

**SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS
NO. 2010-CA-00274-COA**

ROUNDSTONE DEVELOPMENT, LLC

APPELLANT

V.

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

APPELLEES

APPEAL FROM CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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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 evaluate possible disqualifications or recusal:

1. Roundstone Development, LLC (Appellant);
2. Dale Danks, Jr., Michael V. Cory, Jr., and Danks, Miller & Cory (Counsel for Roundstone Development, LLC);
3. The City of Natchez, MS (Appellee);
4. Everett Sanders, Chester Jones and Sanders Law Firm (Counsel for the City of Natchez, MS and Board of Alderman); and
6. Honorable Forrest Johnson (the "Circuit Court") (Adams County Circuit Court Judge).

RESPECTFULLY SUBMITTED, this the 18TH day of February, 2011.

DANKS, MILLER & CORY

By: _____

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Michael V. Cory, Jr.

Attorneys for Roundstone Development, LLC

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APPELLANT'S REPLY BRIEF

In reviewing the Brief filed by the City of Natchez, the City of Natchez does not even attempt to dispute most of the underlying facts that were set out by Roundstone. After reviewing the Brief of the City of Natchez, the following facts appear to be uncontroverted and undisputed:

1. The City of Natchez has a long recognized need for quality affordable housing.
2. Part of the land where Roundstone was going to build the Audubon Terrace subdivision was zoned R1 (single family residential).
3. Part of the land where Roundstone was going to build the Audubon Terrace subdivision was zoned O-L (Open Land).
4. The O-L classification is an infrequently seen zoning classification which is essentially a “stop-gap measure to provide parameters for seldom used properties until a final land use determination is made.”
5. O-L zoned land consists mainly of unsubdivided lands but expressly permits single family dwellings as a “use by right.”
6. The Zoning Ordinance adopted by the City of Natchez specifically provides “[i]t is intended that . . . [O-L zoned land] will be reclassified to its appropriate residential, commercial, and industrial category . . . whenever such land is subdivided into urban building sites.”
7. The City of Natchez previously allowed residential subdivisions to be developed in land O-L zoned without requiring that the land be re-zoned.
8. When Roundstone made the decision to buy the land, Roundstone relied on the three different written representations by the City of Natchez that the location of the proposed

subdivision was zoned properly, and that “there are no violations of zoning law, or non-conforming uses and the Project is in compliance with all applicable zoning laws, ordinances and regulations (including, without limitation, all those establishing or relating to parking requirements).”

9. The proposed Audubon Terrace Subdivision met all of the development requirements of the City of Natchez, and was consistent with its Comprehensive Plan.

10. In refusing to approve the site plan and subdivision plat, the Planning Commission relied on an alleged requirement in a draft version of a proposed, but not yet adopted, New Development Code for the City of Natchez.

11. No representative of the City of Natchez argued that the site plan and subdivision plat itself was deficient or that it did not meet any specific requirement.

12. The Planning and Engineering department studied the traffic situation and issued a written report finding that there would be no significant increased traffic problem.

13. Representatives of the City of Natchez acknowledged that the development was “a very good project” and that this type of subdivision “doesn’t have a detrimental effect on neighborhoods.”

14. At the time the City of Natchez voted to block the Audubon Terrace subdivision, the City of Natchez understood that it met “all of the obligations.”

15. The area surrounding the proposed development was residential in nature and consisted primarily of R-1 zoned land.

16. The proper zoning classification for the land was R-1.

17. Census tracts show that the people living in the area of the proposed Audubon Terrace

subdivision were actually at a lower socioeconomic level than the requirements for residents in the proposed development.

18. The Planning Commission in approving or denying subdivision plats operates “strictly by code” and as such can either “uphold the code, or you can choose to ignore the code . . . [b]ut there is no leeway.”

I. THE CITY OF NATCHEZ IMPROPERLY DENIED APPROVAL OF THE SITE PLAN AND SUBDIVISION PLAT

Roundstone has argued that the City of Natchez did not follow its own requirements that allowed O-L zoned land to be subdivided prior to any rezoning. Roundstone also argued that it is undisputed that the City of Natchez in practice had allowed O-L zoned land to be subdivided and developed without first being rezoned. In response to this argument, the City of Natchez essentially says that it does not know how these other O-L zoned subdivisions got there. The only attempt to explain these apparently mysterious subdivisions is some speculation that they may have been “grandfathered in.” But aside from being nothing but speculation, the problem is that the City of Natchez is unable to point to any ordinance these other O-L subdivisions were actually grandfathered in under. As a practical matter this speculation is not evidence of anything. The only evidence is that the City of Natchez arbitrarily and capriciously chose to impose a different set of requirements for approval of the proposed subdivision in this particular case.

Roundstone has proven that the City of Natchez’s Zoning Ordinance does not require a rezoning before an otherwise appropriate site plan and subdivision plat could be approved. In Response to this argument, the City of Natchez contends that (despite the existence of other residential subdivisions in O-L zoned land) there is a specific requirement that O-L zoned land must

be rezoned to R1 before an otherwise proper site plan and subdivision plat could be approved. However, the City of Natchez does not point this Court to any ordinance which imposes such a requirement. Instead, they refer the Court to the portion of the Natchez Zoning Ordinance which does nothing more than state that it is intended for O-L zoned land to be reclassified to residential, commercial or industrial whenever such land is subdivided into urban building sites. A reasonable reading of this provision leads to the conclusion that rezoning is not an actual requirement, and that it does not have to occur before the land is subdivided. The words “require” and “before” are nowhere to be found. Instead you have the words “intended” and “whenever such land is subdivided”. The interpretation suggested by Roundstone is also consistent with the fact that there are actually other residential subdivisions in O-L zoned land in the City of Natchez.

The interpretation suggested by Roundstone is also supported by that part of the Zoning Ordinance quoted by the City of Natchez in its Brief which states that it is the “public policy” of the City of Natchez, and it is “necessary and desirable,” to reclassify open land when it has been subdivided or when subdivision is imminent. Despite the fact that rezoning has not always been done even though it is “necessary and desirable,” the City of Natchez refused both to approve the subdivision, and to reclassify the land to its appropriate classification.

The problem with the argument made by the City of Natchez is that it is circular. The City of Natchez agrees that single family residential is a “use by right” under the O-L zoning classification. This is why the three different city officials said in writing that the proposed subdivision fully complied with all City of Natchez requirements. The City of Natchez agrees that the adjoining land is already zoned R1. The City of Natchez does not even argue that the proper classification for the land in question is actually R-1. Yet, at the last minute the City of Natchez tells

Roundstone that the subdivision will not be approved until after all the land it is going to be build on is zoned R-1. Then when Roundstone applies for the rezoning, the City of Natchez denied the rezoning request. As a result of this action, Roundstone has been prevented from using its land in a way that is expressly authorized and contemplated under both the O-L and R-1 zoning classifications. Or stated differently, the land is now in land purgatory.

For these reasons alone, this Court must Reverse the decision of the City of Natchez, and render a decision rezoning the land to R1 and directing that the City of Natchez immediately approve the site plan and subdivision plat.

II. THE CITY OF NATCHEZ IMPROPERLY DENIED THE REZONING REQUEST

Roundstone has also argued that the City of Natchez did not have a legal basis for denying the rezoning request. The City of Natchez responds in its Brief that the denial was appropriate. But a review of the Brief filed by the City of Natchez shows that the primary reason for denying the request was not that the requested rezoning was actually improper. Rather it was because there were lots of people who apparently opposed the subdivision. The City of Natchez seems to half heartedly suggest that its actions were necessary because the proposed development would lower property values, attract renters, and create and concentration of low income tenants. However, none of these claims is actually supported by any credible evidence or documentation. Moreover, the reasons given by those who spoke in opposition to the rezoning can be fairly characterized as being nothing more than generalizations, unsupported innuendo, and unscientific stereotyping. Accordingly, the City of Natchez has completely failed to make the required showing of a lawful basis for its actions in this case.

As this Court is well aware, in this case the land must be reclassified to R-1 if Roundstone proved that “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.” *Town of Florence v. Sea Lands, Ltd.*, 759 So.2d 1221, 1223 (Miss. 2000); *McWaters v. City of Biloxi*, 591 So.2d 824, 827-28 (Miss. 1991). Roundstone more than met its burden. There is no dispute that part of the Roundstone land itself was already zoned R-1. There is no dispute that the surrounding area was primarily residential. There is no dispute that R-1 was actually the proper classification for the land. There is also no dispute that a substantial public need existed for both the rezoning and the affordable housing that was to be provided there. Therefore, the clear and convincing evidence (and again the only evidence in the record) is that the rezoning was both “justified,” and accompanied by a recognized “public need.” As a result, it is painfully clear that the sole reason the rezoning was first required, and then denied, was because it was the only way to stop the imagined evils, and unwanted people, that this particular subdivision would purportedly bring. For these reasons, the actions take by the City of Natchez were arbitrary, capricious, illegal, discriminatory, and unsupported by the evidence.

The City of Natchez also failed to respond to the assertion by Roundstone that the actions by the City of Natchez rise to the level of a taking. In the case of *Walters v. City of Greenville*, 751 So.2d 1206, 1210 (Miss. Ct. App. 1999), the Court of Appeals looked to federal case law for the definition of an improper taking. An improper taking was defined as “a taking of property when government action directly interferes with or substantially disturbs the owner’s use and enjoyment of the property.” The Court of Appeals appeared to agree that “[a] taking is effected if the application of a zoning law denies the property owner of economically viable use of his land. This can consist of the best use of the land or extinguishing a fundamental attribute of ownership.” *Id.*

In Roundstone's case the undisputed evidence is that the arbitrary application of the zoning law has in fact denied and deprived Roundstone of the use and economic benefits of its land. For these reasons as well, this Court must reverse and render the decisions by the City of Natchez.

III. THE ACTIONS TAKEN BY THE CITY OF NATCHEZ WERE ILLEGAL, DISCRIMINATORY, AND WERE IN VIOLATION OF TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968

Roundstone argued in its Brief that improper discrimination was the real underlying reason for the improper actions taken by the City of Natchez. This assertion is based on the fact that nobody on behalf of the City of Natchez is on record saying that there was actually a problem with the Audubon Terrace Site Plan and Subdivision Plat. Nobody is on record stating a specific reason why the requested rezoning was not appropriate. Instead the City of Natchez just argues very generally that Roundstone has not met its burden, and that the decision was not arbitrary and capricious. But the problem with this is that the real reasons that the City of Natchez acted as it did were not well concealed. The record contains numerous statements that include improper and irrelevant inferences implicating racial, class and social stereotypes. The combination of these irrelevant stereotypes and the absence of any legitimate reasons for the actions that were actually taken leads to the conclusion that the underlying motivation was discriminatory and a violation of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, which prohibits discrimination in the sale, rental, and financing of dwellings, or otherwise making unavailable or denying of a dwelling based on race, color, national origin, religion, sex, and family status. *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 531 (5th Cir. 1996); *U.S. v. Pelzer Realty Co., Inc.* 484 F.2d 438, 440 (5th Cir. 1973); and *Arlington Height v. Metropolitan Housing Dev. Corp.*, 429 U.S 252, 261-62, 97 S.Ct. 555 (1977)(explaining that a developer has standing to challenge discriminatory zoning decision).

The United States Supreme Court in the *Arlington Height* case stated that a claim of improper discrimination does not require proof “that the challenged action rested solely on racially discriminatory purposes” and that “[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.” *Id.*, at 563-64. In this decision the Supreme Court also cited favorably in a footnote to the case of *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970). In *Dailey*, the plaintiffs had planned to build low-income housing on a site that they had purchased. But the City refused to issue a building permit without a the developer first obtaining a rezoning to R-4. However, when the application was submitted the city refused to rezone the land to R-4. The surrounding area was all zoned R-4. Both the present and the former planning director for the city testified that there was no reason “from a zoning standpoint” why the land should not be classified R-4. As a result the 10th Circuit Court of Appeals found that there was an improper racial motivation. *Id.*, at 1040.

The facts in the case involving Roundstone are more than similar enough to the reasoning in *Dailey* warrant a similar finding that improper considerations were involved in the actions taken by the City of Natchez. Three city planners said that nothing else needed to be done. Yet, extra steps were added to the process. The requested rezoning should have been as automatic as a rezoning request gets. Yet the request was ultimately denied without even a whisper that any requirement had not been met. And there was a repeated expressed concern about the “type” of people that would be living in this “glorified Hud subdivision” (RE0013). For all of these reasons as well, this Court must reverse and render the decision by the City of Natchez to deny the re-zoning request and award attorney fees and expenses to Roundstone.

IV. THE CIRCUIT COURT ERRED IN DENYING BOTH ROUNDSTONE'S MOTION TO STRIKE AND MOTION FOR A JUDGMENT ON THE PLEADINGS

Finally, Roundstone argued in its Brief that the trial court erred in considering the untimely filed Appellee's Brief, and in failing to enter a judgement in favor of Roundstone on the pleadings. In response to this assertion of error, the City of Natchez simply says that this was well within the discretion of the trial court. However, it is the position of Roundstone that this was an abuse of discretion under the circumstances.

The Brief of the City of Natchez was originally due on or before March 2, 2009. This date was ignored. On March 13, 2009 the City of Natchez filed an out of time Motion for Enlargement of Time asking that it be given until April 2, 2009 to file it's Brief. No order was ever entered on this Motion. April 2, 2009, came and went without the City of Natchez filing a brief. Thereafter on June 4, 2009, Roundstone filed a Motion for Judgment on the Pleadings. Twenty one days later on June 25, 2009 the City of Natchez filed another out of time Motion For Enlargement Of Time stating only that Counsel has been unable to complete his Brief in time but anticipates completing the same by July 15, 2009. Despite the fact that there was a pending motion for a Judgment on the Pleadings, and despite the fact that the motion for time was filed out of time on two occasions, the Circuit Court on June 29, 2009, entered an Order granting the City of Natchez's motion. Despite the apparent reprieve, the City of Natchez did not get around to filing its Brief until July 24, 2009.

At a minimum, the circuit court abused its discretion by not following Rule 26(b) of the Mississippi Rules of Appellate Procedure or Rule 6(b) of the Mississippi Rules of Civil Procedure. First, Rule 26(b) provides that "good cause" must be shown in order for the Court to "permit an act to be done after the expiration of such time. . . ." The burden of establishing good cause rests

squarely with the party who is asking for relief. [cite]. The City of Natchez did not show good cause. Next, Rule 6(b) provides that time may only be enlarged after the expiration of the period when the "failure to act was the result of excusable neglect." Again, the burden of showing excusable neglect rest on the City of Natchez. And again, the City of Natchez did not show excusable neglect.

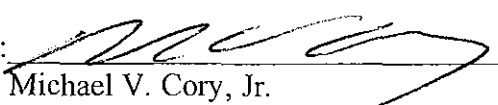
In *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 147 (Miss. 1994), the Mississippi Supreme Court stated that where a party made no showing of cause or excusable neglect for the late filing of affidavits in response to a motion for summary judgment, the trial court had no choice but to strike the untimely filing. Likewise in this case, the City of Natchez made no showing of cause or excusable neglect. Instead, the record shows what can only be described as being a complete disregard of the applicable Rules. For all of these reasons the trial court abused its discretion. Therefore, this Court must reverse the decision of the trial court and render a judgment on the pleadings in favor of Roundstone.

V. CONCLUSION

Roundstone has demonstrated that there was no legitimate basis for refusing to approve the site plan and subdivision plat, and for refusing to approve the rezoning request. Roundstone has further proven by clear and convincing evidence that the City of Natchez acted in an arbitrary and capricious manner. For these reasons this Court must reverse and render the wrongful actions.

RESPECTFULLY SUBMITTED, this the 18th day of February, 2011.

By:


Michael V. Cory, Jr.

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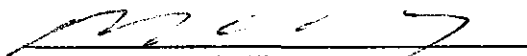
CERTIFICATE OF SERVICE

I, Michael V. Cory, Jr., do hereby certify that I have this day mailed, via First Class United States Postal Service, a true and correct copy of the above and foregoing to:

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Honorable Forrest A. Johnson
Adams County Circuit Court
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THIS, the 22nd day of February, 2011.


DALE DANKS, JR.
MICHAEL V. CORY, JR.