2010-CA-01733-T

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 the Court may evaluate possible disqualification or recusal.

1. Thomas J. Gardner, III, Appellant
2. The City of Tupelo, Mississippi, Appellee
3. Ed Neelly, Dick Hill, Nettie Davis, Smith Heavner, Doyce Deas, Carolyn Mauldin, Bill Martin, Mike Bryan, Thomas Bonds, and Berdell Jones as members of the City Council of the City of Tupelo, Mississippi, Appellees.
4. Wilson Coleman, owner of property rezoned by action of City of Tupelo, Mississippi on April 15, 2008.
5. J. Cal Mayo, Jr. and Paul B. Watkins, attorneys for Appellees City Council of Tupelo, Mississippi and City of Tupelo, Mississippi;
6. B. Bronson Tabler, attorney for Wilson Coleman;
7. R. Shane McLaughlin, attorney for Appellant Thomas J. Gardner, III.

R. Shane McLaughlin
Attorney of record for Appellant

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STATEMENT OF THE ISSUES

1. Whether a change in zoning from one classification to a Planned Unit Development (PUD) constitutes a "rezoning" under Mississippi law such that the stringent criteria for rezoning must be proven by clear and convincing evidence.
2. Whether the Circuit Court erred in affirming the rezoning, since there was insufficient evidence that the character of the neighborhood had substantially changed or that a public need existed for the rezoning.

STATEMENT OF THE CASE

This is an appeal of a Circuit Court's review of a rezoning decision by the City of Tupelo, Mississippi.

Wilson Coleman submitted an Application for Rezoning requesting the rezoning of approximately forty-five (45) acres of property within Tupelo, Mississippi. (R. p. 7). On April 15, 2008, the Tupelo City Council voted to approve the rezoning as requested by Coleman. (R. p. 106-07). The City adopted an Ordinance Rezoning Property and Amending the Official Zoning Map of the City of Tupelo, Mississippi. (*Id.*).

Thomas J. Gardner, III filed a Bill of Exceptions in the Circuit Court of Lee County, Mississippi pursuant to Mississippi Code Annotated section 11-51-75. (R. p. 2). The Circuit Court heard argument and entered an Order affirming the City's decision. (R. p. 242-43). Gardner timely perfected this appeal. (R. p. 244).

STATEMENT OF FACTS

Wilson Coleman ("Coleman") owns approximately forty-five (45) acres of property in Tupelo, Mississippi. (R. p. 2). Coleman's property was zoned "R-1L" (large-lot residential) in the City of Tupelo's Comprehensive Plan. (*Id.*; *see also* R. p. 11). On January 4, 2007, Coleman submitted an Application for Rezoning requesting that the subject property be rezoned from R-1L to a Planned Unit Development ("PUD"). (R. p. 7, 11). The proposed PUD would allow a dense 201 residential unit development to be constructed in the large-lot rural area of Tupelo. (*Id.*).

Thomas J. Gardner, III ("Gardner") owns property adjacent to Coleman's property. (R. p. 3). Gardner's property would be greatly affected by the rezoning of Coleman's property, and Gardner has opposed the rezoning. (*Id.*).

Pursuant to the City's ordinances, the steps in the disposition of an application for rezoning are as follows: 1) an application for rezoning is submitted to the Planning and Development Department; 2) the Planning and Development Department staff reviews the request and issues a report; 3) a public hearing is held before the City's Planning Committee; 4) the Planning Committee issues a recommendation on the request; 5) a public hearing is held before City Council; 6) the City Council issues a decision on the application. (R. p. 200).

Neither the Planning and Development Department or the Planning Committee has authority to approve or disapprove of a rezoning request. (R. p. 199; R. p. 200). The Planning Committee merely serves in an advisory capacity to the City Council. (*See id.)* The authority to act on an application for rezoning rests with the City Council. (R. p. 199; R. p. 200).

Following Coleman's Application for Rezoning, the Planning Department issued a "Staff Analysis" regarding the application. (R. p. 11). The Staff Analysis addressed certain criteria

specified in section 7.1.6(1) of the Tupelo Development Code. (*Id.*). Notably, two separate Staff Analyses made the following finding:

> **"Otherwise, that changes in the area warrant the requested zone – *not applicable."***

(R. p. 9, 11) (emphasis added). Thus, the Staff Analysis did not address whether the character of the subject area had changed sufficiently to justify a rezoning from R-1L to a PUD. In fact, the Staff Analysis candidly noted that the area is "rural in character with hayfields, pastures and large house lots" and would change to a "more suburban environment" as a result of the rezoning. (R. p. 12).

The Staff Analysis likewise gave short shrift to whether there was a public need for the rezoning. The Staff Analysis simply stated:

> **Need for additional land in Tupelo to be zoned PUD-**
>
> From the perspective of the city's needs for residential development, this rezoning has the positive effect of increasing the number of units that the remaining residential acreage can support.

(*Id.*). The Staff Analysis did not contain any data, statistics or other evidence regarding the public need for PUD zoned property in the City. (*See id.*).

Notwithstanding the absence of any real evidence, the Staff Analysis recommended that the rezoning application be approved. (R. p. 13). Following the Staff report, a public hearing was held before the Planning Committee. (R. p. 3). Gardner appeared before the Planning Committee and opposed the rezoning. (*Id.*). However, the Planning Committee accepted the Staff Analysis and likewise recommended approval of the rezoning by the City Council. (*Id.*).

A hearing was held before the City Council on the rezoning request on April 15, 2008. (*Id.*). The City Council voted to approve the rezoning of the forty-five (45) acres from R-1L to a

PUD. (*Id.*) The City adopted an Ordinance Rezoning Property and Amending the Official Zoning Map of the City of Tupelo, Mississippi. (R. p. 106).

As fully discussed below, the City's decision to rezone the property from R-1L to a PUD was a "rezoning" such that there must be clear and convincing evidence of a substantial change in the character of the area and a public need for the rezoning. There is wholly insufficient evidence in the Record to justify rezoning the subject property under Mississippi law. Accordingly, the Circuit Court's decision should be reversed and judgment rendered setting aside the rezoning.

STANDARD OF REVIEW

In rezoning cases the Circuit Court sits as the first-level appellate Court. *See Thomas v. Bd. of Supervisors*, 45 So. 3d 1173, 1180 (Miss. 2010). The Circuit Court does not try facts but reviews the decision by the governing authority. *Thomas*, 45 So. 3d at 1180. This Court applies the same standard of review as that applied by the Circuit Court. *Id.*

The Supreme Court has often noted that in zoning cases the decision of a municipality will "not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis." *Faircloth v. Lyles*, 592 So. 2d 941, 943 (Miss. 1991). That is, a rezoning decision is affirmed so long as it is at least "fairly debatable" whether the required criteria have been sufficiently proven. *Childs v. Hancock County Bd. of Supervisors*, 1 So. 3d 855, 859 (Miss. 2009).

However, in order to be affirmed, the municipality must have had *actual proof* of either a mistake in the original zoning or a significant change in the character of the neighborhood since the original zoning and a public need. *Cockrell v. Panola County Bd. of Supervisors*, 950 So. 2d 1086, 1091 (Miss. Ct. App. 2007). In instances of insufficient evidence, where it is not debatable and the criteria for a rezoning were not sufficiently proven before the municipality, this Court will not hesitate to reverse. *Cockrell*, 950 So. 2d at 1091. The Court in *Cockrell* noted that "it is clearly within our judicial discretion to reverse a rezoning ordinance which was adopted based on insufficient proof." *Id.* at 1092.

Thus, even deferring to the municipality's decision, this Court must nevertheless reverse if there is insufficient evidence to meet the stringent standard for rezoning. *Id. See also, Board of Aldermen v. Conerly*, 509 So. 2d 877, 884 (Miss. 1987) (noting that "while this Court accords profound deference to actions of governing boards pertaining to their local affairs, we have

nevertheless carefully delineated rules for them to follow before amending their duly adopted and established zoning ordinances.").

SUMMARY OF THE ARGUMENT

The City of Tupelo rezoned property in this case from an R-1L zoning to a PUD zoning designation. Because this is a "rezoning" decision the stringent analysis for rezoning applies to this case. The Record is replete with evidence that the City's decision in this case was a rezoning, notably including a City Ordinance which expressly rezones the subject property. Further, this Court's precedent makes clear that any rezoning, including a change in designation to a PUD, constitutes a "rezoning" under Mississippi law such that the analysis for a rezoning applies.

Since the City's actions did rezone the property for a use different than that approved in its Comprehensive Plan, the stringent test for rezoning decisions applies in this case. Under Mississippi law property can be rezoned by a City only where it is established, by clear and convincing evidence, that 1) there was a mistake in the original zoning; or 2) the character of the area changed to an extent justifying rezoning and there exists a public need for the rezoning. Clear and convincing evidence must be found in the Record before this Court in order for the rezoning to avoid reversal.

In this case, the Record is devoid of such evidence. There was no evidence whatsoever, much less clear and convincing evidence, of either of the criteria for rezoning. The City does not claim an error in the original zoning and there is no evidence of such an error. There was no evidence regarding a change in the character of the area or a public need for the rezoning submitted to the City or before the Circuit Court. No surveys, statistics, data compilations or other evidence is to be found in the Record establishing these criteria. The evidence in the

Record irrefutably shows that, as of the date of the rezoning, the character of the area remained rural, consisting of large house lots, hayfields and pastures. At best, the Record reveals that the City speculated that the character of the area might be substantially changed in the future by potential industrial development outside the City and the subject rezoning itself. The Circuit Court accepted the argument that the proposed residential development, which would transform the area into a dense suburban environment, could itself be the substantial change necessary to justify the rezoning.

There is no evidence that the character of the area had changed as of the rezoning decision. Mississippi law required actual evidence that a substantial change in the character of the area had occurred before the rezoning. There is no such evidence in the Record. On this basis alone, the Circuit Court's decision should be reversed and rendered.

Similarly, there was no actual evidence of a present public need for the rezoning. At most, there was a theory that due to future industrial growth Tupelo might have an increased need for dense housing at some unspecified time in the future. However, no actual evidence showed the extent of the demand for housing in Tupelo or any present or even future need for more dense housing developments. On this basis as well, the Record contains insufficient evidence such that the rezoning decision should be reversed.

Since the criteria for rezoning were not proven by clear and convincing evidence, the Circuit Court's decision to affirm the rezoning must be reversed and judgment rendered in Gardner's favor.

ARGUMENT I.

THE CITY'S ACTION CONSTITUTES A "REZONING" OF THE SUBJECT PROPERTY.

The City claimed below that its action of approving the Planned Unit Development ("PUD") did not constitute a "rezoning." Accordingly, the City argued, there was no requirement for evidence of a change in the area's character and public need for the action.[1] The City's argument is refuted by overwhelming evidence in the Record and is contrary to Mississippi law.

First, the Record manifestly exhibits that the property was in-fact rezoned. The subject tract of land was initially zoned R-1L. (R. p. 7). Wilson sought to have the zoning designation changed to "PUD." (*Id*). This, unquestionably, amounts to a rezoning. Wilson Coleman submitted a "Request for Rezoning." (*Id*). The Request provided that the property was "Currently zoned R1L" and requested that the property "***be rezoned to PUD.***" (*Id.*) (emphasis added).

Further, both of the City's Staff Analyses treat the proposed action as a rezoning. (R. p. 9, 11). The Staff Analyses evaluate the factors listed in Tupelo Development Code 7.1.6(1) – the chapter of the Development Code which pertains to rezoning. (R. p. 201). Each of the notices of public hearing expressly state that the City was considering a "rezoning" of the subject property. (R. p. 14-19). At all times during hearings before the City, the City noted it was evaluating "rezoning" the property. (*See, e.g.*, p. 163) (City Council member presenting for consideration the "rezoning of 46 acres").

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[1] The Circuit Court did not specifically address this issue, finding instead that the City had before it evidence making the "change and need" test fairly debatable. (R. p. 241). However, the Circuit Court concluded that the "specific considerations inherent in the PUD application . . . all contributed to the Council's findings of the change in the area, and need for the PUD for which the application was sought." (*Id.*). Gardner maintains that the fact that the rezoning involved a PUD does not change the analysis or make it less exacting in any respect.

Most notably, the City did in-fact rezone the property by adopting the "Ordinance Rezoning Property and Amending the Official Zoning Map of the City of Tupelo, Mississippi." (R. p. 106). The Ordinance expressly provides that it ***rezones*** the subject property. (*Id.*).

The Record before the Court establishes that the City's action in this case, changing the zoning designation of the property from R-1L to PUD, was a rezoning.

However, not only does the Record make clear that the City rezoned the property, Mississippi law also establishes that changing a property's designation to a PUD constitutes a rezoning. The Mississippi Supreme Court has repeatedly analyzed a change of property's designation to a PUD as a rezoning and has applied the legal test for rezoning. In *Fondren N. Renaissance v. Mayor of Jackson*, 749 So. 2d 974, 976 (Miss. 1999) the Supreme Court was faced with a challenge to property which had been rezoned to a PUD. The *Fondren* Court stated that the "City Planning Board conducted a public hearing on Columbia's application to ***rezone*** the school property, which had previously been a Special Use, R-1A and C-2, to a PUD." *Fondren*, 749 So. 2d at 976. The Court in *Fondren* consistently referred to "the City Council's decision to ***rezone*** the property." *Id.* at 977 (emphasis added). The Court, analyzing the change to a PUD as a rezoning (as it obviously is), applied the "change and need" test. *Id.*

Similarly, the Supreme Court treated a change to a PUD designation as a rezoning in *Old Canton Hills Homeowners Ass'n v. Mayor of Jackson*, 749 So. 2d 54, 62 (Miss. 1999). Similar to *Fondren*, the Jackson City Council approved a PUD in *Old Canton Hills*. *Old Canton Hills*, 749 So. 2d at 56. The Court in *Old Canton Hills* began its analysis by defining a PUD. The Court stated:

> A planned unit development is a district in which a planned mix of residential, commercial, and even industrial uses is sanctioned subject to restrictions calculated to achieve compatible and efficient use of the land . . .;

> One of the purposes of a Planned Unit Development is to ensure that, once an area is zoned for a particular classification, the property is actually used in the manner previously agreed upon by the City and prospective developers. It should be readily apparent that the sort of contingencies agreed to by the Pear Orchard developers in the present case are fully consistent with the goals and purposes of the PUD land planning device.

Id. at 59. (citing 83 AM.JUR.2D *Zoning and Planning* § 497 at 394 (1992)). Tellingly, the Supreme Court then applied the stringent "change and need" test applicable to rezonings. The Court stated:

> Having addressed Old Canton's previous points of error, this Court must now determine ***whether the rezoning was proper under the standard of review applicable to rezoning decisions.*** While this Court generally employs the familiar "arbitrary and capricious" standard in reviewing zoning decisions, we have established a rather stringent burden of proof for the petitioner in a ***rezoning*** case. In the case of ***rezoning***, the petitioner for ***rezoning*** must prove by clear and convincing evidence that:
>
> (1) There was a mistake in the original zoning, or
> (2) The character of the neighborhood has changed to such an extent as to justify reclassification, and that there was a public need for rezoning.
>
> This Court presumes that the original zoning was well planned, and the record must contain findings that the aforementioned two requirements have been met. Further, these findings must be supported by substantial evidence in the record.

Id. at 62. (internal citations omitted) (emphasis added). *See also A&F Props., LLC v. Madison County Bd. of Supervisors*, 933 So. 2d 296, 297 (Miss. 2006) (summarizing that "the Madison County Board of Supervisors ("Board") adopted the petition of Lake Caroline, Inc. ("LCI") to have 3,047 acres of property ***rezoned*** from A-1 Agricultural Classification to P-1 Planned Unit Development District Classification.") (emphasis added).

The Mississippi Supreme Court has consistently treated a change of designation from one zoning to a PUD as a rezoning and has applied the change-need analysis.

Of course, there is sound policy which requires treating a change in designation to a PUD as a rezoning, just as the Mississippi Supreme Court has repeatedly done. To do otherwise

would leave an enormous loophole through which municipalities could leap. Local governments desiring to rezone property, but lacking sufficient proof to meet the stringent rezoning burden, would simply create various PUDs to suit their needs. Such a result is untenable. Accordingly, under Mississippi law, any change in zoning, including a change to a PUD, must be evaluated under the stringent standard set for rezoning decisions.

This Court should apply the "change and need" analysis to the rezoning in this case. As discussed below, there is no evidence whatsoever in the Record sufficient to support the rezoning under this stringent standard and the Circuit Court's decision should be reversed and rendered.

ARGUMENT II.

THE CITY'S DECISION WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE OF A CHANGE IN THE CHARACTER OF THE AREA AND PUBLIC NEED.

Mississippi law provides that there are only two instances when property may be permissibly rezoned: 1) when there was a mistake in the original zoning of the property; or 2) when the character of the neighborhood has changed to such an extent as to justify reclassification and there is a public need for the rezoning. *Town of Florence v. Sea Lands, Ltd.*, 759 So. 2d 1221, 1224 (Miss. 2000). Importantly, these criteria must be proven by **clear and convincing evidence**. *Town of Florence*, 759 So. 2d at 1224. Further, the record of the rezoning decision must contain findings that the requirements for rezoning have been met. *Briarwood, Inc. v. City of Clarksdale*, 766 So. 2d 73, 80 (Miss. Ct. App. 2000).

The Supreme Court in *Town of Florence* noted that Mississippi Courts "presume that comprehensive zoning ordinances adopted by municipal authorities are well planned and designed to be permanent." *Id.* at 1224. Accordingly, a rezoning decision is reviewed much less

deferentially than an original zoning decision. *Id.* at 1224 n.1. The Supreme Court in *Board of Aldermen v. Conerly* explained the policy behind this reasoning as follows:

> 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.
>
> It is for precisely this reason that, while this Court accords profound deference to actions of governing boards pertaining to their local affairs, we have nevertheless carefully delineated rules for them to follow before amending their duly adopted and established zoning ordinances. The amendment of a zoning ordinance will never be simply a matter of local politics as long as this Court sits.

Conerly, 509 So. 2d at 885-86.

The burden of proving the requirements for rezoning by clear and convincing evidence is on the applicant for rezoning. *Conerly*, 509 So. 2d at 884. Where any one of the criteria was not established before the City by clear and convincing evidence the Circuit Court must conclude that the rezoning was unreasonable, arbitrary and capricious, and reverse the City's decision. *Id.* Mississippi Appellate Courts have frequently had occasion to reverse rezoning decisions on this basis. *See, e.g., Harris v. Jackson*, 268 So. 2d 342, 344 (Miss. 1972) (reversing rezoning decision where applicants failed to meet burden of proof); *Smith v. City of Gulfport*, 269 So. 2d 345 (Miss. 1972) (same; reversing and rendering rezoning amendment); *Underwood v. Jackson*, 300 So. 2d 442 (Miss. 1974) (same); *Jitney-Jungle, Inc. v. City of Brookhaven*, 311 So. 2d 652

(Miss. 1975) (reversing and rendering rezoning order); *City of Oxford v. Inman*, 405 So. 2d 111, 114 (Miss. 1981) (affirming Circuit Court's reversal of rezoning where "no concrete evidence of public need"); *Cockrell v. Panola County Bd. of Supervisors*, 950 So. 2d 1086 (Miss. Ct. App. 2007) (reversing rezoning where no clear and convincing evidence of change in character of area).

The Supreme Court in *Conerly* stated as follows regarding the minimum amount of evidence that is required to show a change and public need sufficient to justify rezoning:

> To support on appeal a reclassification of zones, the record at a minimum should contain a map showing the circumstances of the area, the changes in the neighborhood, statistics showing a public need, and such further matters of proof so that a rational, informed judgment may be formed as to what the governing board considered. When there is no such proof in the record we must conclude there was neither change nor public need.

Conerly, 509 So. 2d at 886.

1. Substantial Change in the Character of the Area.

The Supreme Court has noted that "[w]ithout comparable evidence there can be no showing of a material change in the neighborhood." *Town of Florence*, 759 So. 2d at 1228. Thus, a rezoning decision must be reversed when a substantial change in the neighborhood is not shown by comparable evidence, such as statistics, quantitative data or similar clear and convincing evidence. *See Cockrell*, 950 So. 2d at 1094.

The *Cockrell* decision is markedly similar to the facts of this case. In *Cockrell* a Board of Supervisors approved a rezoning over the objection of an adjacent landowner. *Id.* at 1088. The Circuit Court affirmed, finding that the rezoning decision was "fairly debatable." *Id.* at 1091. The Court of Appeals reversed and rendered, concluding that the proponents of the rezoning had not presented clear and convincing evidence of a substantial change in the character of the area. *Id.* at 1093.

The Board of Supervisors in *Cockrell* determined that expansion at a nearby factory, Hanson Industries, amounted to a sufficient change in the character of the area. *Id.* The Record in *Cockrell* contained anecdotal statements to the effect that Hanson Industries had expanded within the last three (3) years. *Id.* However, the Court of Appeals explained that the Record did not contain actual evidence of a substantial change in the character of the area "such as increased traffic, facilities production, or employees at Hanson Industries." *Id.* There were no statistics, quantifications or any other real evidence of a substantial change in the area. *Id.* Mere anecdotal statements of the factory's expansion, as opposed to actual evidence of a substantial change in the area, was insufficient to justify the rezoning. *Id.* at 1093-94.

The Board of Supervisors in *Cockrell* alternatively argued that potential future development near the area could amount to a sufficient change in the area. *Id.* at 1095. The Court in *Cockrell* held as follows:

> The Board has cited no authority for the proposition that future potential for industrial development can be an indication of change in the character of this area to warrant rezoning. ***We reject this contention.***

Id. (emphasis added). Thus, the Court in *Cockrell* found that the Record did not contain clear and convincing evidence of a change in the character of the area and reversed the Circuit Court's decision. *Id.* at 1095.

In this case there is no claim that there was a mistake in the original zoning. Accordingly, the City's decision to rezone must be evaluated as to whether there was clear and convincing evidence of a change in the area sufficient to justify rezoning and whether there was clear and convincing evidence of a public need for the rezoning.

The record is completely devoid of any evidence regarding both of these essential elements. There was no evidence before the City that there had been a significant change in the

area justifying rezoning the property; indeed, there has not been such a change. The Record in this case, just like the Record in *Cockrell*, contains no statistics, real data or any quantification of growth or change in the area. The Record does not contain any comparable evidence upon which a substantial change in the character of the area could be found.

This is most obviously established by the statements in the City's Staff Analyses, which themselves concluded that changes in the area were "not applicable" to the City's decision to rezone. Of course, the Staff Analysis is wrong. There must be clear and convincing evidence of changes in the area to justify a rezoning. The Staff Analyses' admission that changes in the area were not considered, indeed that this consideration was inapplicable, makes it indisputable that there was no clear and convincing evidence to meet this criteria. This, standing alone, requires reversal of the City's decision.

Further, the Staff Analysis itself noted that the rezoning would change this rural area of hayfields and large house lots into a much denser suburban environment. Thus, the Record makes clear that there not only had not been a change in the area justifying rezoning, but that the rezoning *would itself effect such a change*.

Similar to the facts of *Cockrell*, the City's chief argument as to a change in the area, as ultimately accepted by the Circuit Court, was the future construction and operation of a Toyota manufacturing plant in Lee County, Mississippi. (*See* R. p. 231). The Toyota location is outside the City and about seven (7) miles from the rezoned property. (R. p. 239). Just as in *Cockrell*, there is no evidence whatsoever as to the potential future effect of the Toyota facility on the subject area in the Record. There are no statistics, data, quantifications or any other real evidence in the Record showing that the facility has had an effect on the area. At best, the Record contains mere anecdotal evidence that the facility might have a potential future impact on

the area. However, as noted by *Cockrell*, a potential future impact is insufficient as a matter of law to amount to a sufficient change in the character of the area.

None of the facts relied on by the City and accepted by the Circuit Court amounted to actual evidence of a change in the character of the area since the rezoning. Other than mention of the Toyota facility, none of the criteria relied on by the Circuit Court even arguably show a substantial change in the character of the area. Most of the criteria mentioned by the Circuit Court pertained to the proximity of the area to other, more developed, areas of the City. This, however, does not evidence a change in the subject area. The fact that the property has "convenient access" to more developed areas of the City in no way evidences that the area has itself undergone a substantial change.

Tellingly, the Circuit Court also found that the rezoning will "[t]ransition [the area] to a more suburban character" which "is expected to have a positive effect on most property values in the area." (R. p. 232). Of course, an increase in property values resulting from a rezoning is not a legitimate consideration for approving a rezoning and does not demonstrate a change in the character of the area. In fact, this strongly militates against the rezoning as it further exhibits that the subject area had not undergone a substantial change but that the proposed rezoning would effect a change in the area. That is, the Circuit Court tacitly conceded that this rural area, which had not yet suffered a substantial change in character, would do so ***because of this rezoning***. The Circuit Court ostensibly concluded that this was sufficient, since it determined this was desirable as it would increase property values. This alone demonstrates that the area had, in-fact, not substantially changed and that the rezoning was improper.

In short, there is no evidence of a substantial change in the character of the area in the Record. There is no empirical data, traffic information, statistics or other real evidence as

required by *Town of Florence* and *Cockrell*. At best, there is anecdotal evidence and conjecture, mostly speculating that the character of the area will change in the future based on future industrial development and this very rezoning decision. As explained by legions of Mississippi cases, this is insufficient to show a substantial change in the character of the area sufficient to approve a rezoning. Because there is insufficient evidence of a change in the character of the area the decision should be reversed and rendered.

2. Public Need.

Similarly, there was no evidence, other than a mere conclusion by the Staff Analysis, that there was a public need for the PUD zoning. Again here, there were no data or statistics of any kind presented to the City which could be construed as showing a public need for the rezoning.

There was, at most, anecdotal evidence of a potential future need for more dense housing in Tupelo. There was, however, no evidence of an existing public need. The Circuit Court concluded based on unsupported statements before the City Council that "in the near future" the City would need 450 housing units a year due to growth, but only about 120 to 130 houses were currently being constructed. (R. p. 233). Thus, the Court concluded, there will be a need for more housing in the future. This speculative future need, the extent of which was nothing more than a guess and is unsupported by any evidence, is the sole basis of the purported public need for the rezoning in this case.

There is nothing, other than a mere assertion made in a hearing before the City Council to support this prophesy regarding the potential future housing needs in the City. The transcript of the subject hearing simply opines that Tupelo will need "450 houses a year, housing units a year" at some unspecified future date. (R. p. 167). Again here, there is no actual empirical data, nor any evidence as to when this alleged public need could come to fruition. Of course, simply

making a prediction of future public need does not in any way prove that a public need actually exists for more densely zoned property. In any event, the conclusory and unsupported assertions clearly do not amount to proof of actual public need by clear and convincing evidence.

If simple conclusory assertions of public need and changes in the character of an area were sufficient to meet the burden of proof for rezonings, these requirements would become a dead letter. Municipalities would simply state into their record, without more, that the area had changed and that there was a public need for a rezoning. Municipalities would be able to avoid the high burden of proof imposed in rezoning cases. This is clearly insufficient under Mississippi law. Mississippi law requires that Cities carry a heavy burden to justify rezonings. As explained in cases such as *Cockrell* and *Town of Florence*, Mississippi law requires actual evidence to meet the stringent test for rezoning.

There is no evidence of a present public need for the rezoning decision in this case. Thus, on this basis as well, the Circuit Court's decision should be reversed.

CONCLUSION

The decision in this case should be analyzed as what it was – a decision to rezone rural, large lot property in the City to a dense suburban environment. The Record-evidence in this case does not even approach the standard required for a rezoning. There is no evidence that the character of the subject area had substantially changed justifying the rezoning. In fact, the Record makes clear that the area had not changed, and remained rural in character, as of the date of the rezoning decision. The rezoning decision itself would change the character of the area by allowing a dense residential development in an otherwise rural large-lot area of the City. While the Record contains speculation about future developments, there is no actual evidence of a

substantial change in the character of the area. For this reason alone, the Circuit Court's decision affirming the rezoning should be reversed.

Similarly, there is no evidence in the Record of a public need for the rezoning. The Record is again devoid of statistics, studies, empirical data or any real evidence of a public need. At best, there are anecdotal statements from lay persons to the effect that, at some future uncertain time, there might be a public need for more housing in Tupelo. This does not amount to clear and convincing evidence of an existing public need. Since there was no evidence of a public need, on this basis as well, the Circuit Court's decision should be reversed.

Accordingly, for all of the above and foregoing reasons, the Circuit Court's decision should be reversed and rendered.

RESPECTFULLY SUBMITTED, this the 15th day of March, 2011.

MCLAUGHLIN LAW FIRM

By: _____

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Hon. Billy G. Bridges
Circuit Court Judge
520 Chuck Wagon Drive
Brandon, Mississippi 39042

Pope S. Mallette
Paul B. Watkins
Mayo Mallette PLLC
Post Office Box 1456
Oxford, Mississippi 38655

B. Bronson Tabler
B. Bronson Tabler, P.A.
P.O. Box 7116
Tupelo, Mississippi 38802-7116

This the 15 day of March, 2011.

R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Kathy Gillis
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 15th day of March, 2011.

R. Shane McLaughlin