith appeared before the Mayor and Board of Aldermen as a courtesy and advised them that he was representing Roundstone Development, the developer of the Audubon Terrace project. He indicated that they were aware of the

opposition to the project and he had received calls in this regard. He said that an application was submitted on behalf of Roundstone Development and all concerns would be addressed by the developer. (R 71)

At its' September 20, 2007, the Planning Commission entertained the Applications for Subdivision of the land, Site Plan Review and Rezoning of the proposed Audubon Terrace Development. Andrew Smith said the position of the developer is that rezoning has not been required of other developments that are currently zoned O-L (Open Land). Mr. Smith said that to require such in this case would be an arbitrary action. Mrs. Martin said those developments were grand fathered in and the current commission is following the code. Mrs. Martin indicated that there were 84 signatures that opposed the development. Mr. Phillip, the developer, raised a question regarding whether a traffic count had been done and it was indicated that one had not occurred. After receiving public comments, the Commission voted to table consideration of the subdivision application pending a traffic study. The Commission voted to table the site plan review until the subdivision Plat is approved and the property is rezoned.(R 70)

On September 25, 2007, Mr. Story reported to the Mayor and Board of Aldermen that he sent a letter to the developer requesting the submission of a formal application for rezoning of the property. He said the information was advertised as part of the legal notice in anticipation that the application would be submitted to the planning department prior to the deadline. Mr. Story said there is a requirement of advertising fifteen (15) days prior to the public hearing. He said he did not want the developer to wait another thirty (30) days to be on the agenda. Mr Story said the application was not submitted and the rezoning was not addressed at the regular meeting of the City Planning Commission on September 18, 2007. Mr. Story indicated that he said the developer

has taken the position that since other areas in Natchez have mixed classifications, they should not be required to rezone their property.(R. 71)

At its' meeting on November 15, 2007, the Planning Commission took up the issue of rezoning the property to be included in the proposed Audubon Terrace Development and permitted representatives of the developer as well as area residents to make comments. Other than the representatives of the developers, no one spoke in favor of the rezoning. The residents expressed concerns about the development's potential for increasing crime, lowering property values, attracting renters rather than buyers, creating an over concentration of low income tenants, and increased traffic. The Commission voted unanimously not to approve the request to rezone the property from OL (Open Land) to R-1 (Single Family Residential) The Commission also voted unanimously to table consideration of the Site Plan Review and the Subdivision review pending the decision of the Mayor and Board of Aldermen regarding the rezoning of the property. (R 70)

At its' February 26,2007 meeting, the Mayor and Board of Aldermen took up the appeal of the developer of the proposed Audubon Terrace Subdivision. Counsel for the developer represented that the property did not need to be rezoned and that Roundstone Development purchased the property in reliance on the representations made by former city planners as to the property's zoning and that the City of Natchez had permitted subdivisions and commercial developments to be developed on land zoned as Open Land without the requirement of rezoning. A representative for the developer indicated that for the first 15 years of the development the residents would be tenants. After the 15 year period, individuals could purchase the houses which would likely be financed over 30 years. The houses were not subject to being purchased during

the initial 15 years. Residents representing others persons from the area where the proposed development is to be located spoke against the rezoning. They expressed concerns that the development will result in a concentration of low income tenants, forced residential segregation, an increase in crime, a decrease in property values, and a high volume of traffic among other things. There was only one area resident that spoke in favor of the development. After conducting the hearing, the Board of Aldermen voted unanimously to uphold the action of the Planning Commission. It is from this action that Appellant prosecutes this appeal.

STATEMENT OF THE ARGUMENT

Appellants purchased the property located in the City of Natchez which was classified as Residential (R-1) and Open Land (O L). The Zoning Ordinances of the City of Natchez require that open land be rezoned at the time development is sought. Appellant erroneously claims that it did have to make application to have the Open Land rezoned because they believe erroneous information provided to them by City officials.

The Planning Commission exercising its discretion, after conducting hearings denied Appellant's the rezoning request. The Mayor and Board of Aldermen after also conducting a hearing upheld the action of the Planning Commission.

Appellant failed to introduce evidence to demonstrate that Appellees actions were in any respect arbitrary, capricious, illegal or unsupported by substantial evidence.

Appellees contend that Appellant's failure to raise the claim regarding an alleged violation of the Federal Housing act in its Bill of Particulars constituted a procedural waiver.

Appellees also contend that the Court below did not abuse its discretion in denying its Motion to Strike Appellees Brief and denying it Motion for Judgment in the pleadings.

ARGUMENTS

A. APPLICABLE STANDARD OF REVIEW

Appellees submit that the standard of review in zoning cases is well settled. *In Adams v. Mayor of City of Natchez*, 964 So.2d 629,633, the Supreme Court stated, inter alia,:

In reviewing zoning cases, the appellate court is bound to the same limited standard of review exercised at the circuit court level. *Broadacres, Inc. v. Hattiesburg*, 489 So.2d 501, 503 (Miss. 1986). The Court is limited to a consideration of:

whether the action of the board or commission was arbitrary or capricious and whether it was supported by substantial evidence. *Perez v. Garden Isle Community. Ass'n*, 882 So.2d 217, 219 (Miss. 2004) (citing *Broadacres, Inc. v. City of Hattiesburg*, 489 So.2d 501, 503 (Miss. 1986)). Thus, zoning decisions will not be set aside unless clearly shown to be arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis. *Perez*, 882 So.2d at 219; *Carpenter v. City of Petal*, 699 So.2d 928, 932 (Miss.1997). . . . Where the point at issue is "fairly debatable," we will not disturb the zoning authority's action. *Perez*, 882 So.2d at 219; *Carpenter*, 699 So.2d at 932.

Drews v. City of Hattiesburg, 904 So.2d 138, 140(¶5) (Miss.2005).

B/C THE CITY OF NATCHEZ AND THE PLANNING COMMISSION'S DECISIONS TO DELAY APPROVAL OF APPELLANTS SITE PLAN AND SUBDIVISION APPLICATIONS SUBJECT TO ACTING ON APPELLANT'S REZONING APPLICATION WAS NEITHER ARBITRARY, CAPRICIOUS, ILLEGAL NOR UNSUPPORT BY THE EVIDENCES

The issues raised by Appellant in arguments A and B are factually related and both claim that the Appellees acted arbitrarily, capriciously, illegally and without substantial evidentiary support. Therefore, Appellees are going to address both issues in one argument.

Appellant contends that Planning Commission had no lawful authority to review their applications for site approval and for subdivision of the property. Appellant suggests that the Planning Commission review was ministerial and limited to rubber stamping the approval of the applications. However, Appellants offer no legal authority for this position.

Also, it is rather ostensible that Appellant feels that it is not required to seek reclassification of that portion of its property which is zoned O-L (Open Land) in order to develop its' proposed subdivision. Theses positions fly in the face of the obvious dictate of the Zoning Ordinances and Subdivision Regulations of the City of Natchez.

Appellant erroneously argues that land zoned in part O-L or Open Land and in part R-1 or "Single Family residential" are permitted uses by right and do not require a zoning action.

The charter of uses permitted indicates, *inter alia*:

- (1) Uses by right. The uses listed are permitted subject to the conditions specified.
- (2) Uses requiring planning approval. The uses listed are permitted upon approval of the location and site plan thereof by the planning commission as being appropriate with regard to transportation and access, water supply, waste disposal, fire and police protection, and other public facilities, as not causing undue traffic congestion or creating a traffic hazard, and as being in harmony with the orderly and appropriate development of the district in which the use is located (See Appendix B)

The relevant parts of the City of Natchez Zoning Ordinances provide the following:

Section IV. Residential Districts provides in relevant part as follows:

1. O-L districts: Open-land districts. These districts are composed mainly of unsubdivided lands that are vacant or in agricultural or forestry uses, with some dwellings and some accessory uses. The regulations are designed to protect the essentially open character of the districts by prohibiting the establishment of scattered uses that are unrelated to any general plan of development and that might inhibit the best future urban utilization of the land. **It is intended that land in these districts will be reclassified to its appropriate residential, commercial, and industrial category in accordance with**

amendment procedure set forth herein whenever such land is subdivided into urban building sites.

Section XV. Amendments provides the following:

Amendment Policy

1. Reason for amendment. This ordinance, including the zoning map, is based on comprehensive planning studies and is intended to carry out the objective of a sound, stable and desirable development. It is recognized that casual change or amendment of the ordinance would be detrimental to the achievement of that objective, and it is therefore declared to be the public policy to amend this ordinance only when one or more of the following conditions prevail:

- a. Error. There is a manifest error in the ordinance;
- b. Change in conditions. Changed or changing conditions in a particular area, or in the metropolitan area generally, make a change in the ordinance necessary and desirable;
- c. Increase in need for sites for business or industry. Increased or increasing needs for business or industrial sites, in addition to sites that are available, make it necessary and desirable to rezone an area or to extend the boundaries of an existing district;
- d. Subdivision of land. The subdivision or imminent subdivision of open land into urban building sites makes reclassification necessary and desirable. (See Appendix A)

It is clear that Open Land can be reclassified prior to the actual subdividing of the property. The words "imminent subdivision" would suggest that rezoning prior to reclassification is acceptable. In fact, prior reclassification would be seemingly preferable. It would serve as a buffer against a needless expenditure of funds only to have the project derailed by a zoning issue.

So, it is difficult to appreciate the merit of Appellant's position regarding the need for approval of its Site Plan and Subdivision plans since there is an overriding zoning issue at hand. Once the zoning issue is put to rest, Appellant will have a clear view of where its' project is headed.

Appellant somehow attempts to argue that the City is irrevocably linked to a piece of correspondence authored by Mr. Huston wherein he erroneously indicated that all the property involved in the Audubon Terrace development was zoned R-1 as opposed to being mixed and containing some Open Land. Notwithstanding any representations to the contrary, it is clear that City of Natchez's "Zoning Ordinance and Regulations" require that Open Land be reclassified. Mr. Huston's letter did not serve to amend or change this requirement. Appellant became aware of this mistake less than three (3) months after the date of the correspondence and certainly before Appellant submitted its' Subdivision Application. The application indicated that the land was zoned R-1 and O-L. Presumably, Mr. Smith, appellant's representative, was aware of the land's classification since he is a former City Planner.

Appellant alleges that Appellees have not required other projects to be rezoned from O-L prior to permitting development and, therefore, it was arbitrary, capricious, discriminatory and illegal to impose such a requirement on it.³ In spite of Appellant's allegations, it offered no substantive evidence to support its' contention. The record is conspicuously devoid of any evidence as to show the actual practice of Appellees with respect to projects seeking to locate on

³The Court should take judicial notice that this contention is refuted by the case of *Adams v. Mayor of City*, 964 So.2d 629 (MS2007) which involved a zoning issue relating to the City of Natchez. The Court of Appeals found in *Adams* as a matter of fact that "Appellants, a group of residents living near the property that is the subject of this zoning dispute, appeal the trial court's decision to uphold the action of the Mayor and Board of Aldermen of the City of Natchez to re-zone a parcel of real property from O-L (Open Land) to B-2 (General Business) so that the purchaser, James D. Gammill, II could relocate his business, Fat Mama's Tamales."

Open Land. It is only through looking at the recent history of how Appellees have dealt with zoning can the Court discern whether there exists a pattern that would support Appellant's allegations. The City of Natchez has been for the last 12 years rezoning property before approving site plan and division applications. (R 181 Tr.P 94 L7-11)

Even if you assume *arguendo* that developments exist on Open Lands which have not been reclassified, there is no evidence in the record offered by Appellant that would indicate when these developments occurred or how they occurred. There could be a rational explanation as to why such a variance exists. For example, the development could have been grand fathered,⁴ or, the product of annexation, or, separately constructed homes by individuals over a period of time which resulted in a *de facto* subdivisions whose classification has not changed or perhaps occurred prior to the enactment of the zoning ordinances.⁵

An allegation that a zoning decision is arbitrary, capricious, discriminatory or illegal does not raise a presumption of truthfulness as to the assertion. On the contrary, the party making the allegation has the burden of proof. In *Childs v Hancock County Board of Supervisors* 1 So.3d 855, the Supreme Court stated, *inter alia*:

When contesting a rezoning classification, the burden of proof is on "the individual or other entity asserting its invalidity." *Faircloth*, 592 So.2d at 943. This Court has held,

[A]ll presumptions must be indulged in favor of the validity of zoning ordinances. It is presumed to be reasonable and for the public good. It is presumed that the legislative body investigated it and found conditions such that the action which it

⁴Mrs. Martin, Chairman of the Planning Commission indicated the subdivisions were grandfathered. (R 47)

⁵Mrs. Mary Toes indicated that College Heights was brought into the City in the 40's or the 50's (R.131). The zoning ordinances were adopted in 1963.

took was appropriate. The one assailing the validity has the burden of proof to establish that the ordinance is invalid or arbitrary or unreasonable as to his property, and this must be by clear and convincing evidence.

Ballard v. Smith, 234 Miss. 531, 546-547, 107 So.2d 580 (Miss.1958) (citing *W.L. Holcomb, Inc. v. City of Clarksdale*, 217 Miss. 892, 65 So.2d 281 (1953) (emphasis added)

It is evident that Appellant has completely failed to satisfy its burden of establishing that the City of Natchez's actions in connection with the re-zoning of this property was in any respect arbitrary, capricious, discriminatory and illegal and therefore the appeal should be denied.

D. THE ACTION OF THE CITY OF NATCHEZ AND THE PLANNING COMMISSION IN DENYING APPELLANT'S REZONING REQUEST WAS NEITHER ARBITRARY, CAPRICIOUS, DISCRIMINATORY, ILLEGAL NOR UNSUPPORTED BY THE EVIDENCE

Appellant in this matter appealed the Planning Commission's decision to deny its rezoning application and/or recommend to the Mayor and Board of Aldermen to deny such application. Although the Appellants attempted to appeal the decision of the Planning Commission to not act on its' applications for site plan approval and division of the property, the Mayor and Board of Aldermen vote unanimously to uphold the action of the Planning Commission.

The Mayor and Board of Aldermen and the Planning Commission conducted hearings and considered the positions articulated by Appellant's representatives as well as the residents that opposed the reclassification. Appellees gave value to the Appellant's position that its' proposed development would provide housing for residents with low to moderate incomes as well as an opportunity for home ownership. Appellees gave equal consideration to residents

living near the proposed development and their representatives who filed petitions and voiced opposition to the development. They expressed concerns that the development will result in a concentration of low income tenants, forced residential segregation, an increase in crime, a decrease in property values, and a high volume of traffic among other things. There was only one area resident that spoke in favor of the development. (R.130, 131,132)

The appellate Courts have recognized the importance of citizens' comments in zoning matters. In *City of Jackson v. Aldridge*, 487 So.2d 1345, 1347 (Miss.1986) the Supreme Court stated:

“ In *Board of Alderman of Town of Bay Springs v. Jenkins*, 423 So.2d 1323 (Miss. 1982) the court further emphasized the unique role of city officials in rezoning decisions:

In rendering the municipal order, the Mayor and Board of Alderman were authorized to consider the statements expressed by all the landowners at the hearing, as well as to call upon their own common knowledge and experience in their town. It is manifest that the Mayor and Board took into consideration all statements, both sworn and unsworn, and their common knowledge and familiarity about their small community, in reaching their decision. We believe this method to be sound and practical, and courts should respect such findings unless they are arbitrary, capricious and unreasonable.

423 So.2d at 1327-1328.”

In addressing the value of public comments in zoning matters, the Court of Appeals in *Mayor and Board of Aldermen v. Estate of Lewis*, 963 So.2d 1210, 1216 (Miss.2007) said, among other things, the following:

When assessing the weight that may be given to public opposition to a petition for rezoning, we look for guidance from the Mississippi Supreme Court. In the case of *Mayor & Commissioners of Jackson v. Wheatley Place, Inc.*, 468 So.2d 81, 83 (Miss.1985), our supreme court held that substantial weight could be given to the concerns of its citizenry in determining whether a public need exists for rezoning. The court stated:

It should also be borne in mind, however, that while a duly enacted comprehensive zoning ordinance is not a true protective covenants agreement, it bears some analogy.

Purchasers of small tracts of land invest a substantial portion of their entire lifetime earnings, relying upon a zoning ordinance. Without the assurance of the zoning ordinance, such investments would not be made. On this small area they build their homes, where they expect to spend the most peaceful, restful and enjoyable hours of the day.

Zoning ordinances curb the exodus of city workers to a lot in the distant countryside. Indeed, the protection of zoning ordinances in municipalities, as opposed to no zoning in most county areas, encourage the choice of a city lot rather than a country lot for a home in the first instance. Zoning ordinances make city property more attractive to the prudent investor.

In the absence of agreement between all interested parties, an amendment to a zoning ordinance is not meant to be easy. Otherwise, it would be a meaningless scrap of paper. As former Justice Robertson noted in *City of Jackson v. Wilson*, 195 So.2d 470 (Miss.[1966]), at 473:

Homeowners are the backbone of any community. They take pride in developing and maintaining attractive homes and yards, and anything that discourages this wholesome attitude on their part hurts the community.

Wheatley Place, 468 So.2d at 83. Undoubtedly, the Mayor and Board of Aldermen gave significant weight to the testimony of the concerned homeowners regarding the rezoning of the nearby Lewis-Parker property from the residential to the commercial classification. We cannot say that giving such weight to the homeowners' testimony regarding their opposition to a nearby rezoning is error.

The decisions of the Mayor and Board of Aldermen and the Planning Commission were based on substantial evidence. Appellant has failed to demonstrate that the decisions were arbitrary, capricious, illegal or not supported by substantial evidence. The burden is on Appellant and it has failed to satisfy its burden.

E. APPELLANT HAS FAILED TO DEMONSTRATE THAT ANY ACTION ON THE PART OF THE CITY OF NATCHEZ WAS DISCRIMINATORY IN NATURE AND IN VIOLATION OF TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968

Appellants allege that denying approval of the its' site plan and request for zoning and request for re-zoning constituted a denial on rights secured to it pursuant to Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended. The Fair Housing Act does in fact protect certain classes of individuals from discrimination in the sale, rental and financing of homes. Appellant has failed to establish that Appellees discriminated against it in any respect. Also, Appellant has failed to establish that if such discrimination took place that it was because of its race, color, national origin, religion, sex or family status. The failure to establish this should result in the denial of this claim.

Appellant's claim should also be denied because it did not raise this claim before the Mayor and Board of Aldermen and it is not contained in its Bill of Exceptions. Appellant sought to raise this claim for the first time in its appeal to the Court below. (R 62-72) Therefore, it should be procedurally barred.

F. THE TRIAL COURT DID NOT ERR IN DENYING ROUNDSTONE'S MOTION TO STRIKE AND MOTION FOR A JUDGMENT ON THE PLEADINGS

Appellant argues that the Court below erred in permitting Appellees to file their brief and in denying Appellant Motion for Judgment on the Pleadings. The decision of the Court below constituted exercised its discretion in this matter. In ruling on this matter, the Court stated, *inter alia*:

“All right. Let the record show that the respondent, the defendant, the City on this appeal could have been more diligent in filing its brief. It has now been filed. The Court is careful in reviewing the situation. This is a matter where the Court does have a great deal of discretion. The law does favor deciding matter on the merits without deciding them on procedural deficiencies...The Court is going to allow the appeal to proceed as a matter of discretion...” (R.14)

Appellants cite *Transcontinental Gas Pipe Line Corp v. Rogers*, 284 S02d 304, 305 (Miss.1973) and *Lawler v. Moran*, 148 So.2d 198 (Miss.1963) These cases are inapplicable to case, *sub judice*. Both Lawler and Rogers involved situations where the party failed to filed a brief in this Court and the case was dismissed.

In this case the Court was aware of the facts involved and exercised its discretion and permitted Appellees to filed their brief. Appellees submit that this not an appealable issue and the Court should deny Appellant any relief with respect to this issue.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Mayor and Board of Aldermen.

This the 4th day of January, 2011.

Respectfully submitted,

CITY OF NATCHEZ, ET AL

BY:



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ATTORNEYS FOR APPELLEES


CERTIFICATE OF SERVICE

I, EVERETT T. SANDERS, do hereby certify that I have this day served via U.S. Mail,
postage pre-paid, a true and correct copy of the foregoing *Brief of Appellees* on:

Dale Danks, Jr., Esq.
Danks, Miller, Hamer & Cory
Post Office Box 1759
Jackson, Mississippi 39215

Honorable Forrest A. Johnson
Circuit Court Judge
Post Office Box 1372
Natchez, Mississippi 39121

This the 4th day of January, 2011.



EVERETT T. SANDERS

CITY OF NATCHEZ

ZONING ORDINANCE AND SUBDIVISION REGULATIONS

AN ORDINANCE, PURSUANT TO THE AUTHORITY GRANTED BY THE LAWS OF THE STATE OF MISSISSIPPI AND PROVISIONS OF THE CHARTER OF THE CITY OF NATCHEZ, AS AMENDED, PROVIDING FOR THE ESTABLISHMENT OF ZONING DISTRICTS WITHIN THE CORPORATE LIMITS OF THE CITY OF NATCHEZ, MISSISSIPPI, AND TO REGULATE THE HEIGHT, NUMBER OF STORIES, AND SIZE OF BUILDINGS AND OTHER STRUCTURES: THE PERCENTAGE OF LOT THAT MAY BE OCCUPIED, THE SIZE OF YARDS, COURTS AND OTHER OPEN SPACES: THE DENSITY OF POPULATION AND THE LOCATION AND USE OF BUILDINGS, STRUCTURES, AND LAND FOR TRADE, INDUSTRY, RESIDENCES AND OTHER PURPOSES.

BE IT ORDAINED BY THE MAYOR AND BOARD OF ALDERMEN OF THE CITY OF NATCHEZ IN COUNCIL CONVENED as follows:

Section I. Definitions.

For the purpose of this ordinance certain words or phrases used herein are defined as follows:

Words used in the present tense include the future tense; the singular number includes the plural; the work person includes a corporation as well as an individual; the term "shall" is mandatory; the work "used" or "occupied" as applied to any land or building shall be construed to include the words "intended, arranged or designed to be used or occupied."

Accessory Building: A subordinate building the use of which is incidental to that of the main building on the same lot.

Accessory use: A use customarily incidental and accessory to the principal use of a lot or to a building or other structure located upon the same lot with the accessory use.

Adult Arcade: An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors, or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

Adult Bookstore: An establishment which has as a substantial portion of its stock-in-trade and offers for sale for any form of consideration any one or more of the following:

- A. Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or

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- "specified anatomical areas," or
3. instruments, devices or paraphernalia which are designed for use in connection with "specified sexual activities."

Adult Cabaret: A nightclub, bar, restaurant, theater, or similar establishment which regularly feature live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities," or films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

Adult Entertainment Establishment: An adult arcade, adult bookstore, adult cabaret, adult motel, adult motion picture theater, or similar establishment which regularly features or depicts behavior which is characterized by the exposure of "specified anatomical areas" or where any employee, operator of owner exposes his/her "specified anatomical areas" for viewing by patrons.

Adult Motel: A motel or similar establishment which includes the word "adult" in any name it uses or otherwise advertises the presentation of adult material, offering public accommodations for any form of consideration which provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities: or specified anatomical areas."

Adult Motion Picture Theater: An establishment where, for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which is characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

Boardinghouse: A building where, for compensation and by prearrangement, five (5) or more persons other than occasional or transient customers are provided with meals.

Building: Any structure having a roof and intended for the shelter, housing, or enclosure of persons, animals, or chattels.

Casino: A structure in which legalized gaming is conducted and regulated by the State of Mississippi.

Dwelling: A building used as the living quarters for one or more families.

Dwelling, one-family: A detached building used exclusively by one family.

Dwelling, two-family: A building used exclusively by two (2) families living independently of each other.

Dwelling, multiple-family: A building used as a residence for three (3) or more families living independently of each other; the term includes apartment house, apartment hotel, flats, and group houses.

Family: One or more persons living together as a single housekeeping unit, which may include not more than four (4) lodgers or boarders.

Gambling/Gaming: As defined by Mississippi Code Annotated, Section 75-76-(L) (1991) and amendments made thereto.

Garage, public: Any garage other than a private garage, available to the public, operated for gain, and which is used for storage, repair, rental, greasing, washing, servicing, adjusting or equipping of automobiles, or other motor vehicles.

Gross Floor Area: The total area of a structure measured by taking the outside dimensions of the structure at each floor level intended for occupancy, storage or mechanical systems.

Guesthouse: A building in which overnight accommodations are provided or offered for transient guests for compensation; the term includes tourist home.

Home occupation: An occupation for gain or support conducted only by members of a family residing in a dwelling and conducted entirely within the dwelling, provided that no article is sold or offered for sale except such as may be produced by members of the family residing in the dwelling, and further provided that the occupation is incidental to the residential use of the premises and does not utilize more than twenty-five per cent (25%) of the floor area of the dwelling. Home occupations shall include, in general, personal services, such as are furnished by a physician, dentist, musician, artist, beauty operator, or seamstress when performed by the person occupying the building as his or her private dwelling, and not including the employment of any additional persons in the performance of such services.

Hotel: A building containing six (6) or more rooms to be used as the more or less temporary abiding place of guests who are lodged with or without meals and in which no provision is made for cooking in any individual room or suite.

Lot: A parcel of land occupied to be occupied by a building and its accessory buildings or uses or by a group housing project together with such open spaces or yards as are required by this ordinance.

Lot of record: A lot which is part of a subdivision, the map of which has been recorded in the Chancery Court of Adams County,

Mississippi, or a lot described by metes and bounds, the description of which has been recorded in the Chancery Court of Adams County, Mississippi.

Mean High Water Line: As defined by the US Army Corps of Engineers.

Recreational Vehicular: A vehicular, portable structure built on a chasis, designed to be used as a temporary occupancy for travel, recreation or vacation uses. Travel trailer, motor-home, camping trailer, and pickup coach are deemed synonymous with recreational vehicle.

Rooming house: A building, other than a hotel, where, for compensation and by prearrangement, five (5) or more persons other than occasional or transient customers are provided with lodging.

Specified Anatomical Areas: Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or less than 50% of the female breast below a point immediately above the top of the areolae; or human male genitals in a discernible turgid state even if completely and opaquely covered.

Specified Sexual Activity: Human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, or sodomy; fondling or other erotic touching of human genitals, pubic regions, buttocks or female breasts; flagellation or torture in the context of a sexual relationship; masochism, erotic touching, fondling or other such contact with an animal by a human being; or human exertion, urination, menstration, vaginal or anal irrigation as part of or in connection with any of the activities set forth in this section.

Tourist Court: A group of attached or detached buildings containing individual sleeping or living units, designed for or used temporarily by automobile tourists or transients, with garage attached or parking space provided; the term includes auto court, motel, motor lodge, and cabin court.

Valet Parking: A method of parking in which a patron, upon reaching his/her destination, permits a designated employee(s) of the destination business to transport and store the patron's vehicle at a remote, possibly off-site, location. The vehicle is then returned to the patron upon demand by the designated employee(s) of the subject business. Said vehicles may be parked in tandem (stacked).

Vessel: A craft for traveling on water; a ship or a boat.

Yard, front: An open unoccupied space on the same lot with a main building, extending the full width of the lot and situated between the street line and the front line of the building projected to the sidelines of the lot. The depth of the front yard shall be measured between the front line of the building and the

- contain at least eight (8) acres of gross area; provided, however, that a proposed S-3 district which would abut an existing B-1, B-2, or I-1 district shall be exempt from any requirement of minimum size; provided, further, that a proposed B-2 district shall be exempt from any requirements of minimum size;
- (2) B-1 districts. A proposed new B-1 district shall contain at least two (2) acres of gross area; provided, however, that a proposed B-1 district which would abut an existing B-2 or I-1 district shall be exempt from any requirements of minimum size;
- (3) Need for uses. No amendment creating a business or industry classification of an area shall be adopted unless there is a clear and demonstrated need in the area for those uses permitted in the proposed district.

Amendment Procedure

1. **By whom initiated.** Amendments to this ordinance may be initiated by the city council [mayor and board of aldermen] on its own motion or by the planning commission; amendments may also be initiated by any person, firm or corporation by filing a written application therefor with the planning commission.

2. **Amendment application.** An application for amendment to this ordinance shall contain at least the following:

- a. **Interest and ownership.** The applicant's name, address, and interest in the application, and the name, address, and interest of every person, firm or corporation represented by the applicant in the application, the name of the owner or owners of the entire land area to be included within the proposed district, the owner or owners of all structures then existing thereon and all incumbrances of such land area and structures, and additionally, sufficient evidence to establish that the applicants have the right of possession to the land area and structures, and intend actually to develop the designated area; and the names and addresses of all owners of adjacent property;
- b. **Plot plan.** If the proposed amendment would require a change in the zoning map, a plot plan showing the land area which would be affected, easements bounding and intersecting the designated area, the locations of existing and proposed structures with supporting open facilities, and the ground area to be provided and continuously maintained for the proposed structure or structures;
- c. **Development schedule.** The time schedule for the beginning and completion of development planned by

the board a written notice of appeal specifying the decision from which such appeal is taken.

2. Transcript of proceedings. Upon receiving notice of appeal, the board shall transmit to the council [mayor and board of aldermen] a certified copy of the proceedings in the case upon which the appeal is taken, and the issue shall be tried in the council [mayor and board of aldermen] solely on the question of whether the board has acted beyond the limits of its powers or abused its discretion. (Ord. of 5-23-67, § 1)

Section XV. Amendments

Amendment Policy

1. **Reason for amendment.** This ordinance, including the zoning map, is based on comprehensive planning studies and is intended to carry out the objective of a sound, stable and desirable development. It is recognized that casual change or amendment of the ordinance would be detrimental to the achievement of that objective, and it is therefore declared to be the public policy to amend this ordinance only when one or more of the following conditions prevail:

- a. Error. There is a manifest error in the ordinance:
- b. Change in conditions. Changed or changing conditions in a particular area, or in the metropolitan area generally, make a change in the ordinance necessary and desirable;
- c. Increase in need for sites for business or industry. Increased or increasing needs for business or industrial sites, in addition to sites that are available, make it necessary and desirable to rezone an area or to extend the boundaries of an existing district;
- d. Subdivision of land. The subdivision or imminent subdivision of open land into urban building sites makes reclassification necessary and desirable.

2. **Limitations on proposed amendments.** All proposed amendments to this ordinance shall be subject to the following limitations:

- a. Minimum sizes for new districts. No amendment changing that classification of an area shall be adopted unless the area meets the following requirements as to minimum size:
 - (1) R-2, R-3, B-2 and I-1 districts. A proposed new R-2, R-3, B-2 or I-1 district shall

hereafter be used or occupied and no building or part thereof shall be erected, moved, or altered unless in conformity with the regulations herein specified for the district in which it is located.

No building shall hereafter be erected or altered to exceed the height, to accommodate or house a greater number of families, or to have narrower or smaller front, side, and rear yards than are specified for the district in which such building is located.

No part of a yard required about any building for the purpose of complying with the provisions of this ordinance shall be included as a part of a yard similarly required for another building.

Every use, unless expressly exempted by this ordinance, shall be operated entirely within a completely enclosed structure.

Section IV. Residential districts.

1. **O-L districts: Open-land districts.** These districts are composed mainly of unsubdivided lands that are vacant or in agricultural or forestry uses, with some dwellings and some accessory uses. The regulations are designed to protect the essentially open character of the districts by prohibiting the establishment of scattered uses that are unrelated to any general plan of development and that might inhibit the best future urban utilization of the land. It is intended that land in these districts will be reclassified to its appropriate residential, commercial, and industrial category in accordance with the amendment procedure set forth herein whenever such land is subdivided into urban building sites.

- a. Uses permitted. See chart of uses permitted, (Editor's note -- The chart of uses permitted referred to above is on file in the office of the city clerk) which chart is hereto attached to this ordinance, marked exhibit "A" and made a part of this ordinance for all purposes.
- b. Required lot area. Except as provided in Section VIII, the minimum lot area shall be:

For a one-family dwelling	7,200 square feet
For any other permitted use	10,000 square feet
- c. Building height limit. Except as provided in Section VIII, no structure shall be designed, erected, or altered to exceed thirty-five (35) feet.
- d. Yards required. Except as provided in section VIII, the minimum dimensions of yards shall be:

EXHIBIT A

Chart of uses permitted under 1963—Zoning Ordinance of the City of Natchez, Mississippi, as amended to which this chart of uses permitted is attached to said zoning ordinance, marked as Exhibit "A" and made a part thereof for all purposes thereto.

CHARTER OF USES PERMITTED

The uses permitted in each of the types of districts are listed in this charter in three (3) categories, as follows:

- (1) *Uses by right.* The uses listed are permitted subject to the conditions specified.
- (2) *Uses requiring planning approval.* The uses listed are permitted upon approval of the location and site plan thereof by the planning commission as being appropriate with regard to transportation and access, water supply, waste disposal, fire and police protection, and other public facilities, as not causing undue traffic congestion or creating a traffic hazard, and as being in harmony with the orderly and appropriate development of the district in which the use is located.
- (3) *Special exception uses.* The uses listed are subject to the same approval of location and site plan as uses requiring planning approval, in addition, these uses are declared to possess such characteristics of unique or special form that each specific use shall be considered an individual case and shall be subject to approval of the board of adjustment in accordance with the provisions of section XIV governing special exceptions.

Appendix B