

**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**

**APPEAL FROM CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI**

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**BRIEF OF APPELLANT**

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**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 30<sup>TH</sup> day of September, 2010.

DANKS, MILLER & CORY

By: \_\_\_\_\_

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## **STATEMENT OF THE ISSUES**

1. Was the refusal by the City of Natchez to approve the site and subdivision plan for the proposed Audubon Terrace Subdivision arbitrary, capricious, discriminatory, illegal, unreasonable, not fairly debatable and/or unsupported by substantial evidence?
2. Was the refusal requirement by the City of Natchez to approve the site plan and subdivision plat until the land was first re-zoned arbitrary, capricious, discriminatory, illegal, and/or unreasonable?
3. Was the denial of request for re-zoning by the City of Natchez arbitrary, capricious, discriminatory, illegal, unreasonable, not fairly debatable, not supported by the substantial evidence and/or the equivalent of an improper taking?
4. Were the actions of the City of Natchez motivated by an improper discriminatory intent?
5. Did the circuit court commit reversible error when it denied the Appellant's Motions To Strike and For Judgment on the Pleadings which were filed in response to the failure by the City of Natchez to timely file its Brief?

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This is an appeal from an improper denial by the Mayor and Board of Aldermen of the City of Natchez, Mississippi, and its Planning Commission (collectively referred to hereafter as the "City of Natchez") of requests for site plan and subdivision plat approval as well as requests for re-zoning. In this case, the actions of the City of Natchez were grossly arbitrary and capricious. As a result, the Appellant, Roundstone Development, LLC ("Roundstone"), has been denied the lawful use of its property.

Roundstone first appealed the wrongful and illegal actions of the City of Natchez to the Circuit Court of Adams County. When the Circuit Court of Adams County affirmed the actions of the City of Natchez without explanation in a one page order dated June 17, 2010, Roundstone timely perfected this appeal. [R p. 496; RE p. 0082].

## **B. STATEMENT OF THE FACTS**

1. Audubon Terrace was a proposed residential subdivision consisting of 65 high quality single-family homes to be located on the north side of Old Washington Road at Lafayette Street in Natchez, Mississippi. The subdivision included, among other things, a community center, recreational facilities, and swimming pool. [R pp. 205-207; RE pp. 0028-0030].

2. The proposed Audubon Terrace subdivision was to be financed in part through a tax credit program administered through the Mississippi Home Corporation ("MHC"). The MHC was established by the Legislature following a report in 1988 from a statewide Housing Task Force that had recommended that the State create a hub agency for housing. The MHC is specifically charged with working to provide safe, decent and affordable housing to all Mississippians. [R pp. 212-214, 212-219, 267- 271, 292-300; RE pp. 0031-0033, 0031-0038, 0039-0043, 0045-0053].

3. The MHC requires that all homes it supports through tax credits be attractive high quality homes that fit in well in the surrounding area. To ensure that the developments are properly maintained, and remain a vibrant and attractive part of the surrounding neighborhood, the MHC periodically performs site inspections. The MHC also retains the authority to fine developers in order to ensure that the each development is properly maintained. [R pp. 191, 212-214, 212-219, 267- 271, 292-300, 328; RE pp. 0031-0033, 0031-0038, 0039-0043, 0045-0053, 0059]. The MHC also requires its developers to provide services such as budget counseling, classes on the

responsibilities of home ownership, and credit counseling to residents in order to prepare them for purchasing their homes.

4. The specific MHC program that Audubon Terrace was to be built under provided for a lease-purchase development where the homes would be leased to the prospective homeowner for a period of 15 years. At the end of this 15 year period, the residents would have the opportunity to purchase their home outright at a discounted price. [R p. 268; RE p. 0040].

5. Roundstone has successfully developed and leased similar tax credit developments in Carthage, Greenwood, Greenville, Indianola, Gautier, Yazoo City and Cleveland. Under the supervision of the MHC, numerous other developers have successfully constructed these type of tax credit developments and provided thousands of high quality affordable houses throughout the State. [R pp. 267-272, 293, 295, 301-302; RE pp. 0039-0044, 0046, 0048, 0054-0055]

6. The City of Natchez has a long recognized need for quality affordable housing. [ R pp. 169, 177, 194-195, 324, 331, 334; RE pp. 0018, 0022, 0058, 0062, 0065].

7. Part of the land where the proposed Audubon Terrace subdivision was to be built was zoned O-L (Open Land), and part of the land was zoned R-1 (Single Family Residential). The O-L classification is a somewhat unique and infrequently seen zoning classification. *Adams v. Mayor and Board of Aldermen of City of Natchez*, 964 So.2d 629, 631 (Miss. App. 2007)(explaining that Open Land classification is essentially a “stop-gap measure to provide parameters for seldom used properties until a final land use determination is made”). O-L zoned land consists mainly of unsubdivided lands but expressly permits single family dwellings as a matter of right. [R pp. 383-390; RE pp. 0068-0075]. The O-L zoning classification is specifically designed to protect the establishment of scattered uses that are unrelated to any general plan of development.



8. With respect to the O-L classification, the City of Natchez's zoning ordinance specifically states that "[i]t is intended that land in these districts will be reclassified to its appropriate residential, commercial, and industrial category . . . whenever such land is subdivided into urban building sites." [R p. 383; RE p. 0068]. Because the zoning ordinance does not require a re-zoning before the land is subdivided, the City of Natchez had previously allowed subdivisions to be developed in land zoned O-L without first requiring that the land be re-zoned. [R pp. 307, 388-390; RE pp. 0056, 0073-0075].

9. Before Roundstone made the decision to purchase the site for the proposed Audubon Terrace Subdivision, Roundstone and its lender were provided with three different letters from the City of Natchez which confirmed that the location of the subdivision was properly zoned for the anticipated use, 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)." [R pp. 108, 113, 114; RE pp. 0003, 0004, 0005]. These letters not only demonstrate conclusively that the proposed subdivision complied with all City of Natchez requirements, but also that the proposed subdivision was effectively torpedoed through the subsequent improper, arbitrary and illegal considerations and actions of the City of Natchez.

10. At no point in any hearing proceeding did the City of Natchez that the proposed Audubon Terrace Subdivision did not meet the City of Natchez's development requirements; or that it was consistent with the City's adopted Comprehensive Plan. Nevertheless, the City of Natchez and its Planning Commission improperly delayed the development for as long as possible before ultimately blocking it completely.

11. After Roundstone moved forward with its purchase of the land for the proposed subdivision, Roundstone appeared before the Site Plan Review Committee on September 12, 2007. During this meeting, the Site Plan Review Committee approved the Audubon Terrace site plan and subdivision plat. [R pp. 119-120; RE pp. 0006-0007].

12. Eight days later on September 20, 2007, Roundstone appeared at the regularly scheduled Planning Commission meeting seeking formal approval of the site plan and subdivision plat. At this meeting, the Planning Commission declined to follow the recommendation of its Site Plan Review Committee. Instead of approving the site plan and subdivision plat, the Planning Commission intentionally and arbitrarily delayed the development stating that the land had to be re-zoned to R-1 before the site plan and subdivision plat would be approved. [R pp. 140-141; RE pp. 0015-0016].

13. The Planning Commission's action in demanding a re-zoning was directly contrary to the existing zoning ordinance. Not only was there no requirement that O-L zoned land be re-zoned before site plan and subdivision plat approval, the City of Natchez's ordinance expressly states that it is intended that the land is to be re-zoned only after it is subdivided into its appropriate use. [R p. 383; RE p. 0068].

14. The Planning Commission also imposed this arbitrary re-zoning hurdle despite the fact that there were four areas in the community with mixed zoning classifications no different than Audubon Terrace and despite the fact that single family subdivisions were permitted by right on land zoned O-L. [R p. 389; RE p. 0074]. Furthermore, the action was illegal, arbitrary and capricious because the Planning Commission was specifically relying on an alleged requirement in a draft version of a proposed, but not yet adopted, New Development Code for the City of Natchez. [R pp.

307, 334 RE pp. 0056, 0065].<sup>1</sup>

15. Also at this September 20, 2007 meeting the Planning Commission attempted to unnecessarily delay the subdivision by requiring a traffic study despite the fact a traffic study was not necessary for approval of a site plan and subdivision plat, and despite the fact that the City Engineer had previously reviewed the site and subdivision plan and determined that the proposed development would not have a negative impact on traffic. [R p. 132; RE p. 0014]. The Planning and Engineering department subsequently studied the traffic situation and issued a written report on October 17, 2007 finding that there would be no significant increased traffic problem. [R pp. 329, 342-343; RE pp. 0060, 0066-0067].

16. The records and transcripts from the September 20, 2007, meeting of the Planning Commission show that there was no lawful or legitimate basis for the actions taken. Members of the Planning Commission admitted that “the project is a very good project . . .” [R p. 123; RE p. 0008]. Despite the acknowledged need for affordable housing in Adams County, the only reason for opposing the subdivision was the erroneous perception that it was nothing but “a glorified HUD Project” that would bring in an undesirable class of people. [R pp. 129-131; RE pp. 0009-0010]. None of the reasons stated in opposition to the subdivision provided a proper or legal basis for refusing to approve the site plan and subdivision plat and requiring an unnecessary re-zoning.

17. The fact that the imposition of this re-zoning requirement was nothing more than a ruse to delay and block the development altogether became apparent when Roundstone appeared before the City Planning Commission on November 15, 2007 asking to re-zone the O-L portion of the site

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<sup>1</sup>Tellingly, one City of Natchez Alderman later stated that if the Planning Commission had not acted to table the request to approve the subdivision site and plat plan, the re-zoning request would have been approved. [R p. 308; RE p. 0057].

to R-1. As with the previous request for site plan and subdivision plat approval, the re-zoning request fully complied with all requirements. Despite this undisputed fact, the Planning Commission denied the request to re-zone the O-L land to R-1, and again tabled the application for site plan and subdivision plat approval. [R p. 398; RE p. 0076].

18. There are many fatal problems with denial of the re-zoning request by the Planning Commission. The surrounding area was already residential in nature and consisted primarily of R-1 zoned land. There was also no argument by anyone that the proper zoning classification for the land was anything other than R-1. Given the existing character and use of the surrounding area, as a practical matter there was no way to credibly argue anything to the contrary. Despite these facts, the re-zoning request was still denied.

19. As with the September 20, 2007, meeting, the record from the November 15, 2007 meeting tells the real motives underlying the improper and capricious actions taken by the Planning Commission. At this meeting the members of the Planning Commission again acknowledged that “the project is a good project; the houses are okay . . . I understand it meets all of the obligations.” [R pp. 178-179; RE pp. 0023-0024]. The real reason again was the misplaced stereotype that this would be a “low income area” and that “with their income and the peoples coming in that area, we gonna have more problem than what we have now.” [R p. 174, 175, 178; RE pp. 0019, 0020, 0023]. None of these reasons are appropriate, and none of the reasons put forth in opposition to the development provide a lawful basis for the recommendation made by the Planning Commission.

20. In response to the concerns expressed at the hearing on September 20, 2007, the City of Natchez’s Land Use Planner explained that this type of subdivision “doesn’t have a detrimental effect on neighborhoods.” [R pp. 176-178; RE pp. 0021-0023]. He also explained that it was the

goal of the Natchez Comprehensive Housing Plan to provide “affordable single family detached housing through the city’s development regulations.” [R pp. 176-178; RE pp. 0021-0023]. He also correctly explained the applicable legal standard when he said that the Planning Commission operates “strictly by code” and that they could either “uphold the code, or you can choose to ignore the code . . . [b]ut there is no leeway.” [R pp. 177-178; RE pp. 0022-0023].

21. On February 26, 2008, Roundstone appeared before the Mayor and Board of Aldermen of Natchez, MS, appealing the wrongful actions and inaction the Natchez Planning Commission. At this meeting, Roundstone requested: (1) Approval of the site plan and subdivision plat for the proposed Audubon Terrace Subdivision; and, (2) that should re-zoning be a prerequisite to approval of the site plan and subdivision plat, that the City of Natchez reverse the decision of the Natchez Planning Commission and approve the proposed re-zoning to R-1. [R pp. 188-189; RE pp. 0026-0027]. However, Motion was made by Alderman West to uphold the decision by the Natchez Planning Commission to deny the request for re-zoning and for site plan approval. [R pp. 333-334; RE pp. 0064-0065].

22. As with the previous appearances before the City of Natchez, the record shows that no legitimate or lawful reason was given in support of the actions ultimately taken by the City of Natchez. The need for affordable housing in Natchez was again discussed as was the fact that the proposed subdivision would be of an equal or higher quality than the houses and apartments in the surrounding area. [R p. 331; RE p. 0062]. The Land Use Planner specifically explained that the census tracts showed 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. [R p. 389; RE p. 0074]. One Alderman who also acknowledged that the proposed

subdivision was a “good proposal”, went on to frivolously object based on the claim that the subdivision was going to built on a chemical dump site which would cause the African American Community to be poisoned and could cause cancer. [R p. 332; RE p. 0063]. However, there was nothing provided to support such an outlandish claim. Again, and as with each of the prior hearings, the City of Natchez did not state any legally valid reason either in support of its decision to deny the re-zoning or in support of its decision to deny site plan and subdivision plat approval.

23. The actions by the City of Natchez from September 20, 2007 to February 26, 2008, show a deliberate disregard for the existing ordinances, the existing land use plan, prior practice, and for long established and fundamental property rights under the Mississippi Constitution and the Constitution of the United States of America. The actions by the Planning Commission and the Mayor and Board of Aldermen effectively trampled the rights of the property owner in this case. Furthermore, the actions were plainly arbitrary, capricious, discriminatory, illegal, unsupported by substantial evidence, not fairly debatable and amounted to an improper and illegal taking.

24. Roundstone timely commenced this Appeal from the decision by the City of Natchez to deny the re-zoning request and to deny the request for site plan and subdivision plat approval. [R pp. 1-2; RE p. 0001-0002].

### **SUMMARY OF THE ARGUMENT**

There was no legal basis for the City of Natchez’s refusal to approve the Audubon Terrace site plan and subdivision plat. There is no dispute that the site plan and subdivision plat met or exceeded all of the requirements of the City of Natchez. The plan was described by City officials as “a very good plan.” [R p. 163; RE p. 0017]. The Land Use Planner specifically stated that “I don’t see any problem with it on a code basis.” [R p. 180; RE p. 0025]. Nevertheless, the City of

Natchez arbitrarily and capriciously refused to approve the site plan and subdivision plat without specifically stating or providing any lawful reason for doing so.

The City of Natchez had no legally valid basis for imposing a re-zoning requirement on the proposed Audubon Terrace Subdivision. The only reason given for imposing this requirement under the circumstances was the City of Natchez's purported reliance on a draft version of an as yet unadopted New Development Code. The fact that no re-zoning was legally required is further demonstrated by the letter from the City of Natchez dated May 16, 2007. [R pp. 108, 113, 114; RE pp. 0003, 0004, 0005]. This letter specifically stated that the proposed subdivision was appropriate under the existing zoning ordinance. This letter also confirmed that "there are no other requirements which must be satisfied in order for the project to fully comply with applicable zoning and subdivision laws, ordinances, regulation and parking requirements." Simply imposing this requirement under these circumstances was arbitrary and capricious.

Not only did the City of Natchez intentionally and wrongfully refuse to approve the site plan and subdivision plat, and intentionally and wrongfully impose a special re-zoning requirement on Roundstone, the City of Natchez and its Planning Commission then wrongly denied the re-zoning request. There is no dispute that the area surrounding the proposed Audubon Terrace Subdivision was residential in nature. There is no question that residential development was the only appropriate use of the subject land. Despite these facts the City of Natchez refused to re-zone the property. This decision was not based on any articulated finding that the site was suited for anything other than residential development.

Finally, the actions by the Planning Commission and the City of Natchez were based on improper and illegal stereotypes concerning class and race. Accordingly, the actions by the City of

Natchez were in violation of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, which specifically prohibits discrimination in the sale, rental, and financing of dwellings, based on race, color, national origin, religion, sex, and family status.

For all of these reasons, this Court must reverse and render the decision by the City of Natchez to deny the re-zoning request and to deny the request for site plan and subdivision plat approval.

### **ARGUMENT**

#### **A. APPLICABLE LAW AND STANDARD OF REVIEW**

In reviewing the actions of a municipality, a decision by a municipality must be set aside if it is clearly shown to be to be arbitrary, capricious, or discriminatory, illegal or is without substantial evidentiary basis. *City of Jackson v. Capital Reporter Pub. Co.*, 373 So.2d 802, 807 (Miss.1979); *Sanderson v. City of Hattiesburg*, 249 Miss. 656, 163 So.2d 739 (1964). With regard to zoning issues, the Mississippi Supreme Court has stated that a landowner should be able to rely on a zoning plan to maintain the use and value of his property. *Adams v. Mayor and Board of Alderman of the City of Natchez*, 964 So.2d 629, 634 (Miss. App. 2007). Mississippi law is also well settled that property should be reclassified from one zoning classification to another whenever the applicant convinces the zoning authority that: (1) there was a mistake in the original zoning; or (2)(a) the character of the neighborhood has changed to such an extent as to justify re-zoning, and (b) that a public need exists for re-zoning. *McWaters v. City of Biloxi*, 591 So.2d 824, 827-828 (Miss. 1991). On review, zoning decisions of a local governing body will be reversed only where it clearly appears that the decision is arbitrary, capricious, discriminatory, illegal, or is not supported by substantial evidence. *Walters v. City of Greenville*, 751 So.2d 1206, 1208 (Miss. App. 1999).



**B. THE ACTION BY THE CITY OF NATCHEZ AND THE PLANNING COMMISSION IN FAILING TO APPROVE THE SITE PLAN AND SUBDIVISION PLAT WAS ARBITRARY, CAPRICIOUS, ILLEGAL, AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE**

The first problem with the City of Natchez's refusal to approve the Audubon Terrace site plan and subdivision plat is that there was no legal basis for delaying or denying approval. There is no dispute that the site plan and subdivision plat met or exceeded all requirements. Furthermore, while no representative or elected official of the City of Natchez tried to argue otherwise, others openly conceded the obvious.

While undersigned counsel found no specific Mississippi Case directly on point, approval of site plans and subdivision plats should be considered to be ministerial in nature just like the issuance of building permits. *Thompson v. Mayfield*, 204 So.2d 878, 880 (Miss. 1967); *Vineyard Inv., LLC v. The City Of Madison*, 999 So.2d 448, 441 (Miss. Ct. App. 2008). As the City of Natchez's Land Use Planner succinctly explained, in making these decisions you operate "strictly by code", and you can either "uphold the code, or you can choose to ignore the code . . . [b]ut there is no leeway." [R. P. 177-178; RE pp. 0022-0023]. Therefore, when a landowner complies with a city's existing subdivision requirements, then the city has no discretion in carrying out the specific duty delegated to it (which in this case was to approve the site plan and subdivision plat). In this particular case the City of Natchez and the Planning Commission failed to carry out their obligations to approve the site plan and subdivision plat. For this reason alone, the decision to deny Roundstone's request for approval of the Audubon Terrace site plan and subdivision plat was arbitrary and capricious and must be reversed and rendered.

If however this Court concludes that this was a discretionary function, under the specific

circumstances of this case, the refusal of the requested approval was clearly arbitrary, capricious, and motivated by an improper discriminatory purpose as there is no dispute that the Audubon Terrace site plan and subdivision plat met or exceeded all City of Natchez requirements. One member of the Planning Commission specifically stated that “[t]he plan is a very good plan . . . I have nothing against the plan . . . [i]t’s a very good plan.” [R p. 163; 0017]. The Chairman of the Planning Commission also added, “on the surface, it looks, you know, very desirable.” [R p. 179; RE p. 0024]. The Land Use Planner specifically stated that “I don’t see any problem with it on a code basis.” [R p. 180; RE p. 0025].

Despite multiple hearings, ultimately the City of Natchez refused to approve the site plan and subdivision plat without specifically stating or providing any lawful reason for doing so. The record from these hearings shows that the actual reasons for the denial was a combination of misinformation and improper socioeconomic and racial stereotypes. Again, these facts cannot and have not been disputed by the City of Natchez. For these reasons as well, this Court must find that the decision of the City of Natchez to deny approval of the site plan and subdivision plat was arbitrary, capricious, illegal, discriminatory, and/or unsupported by the evidence.

**C. THE ACTION BY THE CITY OF NATCHEZ AND THE PLANNING COMMISSION IN REQUIRING A RE-ZONING AS A CONDITION PRECEDENT TO APPROVAL THE SITE PLAN AND SUBDIVISION PLAT WAS ARBITRARY, CAPRICIOUS, ILLEGAL, AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE**

The land at issue was zoned in part O-L or “open land, and in part R-1 or “single family residential”. Under both of these classifications in the zoning ordinance, single family residences are permitted uses by right. [R pp. 383-390; RE pp. 0068-0075]. This means that no zoning action was necessary to obtain approval of a site plan and subdivision plat. Moreover, the zoning ordinance

itself even specifically states that its intent is that the land will not be re-zoned “to its appropriate residential, commercial, or industrial category” until the land is actually “subdivided into urban building sites.” Despite this plain language, and the previous approval of at least four subdivisions in similarly zoned areas, the City of Natchez took the position that the portion of the land zoned O-L had to be re-zoned to R-1 before the site plan and subdivision plat could be approved. This on its face is arbitrary and capricious.

Under these circumstances, the City of Natchez had no legally valid basis for imposing a re-zoning requirement on the proposed Audubon Terrace Subdivision. The only reason given for imposing this requirement under the circumstances was the City of Natchez’s purported reliance on a draft version of an as yet unadopted New Development Code. However, the fact that no re-zoning was legally required is further demonstrated by the letter from the City of Natchez dated May 16, 2007. [R pp. 108, 113, 114; RE pp. 0003, 0004, 0005]. This letter specifically that the proposed subdivision was appropriate under the existing zoning ordinance. This letter also confirmed that “there are no other requirements which must be satisfied in order for the project to fully comply with applicable zoning and subdivision laws, ordinances, regulation and parking requirements.” Under these circumstances, imposing a re-zoning requirement on a landowner is clearly an arbitrary, capricious, and illegal act. *Berry v. Embrey*, 120 So.2d 165 (Miss. 1960)(holding that where a “municipal governing body . . . has acted beyond its statutory power, or where the denial is unreasonable, arbitrary, discriminatory, or unlawful, the courts will furnish the aggrieved party redress.”)

For these reasons as well the decision to deny Roundstone’s request for approval of the Audubon Terrace site plan and subdivision plat must be reversed and rendered.

**D. THE ACTION BY THE CITY OF NATCHEZ AND THE PLANNING COMMISSION IN DENYING THE UNNECESSARY RE-ZONING REQUEST WAS ARBITRARY, CAPRICIOUS, DISCRIMINATORY, ILLEGAL, UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND AMOUNTED TO A TAKING WITHOUT JUST COMPENSATION**

Not only did the City of Natchez intentionally and wrongfully refuse to approve the site plan and subdivision plat, and intentionally and wrongfully impose a special re-zoning requirement on Roundstone, the City of Natchez and its Planning Commission then wrongly denied the re-zoning request when it was made. Again, there is no dispute that the area surrounding the proposed Audubon Terrace Subdivision was residential in nature. No Commissioner or Alderman actually argued that the land was suited for anything other than residential development. There is no question that residential development was the only appropriate use of the subject land. Even members of the general public who spoke in opposition to the re-zoning specifically acknowledged that the land actually met all the requirements for re-zoning. [R p. 180; RE p. 0025].

Despite the fact that the best zoning classification, if not the only proper zoning classification, for the subject land was and is R-1, the Planning Commission and the City of Natchez refused to re-zone the property. This decision was not based on any articulated finding that the site was suited for anything other than residential development. Rather, it was based on misplaced and improper class and racial stereotyping.

It also merits noting that this case involves an atypical re-zoning issue. The traditional legal analysis in re-zoning cases that requires either a mistake in the original zoning or that the character of the neighborhood has changed and that there exists a public need for the re-zoning is not directly on point in this case. *Adams v. Mayor and Board of Aldermen of the City of Natchez*, 964 So.2d 629, 634-635 (Miss. 2007). The instant case is unique in that it involves an O-L zoning classification

which is a holding classification that expressly permitted single family residential development. Therefore, this is not a situation where the landowner was attempting to down zone to a less restrictive zoning classification. The character of the neighborhood had long been residential which is exactly the zoning classification that was being requested. Under these circumstances, the refusal to re-zone the property from O-L to R-1 is arbitrary, capricious, discriminatory, illegal and/or without substantial justification.

The City of Natchez was also required to make a record showing the factual basis for its findings in this case. *Adams*, 964 So. 2d at 635. Nevertheless, the City of Natchez did not give any lawful reasons for its actions. The records shows without question that the actual reasons for the denial were nothing more than improper considerations of race and class. As a result, the landowner was wrongly denied the right to use and develop the subject property for a permitted use that was consistent with the surrounding area as well as the City of Natchez's own comprehensive plan.

This Court must take appropriate action to ensure that all landowners have the right to rely on the law, including local zoning ordinances, when it comes to the use and development of their own property. *Adams v. Mayor and Board of Alderman of the City of Natchez*, 964 So.2d 629 (Miss. App. 2007)(explaining that landowners should be able to rely on a zoning plan to maintain the use and value of his property). Accordingly, the decision of the City of Natchez Board to deny the request to re-zone the property from O-L to R-1 must be reversed and rendered.

**E. THE ACTION BY THE CITY OF NATCHEZ AND THE PLANNING COMMISSION WAS DISCRIMINATORY IN NATURE AND VIOLATED TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968**

The actions by the City of Natchez in denying approval of the site plan and request for re-zoning were not based on any lawful finding. Rather, the City of Natchez denied the requests of

Roundstone based on improper and illegal stereotypes concerning class and race. All other reasons offered were plainly a pretext. Therefore, the actions by the City of Natchez were in violation of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, which specifically prohibits discrimination in the sale, rental, and financing of dwellings, based on race, color, national origin, religion, sex, and family status. For these reasons as well, this Court must reverse and render the decision by the City of Natchez to deny the re-zoning request.

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

Under Uniform Rule 5.06 of the Uniform Circuit and County Court Rules, briefs filed in an appeal on the record must conform to the practice in the Supreme Court with respect to both the form and the time of filing. This Rule further provides that the “consequences of failure to timely file a brief will be the same as in the Supreme Court.”

Roundstone timely filed its Brief with the Circuit Court on January 28, 2009. Under the applicable rules, the Brief of the City of Natchez was due on or before March 2, 2009. However, the City of Natchez failed to file its Brief on or before this date. Instead of filing a Brief in the time required, the City of Natchez waited until March 13, 2009 (eleven days late), to file its Motion for Enlargement of Time. [R pp. 401-402; RE pp. 0077-0078]. In this Motion, the City of Natchez requested that it be given until April 2, 2009 to file its Brief. However, the City of Natchez never noticed the Motion for hearing and never obtained an order granting the requested extension.

When no Brief was filed by the City of Natchez more than 30 days after the April 2, 2009 date, on June 24, 2009 Roundstone filed and noticed a Motion for Judgment on the Pleadings based on the fact that the City of Natchez was more than three (3) months late in filing its Brief. [R pp.

403-408; 0083-0088]. On June 25, 2009 the City of Natchez filed a 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. [R pp. 448-449; 0079-0080]. Despite the pending motion filed by Roundstone, on June 29, 2009 the Circuit Court entered an Order granting the City of Jackson's Motion. [R p. 450; 0081]. Thereafter on July 24, 2009, the City of Natchez finally filed its Brief.

In order to determine the appropriate remedy for the City of Natchez's disregard of the Rules and failure to file its brief in a timely manner, the circuit court should have followed the requirements of Rule 31 of the Mississippi Rules of Appellate Procedure. According to Rule 31, when "an Appellee fails to file the Appellee's Brief as required, such brief, if later filed, may be stricken from the record on the Motion of the appropriate Appellate Court." In addition, the Mississippi Supreme Court has previously held that a party's "failure to file a Brief is tantamount to confession of error and will be accepted as such unless the reviewing Court can say with confidence, after considering the record, and the brief of the appealing party, that there was no error." *Transcontinental Gas Pipe Line Corp. v. Rogers*, 284 So.2d 304, 305 (Miss 1973); *Lawler v. Moran*, 148 So.2d 198 (Miss 1963). This was not done.

The circuit court should also have followed Rule 26(b) of the Mississippi Rules of Appellate Procedure or Rule 6(b) of the Mississippi Rules of Civil Procedure. 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. . . ." 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." In *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 147 (Miss. 1994), the Mississippi Supreme Court stated that were 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. Despite these Rules and precedent, and despite the pending and unresponded to Motion For Judgment on the Pleadings, the circuit court denied the Motion For Judgment On the Pleadings, and accepted the untimely filing without making any of the required findings. [R p. 467; RE p. 0089]. For all of these reasons the circuit court's decision to deny Roundstone's Motions To Strike and For Judgment on the Pleadings was in error, and must be reversed and rendered. The decisions to deny the re-zoning request, and to deny approval of the site plan and subdivision plat must also be reversed and rendered.

### **CONCLUSION**

A review of the record demonstrates clearly and convincingly that the Planning Commission and the City of Natchez improperly denied the request for site plan and subdivision plat approval; improperly required a rezoning as a condition precedent to rezoning; and, then improperly denied the requested re-zoning. The record further demonstrates that the circuit court erred in finding that the City of Natchez had any arguable basis or reason for its actions and did not act in an arbitrary, capricious and discriminatory. Roundstone has also demonstrated conclusively that there was an improper and illegal discriminatory motive underlying all of the wrongful actions by the City of Natchez and that the circuit court erred in denying Roundstone's Motions To Strike and For A Judgment On The Pleadings.

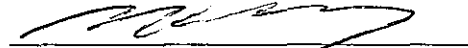
Finally, Roundstone had shown beyond any doubt that both the applicable law, and fundamental concepts of fairness and justice demand that this Court reverse and render the erroneous and illegal actions decisions of the City of Natchez.



THIS, the 30<sup>th</sup> day of September, 2010.

Respectfully submitted,

ROUNDSTONE DEVELOPMENT, LLC

  
Michael V. Cory, Jr.

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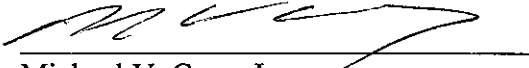
**CERTIFICATE OF SERVICE**

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:

Everett Sanders, Esq.  
Chester Jones, Esq.  
Post Office Box 565  
Natchez, MS 39121  
*Attorney for City of Natchez and Board of Alderman*

Hon. Forrest Johnson  
Adams County Circuit Court  
Post Office Box 1372  
Natchez, MS 39121  
*Trial Court Judge*

THIS, the 30<sup>th</sup> day of September, 2010.

  
Michael V. Cory, Jr.