IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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| TINSELTOWN CINEMA, LLC | APPELLANT |
| v. | NO. 2013-CC-02014 |
| CITY OF OLIVE BRANCH, MISSISSIPPI | APPELLEE |

Appeal from Decision of the DeSoto County Circuit Court

# BRIEF OF APPELLEE CITY OF OLIVE BRANCH

*ORAL ARGUMENT REQUESTED*

**Bryan E. Dye #100796**
**CITY OF OLIVE BRANCH**
**9200 Pigeon Roost**
**Olive Branch, MS 38654**
**662-892-9228**
**Fax 662-892-9225**
**bdye@obms.us**

**Attorney for Appellee**
**City of Olive Branch**

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## STATEMENT OF ISSUES

**Was the February 19, 2013 Order of the Mayor and Board of Aldermen of the City of Olive Branch, Mississippi denying the Tinseltown application for Project Text and Preliminary Development Plan approval:**

- **Supported by substantial evidence;**
- **Arbitrary or capricious;**
- **Within the legislative power of the Board of Aldermen; or**
- **In violation of a statutory or constitutional right of Tinseltown?**

## STATEMENT OF THE CASE

On February 19, 2013 the Board of Aldermen for the City of Olive Branch, after a public hearing, rezoned the 8.28 acre Tinseltown site from A-R ("Agricultural-Residential") to C-4 ("Planned Commercial"). At the same meeting, the Board of Aldermen conducted a separate public hearing for consideration of a Project Text and Preliminary Development Plan for the rezoned site. A project text serves as a site-specific Zoning Ordinance governing the development and use of land which has been designated as a planned commercial district. As such, project texts will include lists of permitted uses, parking regulations, bulk regulation data, buffering requirements, and other development standards. Accordingly, adoption of a project text is a legislative function of a Board of Aldermen [Record, File 8, C-4 Zoning Ordinance, pg. 5-49 through 5-76; R.E. 01-28].[1]

Although the City of Olive Branch Board of Aldermen determined that the Tinseltown property should be rezoned C-4 in accordance with the recommendations of the City's Comprehensive Plan, the Board on February 19, 2013, based on the facts as they existed on that date, acted within its legislative authority in denying the submitted Project Text for the Tinseltown site. Tinseltown appealed the denial to the Desoto County Circuit Court which affirmed the decision of the City of Olive Branch. Being aggrieved by the Circuit Court's decision, Tinseltown Cinema, LLC ("Tinseltown") now appeals to the Supreme Court.

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[1] Pursuant to MRAP 30(b), The City of Olive Branch has prepared and filed a volume labeled "Record Excerpts of Appellee City of Olive Branch." For the convenience of the Court and counsel for Tinseltown, the City has attempted to follow the citation method employed by Tinseltown in its brief and record excerpts volume.

## STATEMENT OF FACTS

In late 2012 the City of Olive Branch received multiple theater-related planning applications submitted by representatives of Ambarish Keshani, principal of Tinseltown Cinema, LLC, seeking various required approvals for different sites located along Highway 302/Goodman Road in Olive Branch [Record, File 9, Planning Staff Reports, Pooja Cinema; R.E. 29]. The initial applications included a site located east of Malone Road on the south side of Goodman Road, for which Mr. Keshani unequivocally sought approval for operation of a theater to be known as Pooja Cinema [Id.].

Also included in the flurry of applications was a proposed Project Text[2] and Preliminary Development Plan for a second Highway 302/Goodman Road site, located east of Pleasant Hill Road, identified as Tinseltown Plaza. Mr. Keshani's representatives submitted a proposed Project Text to the City's Planning Staff and to the City Planning Commission, and the application requested approval of eleven (11) permitted uses for the two lot subdivision, including:

1) Offices
2) Drugstore
3) Grocery Store
4) Restaurant including carry out, but no drive thru
5) Boutiques
6) Small retail

[2] The Olive Branch Zoning Ordinance (Art. V, Section 11, pg. 5-49) states that "within a Planned Commercial District, there are no 'permitted uses' or 'conditional uses' in the conventional sense" (R.F. 8, R.E. 01). Applicants requesting approval of a Project Text and Preliminary Development Plan may propose uses of land, which may include "those uses listed as permitted or conditional uses within the "O," "C-1," "C-2," and "C-3" districts" (R.F. 8, R.E. 02). The City's purpose in not having a set, mandated list of permitted and conditional uses for C-4, Planned Commercial properties is to provide a mechanism for achieving "greater flexibility and control than is afforded under the general regulations" (Zoning Ordinance, Art. V, Section 11, pg. 5-49, R.F. 8, R.E. 01). Accordingly, a Project Text proposed by a developer and thereafter approved by the Board of Aldermen serves as the site-specific zoning ordinance for the City of Olive Branch, governing land-use and development standards for a unique and particular commercial property.

7) Convenience Stores
8) Movie Theaters, but not drive-in theaters
9) Indoor Recreation Center or Arcade with video, pinball games
10) Lounge, bars, taverns, and similar establishments
11) Banks, Federal Credit Unions

[Record File 2, Dec. 11, 2012 Planning Commission Minutes pg. 4; R.E. 35]. It was the understanding of all involved at the time that the subject property was zoned C-4, Planned Commercial.

At the December 11, 2012 Planning Commission meeting where the Tinseltown application for Project Text and Preliminary Development Plan approval was considered, the City's staff, the Planning Commission, and the public in attendance were led to believe that the applicant intended to construct a restaurant at Lot 1 (the smaller out-parcel) and a retail facility at Lot 2 (the larger lot extending to the Wedgewood residential border) [Id.]. Laurette Thymes, Associate City Planner, explained the City's historical practice of approving movie theaters as conditional uses, not permitted uses. In response to the Planning Staff's recommendation that movie theaters and large scale retail be made conditional uses, Hugh Armistead, an attorney representing Mr. Keshani, informed the Commission that his client did not want large scale retail approved as part of the Project Text, and that he was opposed to movie theaters being listed as a conditional use [Id. at pg. 5,6; R.E. 36, 37].

At no time, at the December 11, 2012 Planning Commission meeting, was there consideration of narrowing the list of permitted uses to only allow movie theaters on Lot 2 of the Tinseltown site. In fact, Ms. Thymes advised the Commission that a broad list of uses would provide flexibility for "times when projects do not go forward for their original intent." [Id. at 37] The recommendation of the Planning Commission, which

was sent to the Board of Aldermen for their consideration on January 15, 2013, was to conditionally approve the Project Text and Preliminary Development Plan, showing eight (8) permitted uses and one (1) conditional use, as follows:

Permitted Uses:

1) Offices
2) Drugstore
3) Grocery Store
4) Restaurant including Carryout Restaurant, but no drive-through
5) Small Retail, Boutiques, Convenience stores
6) Indoor Recreation Center or Arcade with video, pinball games
7) Lounge, bars, taverns, and similar establishments
8) Banks; Federal Credit Unions

Conditional Uses:

1) Movie Theaters and Performing Arts Theaters, but not drive-in theaters

[Id.]

On January 15, 2013 the Tinseltown application for Project Text and Preliminary Development Plan approval came before the Board of Aldermen during a public hearing. The Planning Staff's report indicated that the property was zoned C-4, Planned Commercial, and that the applicant, per their own submissions, intended to construct a restaurant on Lot 1 and retail on Lot 2 [Record, File 1, Planning Staff Reports, Tinseltown Plaza; R.E. 40]. Accompanying the Planning Staff's report was a letter dated November 19, 2012 from Robert W. Ginn, identifying Lot 2 of the site as the "Tinseltown Plaza Shopping Center" [Record, File 1, Land Development Resources Application; R.E. 42]. Under this cover letter was the proposed Project Text submitted by the applicant, which includes the following statement:

> "The project is to be developed into 2 lots. Lot 1, along the Goodman Road Frontage, is proposed for a restaurant. Lot 2 is proposed for retail. Both uses are compatible with C-4 zoning uses permitted, and existing development along Goodman Road."

[Id. at pg. 1; R.E. 45]

However, despite the fact that applicant created the impression among the Planning Staff, Planning Commission, and general public that the Project Text would include a broad list of permitted uses with a proposed initial retail use of Lot 2, between the date of the December 11, 2012 Planning Commission hearing and the January 15, 2013 Board of Aldermen hearing, Mr. Keshani's representatives revealed his actual intention to only seek approval for a movie theater as a permitted use on Lot 2, with a similarly narrowed use for Lot 1 [Record, File 3, January 15, 2013 Minutes pg. 293; R.E. 53]. Given the change in proposed uses as revealed by representatives of Mr. Keshani, and the pending application for theater related approvals at the nearby Pooja site also involving Keshani, discussion ensued between Planning Staff and the Board as to whether theaters should be permitted or conditional uses [Id.] The Board and Associate Planner Laurette Thymes also discussed Ms. Thymes opinions regarding how staff would review simultaneous applications for identical uses at multiple sites within areas recommended for planned commercial development [Id.].

At the public hearing on January 15, 2013, certain residents spoke in opposition to the application, including Steve Heuser and John Tackwood who made reference to the belatedly revealed switch in plans as "deception" [Id. at pg. 294, 295; R.E. 54, 55]. Contrary to Tinseltown's brief which describes Alderwoman Hamilton's February 19th opposition to the plan as "last-minute," on January 15, 2013 Alderwoman Hamilton offered a motion to approve the Project Text for the Tinseltown site conditioned on

additional buffering and the omission of movie theaters as either a permitted or conditional use [Id.]. Alderwoman Hamilton's motion, which died for lack of a second, indicated support for commercial development on the Tinseltown site with 8 available permitted uses as recommended by the Planning Commission.

Ultimately, under the erroneous understanding that the subject property and eight (8) other properties southwest of the site were zoned C-4, Alderman Dickerson made a motion to approve a Project Text with additional buffering requirements, listing only Banks and Restaurants as permitted uses for Lot 1, and Movie Theaters, but not drive-in as the only permitted use for Lot 2. The motion received a second and was submitted to a vote, with the result being passage by a vote of 5 in favor, 2 in opposition, Alderman Tullos and Alderwoman Hamilton voting "Nay" [Id. at 297, 298; R.E. 57, 58]. Accordingly, although the Planning Commission recommendation was for a commercial development with eight (8) non-theater permitted uses (with theaters listed as a conditional use), the Board of Aldermen proceeded to approve a commercial development providing only one (1) permitted use, movie theaters, for the larger of the two proposed lots which adjoins the residential Wedgewood development. The Board made this decision based on the then-unknown foundational misunderstanding as to zoning for the Tinseltown site and eight (8) other nearby properties, and *without consideration of the Board's authority, or lack thereof, to approve a commercial development plan on a residentially zoned property.*[3] The January 15, 2013 Ordinance reflecting the approval indicates that the Ordinance "shall take effect and be enforced as provided by law" [Id.].

[3] Underlined, italicized, or bolded text reflects emphasis supplied by counsel for the City.

Less than ten (10) days after the January 15th approval, prior to the approval of the January 15th minutes, prior to the effective date of the Ordinance approving the Tinseltown Project Text and Preliminary Plan, and prior to the expiration of the Mayor's veto options pertaining to the approval, City staff discovered that it had provided erroneous zoning information to the Planning Commission and Board of Aldermen. The City's Comprehensive Plan recommends the Tinseltown site and 8 other adjoining or nearby sites for a future land use of Planned Commercial [Record, File 5, Comprehensive Plan, pg. 178 and Ex. 30; R.E. 59, 60]. However, neither the Tinseltown site nor any of the other 8 sites had ever been rezoned to the C-4 district by legal action of the Board of Aldermen; instead, the sites retained the "A-R" zoning designation which had been in place prior to the annexation of the properties into the City of Olive Branch in 1996 [Record, File 3, R.E. 127].

Contrary to assertions in Tinseltown's brief that the "Record is devoid of any evidence" of an error in the map, or references to an "alleged" or "ostensible" error that was "strangely discovered," the Record contains a detailed explanation of the issues with the zoning designation for the subject property and surrounding sites. Planning Staff characterized the error as a "discovery of a mistake in the database of the zoning map program" [Record, File 9, Planning Staff Report, Feb. 19 Tinseltown Plaza; R.E. 61]. Exhibit "A" to the Board's February 19, 2013 Order denying the Tinseltown Project Text consists of maps illustrating the zoning error [Record, File 6, Zoning Maps, R.E. 64, 65]. The Order itself provides a detailed narrative explanation of the nature of the error, the manner in which it came to exist, and the steps the City took to rectify the situation [Record, File 9, R.E. 127, 128]. Tinseltown Cinema, LLC, Ambarish Keshani, and all

related individuals, entities, and representatives were aware of, and kept informed of, all relevant proceedings and issues related to the subject property at each and every stage of the process [Id. at 128].

Accordingly, rather than being a solid block of C-4 Planned Commercial properties, the southeast quadrant of the Goodman Road/Pleasant Hill Road intersection remained predominately A-R, "Agricultural-Residential" [Record, File 6, Zoning Maps; R.E. 64]. Recognizing that the Board lacked authority to approve a planned commercial development on property that remained zoned A-R, the City scheduled a Special Meeting on January 28, 2013. Prior to the Special Meeting of the Mayor and Board, City Staff informed Tinseltown of the zoning error and the recommendation that the Board rescind the approval of the Project Text and Preliminary Development Plan and schedule expedited hearings for consideration of an application to rezone the site and consideration of the Text and Plan [Record, File 3, R.E. 128]. The Record is silent and devoid of any evidence indicating that Tinseltown relied on the Board's prior approval of the Project Text and Preliminary Development Plan during the days between the January 15th approval and the January 28th Special Meeting.

Ambarish Keshani and counsel for Tinseltown were present at the January 28, 2013 Special Meeting. At the meeting, the Board voted to rescind the January 15th approval of the Project Text and Preliminary Development Plan for Tinseltown, finding that it was appropriate to rescind approval of a commercial development for a site that was in fact zoned A-R [Record, File 3, January 28, 2013 minutes; R.E. 68]. The Board also set a public hearing for February 19, 2013 to consider an application for a Zoning Map Amendment, Project Text, and Preliminary Development Plan approval [Id. at 68,

69]. The Board's action reflected an expedited schedule since the standard planning process would have included a February 12, 2013 Planning Commission hearing and consideration by the Board at the second regular meeting in March, 2013. The Board complied with the statutory 15 days notice but afforded a hearing to the applicant and general public on February 19th, a month earlier than the standard process would have provided [Record, File 3, February 19th hearing proof of publication; R.E. 70].

The Board did not rescind, on January 28th, the approval of the final plat for Tinseltown which had been approved on January 15th. The subdivision reflected in the final plat would meet the requirements of either the A-R zone or the C-4 zone, in that each lot exceeded the one acre requirement of the A-R zone and each lot obviously complied with the provisions of the Tinseltown plan. Thus, no rescission of the final plat approval was necessary [Record, File 2, February 12, 2013 Planning Commission minutes pg. 7; R.E. 71].

In the days following the Board's January 28th rescission of the project approval, with full knowledge of the Board's action and the pending public hearings regarding the project, Tinseltown Cinema, LLC "proceeded with the closing of its purchase of the Property and financing for the Development on January 29, 2013 and January 31, 2013, respectively, and began clearing the land in preparation for commencement of construction of the Development" (Appellant's Supreme Court brief, page 9). Attached to Tinseltown's Circuit Court brief as an Addendum is a copy of a Warranty Deed recorded at Book 700, Page 36. The deed was signed by each of the Grantors on January 29, 2013, the day following the Board's special meeting [Tinseltown Addendum, Warranty Deed; R.E. 72]. Also attached to Tinseltown's Circuit Court brief as an

Addendum is a copy of a Deed of Trust recorded at Book 3581, Page 374. Tinseltown granted the Deed of Trust to Liberty Bank of Arkansas in the amount of $5,000,000 on January 31, 2013, three days after Ambarish Keshani and counsel for Tinseltown attended the Special Meeting at which the Board rescinded the approval of the project [Tinseltown Addendum, Deed of Trust; R.E. 80]. Tinseltown, at its own peril, unwisely assumed that the February 19th public hearings for the rezoning and Project Text application were "mere formalities" (Appellant's Supreme Court brief, page 9). To the contrary, the public hearings were steps required by both local Ordinance and State law, for which there was no pre-determined, pre-arranged outcome.

On or about February 5, 2013, the City's Planning Staff received various materials from opponents of the project, including a written petition which was clearly sufficient to trigger the "super-majority" voting standard prescribed by Miss. Code Ann. Section 17-1-17 [Record, File 3, Super-majority Petition Materials; R.E. 88]. The super-majority voting standard would require a favorable vote of three-fifths (3/5) of the Board in order for a change from A-R to C-4 to become effective. Three-fifths (3/5) of a 7 member Board would require 5 affirmative, favorable votes. The City's C-4 Zoning Ordinance states that "a simple majority vote of the Board of Aldermen shall be required for final action to be taken" regarding approval of a Project Text and Preliminary Development Plan [Record, File 8, C-4 Zoning Ordinance, pg. 5-57; R.E. 09]. In light of the differing, required voting standards prescribed by State law (for the rezoning) and local Ordinance (for the Project Text), both the Planning Commission and the Board of Aldermen bifurcated their proceedings on February 12th and February 19th, respectively.

To have done otherwise would have subjected Tinseltown's Project Text and Preliminary Development Plan application to an elevated and inapplicable voting standard.

On February 12, 2013 the Planning Commission conducted public hearings regarding the Tinseltown rezoning and the Tinseltown Project Text/Preliminary Development Plan. Rather than reflecting the "mere formalities" anticipated by Tinseltown, the Commission conducted a full hearing as required by law and the Commission's options were explained by Staff to include a full range of potential outcomes. Laurette Thymes, Associate City Planner, informed the Commission that "in considering the project text you may wish to approve, deny, or the Commissioners may include additional conditions" [Record, File 2, February 12, 2013 Planning Commission Minutes pg. 9; R.E. 109]. The Planning Commission voted to recommend rezoning of the site to the C-4 designation, and to recommend approval of the Project Text and Preliminary Development Plan reflecting only a theater use for Lot 2 of the Tinseltown site [Id. at pg. 17; R.E. 117]

On February 15, 2013 Mayor Samuel P. Rikard provided a memo to the Board of Aldermen which was included in the informational packets the Board receives on Fridays prior to Tuesday Board meetings [Record, File 9, Samuel P. Rikard Memo; R.E. 119]. The memo reflects the Mayor's opinion regarding the two pending theater applications which Tinseltown/Keshani was simultaneously pursuing [Id.]. As to the Pooja site on Hwy 302/Goodman Road, near Malone and just down the street from the Tinseltown site, Mayor Rikard expressed his opinion that approving a theater for this site could be acceptable with reasonable conditions. As to the Tinseltown site, Mayor Rikard

expressed his support for C-4 zoning, but stated his opinion that approval for a theater use was "short sighted" and representative of planning in a "piece meal fashion" [Id.].

On February 19, 2013, the Board of Aldermen conducted two public hearings for the Tinseltown site. Initially, the Board voted to recognize the signers of the written protest petition as a statutory class sufficient to force a super-majority vote on the rezoning pursuant to Miss. Code Ann. Section 17-1-17. Following the public hearing regarding the rezoning application, the Board voted 5-2 to rezone the Tinseltown site from A-R to C-4. The 5 affirmative, favorable votes constituted a three-fifths vote from among the 7 member Board, thus satisfying the requirements of Miss. Code Ann. Section 17-1-17 [Record, File 3, February 19, 2013 Minutes pg. 368-373; R.E. 120].

Next, the Board proceeded to conduct a full public hearing regarding the application for Project Text and Preliminary Development Plan approval, as required by local Ordinance, State law, and pursuant to the notice of public hearing advertised in accordance with the Board's directive on January 28th [Record, File 3, February 19, 2013 Minutes pg. 373-380; R.E. 126-133]. The minutes[4] of the February 19, 2013 meeting reveal the following:

- The Board was aware that eight (8) parcels adjoining or near the subject property were zoned A-R, when on January 15th the Board had understood said properties to be zoned C-4 (pg. 374; R.E. 127).

[4] The Desoto County Circuit Court ruled in favor of the City of Olive Branch in denying Tinseltown's Motion to Strike. The Motion to Strike pertained to Tinseltown's assertion that the City engaged in "supplementation" of the Minutes of the February 19, 2013 meeting (Appellant's Sup. Ct. Brief, pg 18). In addition to the statutory requisites, minutes may contain "any other information that the public body requests be included or reflected in the minutes." Miss. Code Ann. Section 25-41-11(1). Minutes are the exclusive evidence of "what the board did." Burdsal v. Marshall County, 937 So.2d 45 (Miss. App. 2006). This Court has referred to a written opinion which accompanied the adoption of a rezoning ordinance (which logically was drafted at some point following the vote) as a public body "[a]cting in its legislative capacity." Woodland Hills Conservation Association, Inc, v. City of Jackson, 443 So.2d 1173, 1178-1185 (Miss. 1983).

- The Board rescinded the January 15th approval of the Tinseltown Project Text and Preliminary Development Plan due to the fact that the subject property was not commercially zoned at the time, and due to the erroneous zoning information the Board received regarding the nearby or adjoining parcels (pg. 375; R.E. 128).

- Mr. Keshani and his attorney were made aware of the zoning map error in advance of the meeting on January 28th, they were in attendance at the Jan. 28th meeting, and they were aware of the Board's vote to rescind the January 15th approval from the moment the vote occurred (pg. 375; R.E. 128).

- The Board was aware of the degree to which the southeast quadrant of the Hwy 302/Goodman Road/Pleasant Hill intersection remained zoned A-R as of February 19, 2013 (pg. 375, Ex. A; R.E. 64, 128).

- The Board was aware of the early submittals by Tinseltown that appeared to not reflect a theater as an intended use for Lot 2 (pg. 377; R.E. 130).

- The Board was aware of Tinseltown's placement of a theater sign on yet a third site, west of the Tinseltown site, and east of the Pooja site (pg. 377; R.E. 130).

- The Board was informed that Tinseltown representatives had failed to reach a buffering agreement with Danny Butler, owner of A-R zoned property along the southwestern boundary of the Tinseltown site (page 377; R.E. 130).

- The Mayor and Planning Staff addressed the fact that the Tinseltown developer would be required to construct required buffering on the subject property, without relief for improvements proposed for Butler property (pg. 377; R.E. 130).

- The Board heard from Heather Fox who discussed the difficulty of converting a failed theater to another use, a reference to the narrowed list of permitted uses for Lot 2 (pg. 378; R.E. 131).

- The Board heard from Tracey Carruthers who expressed concerns about development on the south side of Goodman Road as a "hodgepodge, piecemeal jumble" (pg. 378; R.E. 131).

- Alderwoman Hamilton, echoing Mayor Rikard's memo and Ms. Carruthers' concerns, based her motion to deny the application for the Tinseltown Project Text and Preliminary Development Plan on the "piece-meal" nature of the proposed development (pg 378; R.E. 131).

- The Board took into consideration the full record of all proceedings related to Tinseltown, all proof both for and against the application, and their own common knowledge and familiarity with the subject property and surrounding area (pg. 378; R.E. 131).

- The Board found as fact that the February 19th public hearing was conducted under materially different facts, in regard to the zoning of affected properties, than was the January 15th hearing (pg. 379; R.E. 132).

- The Board exercised its legislative authority in choosing not to adopt an Ordinance. The submitted Project Text would have served as a site specific zoning Ordinance for the 8.28 acre site, and the Board found as fact that this result would not have been in the best interest of the City of Olive Branch based on the facts as they existed on February 19, 2013 (pg. 379; R.E. 132).

- The Board found as fact that approval of the submitted Project Text, in light of the material change in facts regarding area zoning, would constitute piece-meal development in what the City has designated as a planned commercial corridor (pg. 380; R.E. 133).

Based on the foregoing Statement of Facts, the Record Excerpts, and the full Record on Appeal, as well as applicable State law and local Ordinances, it is clear that the decision of the Mayor and Board of Aldermen of February 19, 2013 was well-reasoned and based on substantial evidence. The Record reveals no action by Tinseltown in reliance on the Board's January 15, 2013 approval of the Tinseltown plan until after said approval had been rescinded at the January 28, 2013 meeting in the presence of Ambarish Keshani and his attorney. The Record reveals that the February 19, 2013 public hearing was conducted under materially different facts, in regard to the zoning of affected parcels, than was the January 15th public hearing. The Board's denial of the Tinseltown Project Text and Preliminary Development Plan was well within the Board's legislative power, and was neither arbitrary, nor capricious. For these reasons, the Board's February 19, 2013 decision should be affirmed on appeal.

## SUMMARY OF THE ARGUMENT

On February 19, 2013 the Board of Aldermen for the City of Olive Branch appropriately exercised its legislative authority in choosing to not adopt an Ordinance pertaining to the Tinseltown Project Text and Preliminary Development Plan. The Board based its decision on substantial evidence, as revealed by the entire record, particularly the minutes of the February 19th meeting, the transcript of such meeting, the Planning Staff reports, and other materials pertaining to the Tinseltown matter. At its most fundamental level, the action taken on February 19, 2013 was a decision by the Board of Aldermen to not adopt a site-specific zoning Ordinance, said decision being well-reasoned and neither arbitrary nor capricious. Tinseltown's appeal is a plea for this Court to engage in the legislative planning process and to exercise police powers.

The Board of Aldermen was not estopped from making its February 19th decision since Tinseltown's rights, if any, to rely on the January 15th approval were extinguished by the January 28th rescission vote, and all of Tinseltown's purported acts of reliance were post-January 28th. Further, the doctrine of *res judicata* did not present a legal impediment to the Board's February 19th action given the fact that the Board had earlier rescinded the January 15th approval. In no way was the Board of Aldermen precluded from conducting a full public hearing on the Tinseltown application on February 19, 2013, and in no respect was the legislative authority of the Board limited by prior proceedings.

For these reasons, set forth more fully below, the February 19, 2013 denial by the Mayor and Board of Aldermen of the Tinseltown Project Text and Preliminary Development Plan should be affirmed.

## ARGUMENT

### I. Jurisdiction, Burden of Proof, and Standard of Review

The Court in considering the appeal filed by Tinseltown has jurisdiction to review the February 19, 2013 decision of the Mayor and Board of Aldermen denying the application for Project Text and Preliminary Development Plan approval. There is no jurisdiction to review actions of the Mayor and Board taken on either January 15, 2013 or January 28, 2013, as there was no timely appeal filed related to either of those meeting dates or actions taken on such dates. Tinseltown's initial pleadings, filed on February 27, 2013, appeared to assert an appeal from the Board's January 28th action rescinding the January 15th approval. However, due to the untimely filing of the notice of appeal, the Court lacks jurisdiction to review the January 28, 2013 actions of the Board.[5] "The Mississippi Supreme Court has held, time and again, that the ten-day time limit of Section 11-51-75 is 'both mandatory and jurisdictional.'" Alias v. City of Oxford, 70 So.3d 1114, 1117 (Miss. App. 2010). "The timeliness of an appeal is jurisdictional, and this Court must always acknowledge its own lack of jurisdiction." Id. at 1116. Accordingly, the scope of the Court's review should be limited to the actions of the Mayor and Board taken on February 19, 2013, based on the facts as they existed on that date.

Miss. Code Ann. Section 11-51-75 reads, in pertinent part, as follows:

> *"The clerk thereof shall transmit the bill of exceptions to the circuit court at once, and the court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment. If the judgment be reversed, the circuit court shall render*

[5] On April 22, 2013 the Circuit Court entered an Agreed Order which, among other things, includes a statement about the Court's lack of jurisdiction to consider the January 28, 2013 actions of the Mayor and Board.

*such judgment as the board or municipal authorities ought to have rendered, and certify the same to the board of supervisors or municipal authorities.*"

The Board's February 19, 2013 decision was a negative action, a denial of a Project Text – in essence a legislative decision to not adopt an Ordinance. Tinseltown is asking the Court to reverse a negative action, presumably asking the Court to adopt an Ordinance allowing a theater as the only permitted use on Lot 2 of the Tinseltown development. Tinseltown is asking the Court to make affirmative planning and zoning decisions – asking the Court to adopt an Ordinance – regarding development in a planned commercial context. The Ordinance would not only include traditional zoning elements such as lists of permitted uses, but also regulations within a municipality's police power such as off-street parking guidelines ["Conditions such as off-street parking restrictions constitute a proper application of the municipal police power. . . ." Duckett v. City of Ocean Springs, 24 So.3d 405, 410 (Miss. App. 2009)].

Given the strict standard of review for requests to reverse legislative municipal zoning decisions, a request to reverse a negative action of the Board of Aldermen by ordering the City to adopt a site-specific zoning Ordinance would seem to strain the limits of the Court's jurisdiction. The Circuit Court should not undertake a consideration of whether it would have adopted the Project Text Ordinance on February 19, 2013. To the contrary, the appropriate standard of review is whether the action of the Olive Branch Mayor and Board was reasonable and supported by substantial evidence. ["The appellate court should not determine whether it would adopt the ordinance in question; instead, it should determine whether the City's decision to adopt the ordinance is reasonable and supported by substantial evidence." City of Ocean Springs v. Homebuilder's Association of Mississippi, Inc., 932 So.2d 44, 48 (Miss. 2006). "Judicial review is limited to

determining whether there was a substantial evidentiary basis for the Board's decision. It is not the role of the judiciary to reweigh the evidence, but rather to verify if substantial evidence exists." Childs v. Hancock County Board of Supervisors, 1 So.3d 855, 861 (Miss. 2009).]

Tinseltown bears the burden of proof, and must override the presumption of validity that has attached to the Board's February 19th decision. "The burden of proof on issues of enacting or amending ordinances or rezoning rests on the party asserting the invalidity of the board's actions, while the board's actions have a presumption of validity." Thomas v. Board of Supervisors of Panola County, 45 So.3d 1173, 1181 (Miss. 2010). Tinseltown is required to prove that the Board's denial of the Project Text as the site-specific zoning Ordinance for the subject property was unsupported by substantial evidence.

## II. Substantial Evidence

URCCC 5.03 provides that the Court "will only entertain" Tinseltown's appeal to determine if the February 19th denial of the Tinseltown plan was:

1) supported by substantial evidence; or

2) arbitrary or capricious; or

3) beyond the power of the Board; or

4) in violation of some statutory or constitutional right of Tinseltown?

The Court is, of course, familiar with the standard of review. The February 19th Order of the Mayor and Board of Aldermen denying the Tinseltown plan should not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, illegal, or without a substantial evidentiary basis. Thomas v. Board of Supervisors of Panola

County, 45 So.3d 1173, 1180 (Miss. 2010). The term "arbitrary" has been defined as an act that "is not done according to reason or judgment, but depending on the will alone." Id. at 1181. "Capricious" is defined as "any act done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." Id. On the other hand, "substantial evidence" has been described as "more than a mere scintilla of evidence" or "something less than a preponderance of the evidence but more than a scintilla or glimmer." Id.

Although the February 19th decision before the Court on appeal was not a rezoning decision, but rather a decision to not adopt a site-specific zoning Ordinance, the "fairly debatable" standard remains applicable. The Board's decision to deny the Tinseltown plan "must not be disturbed where the issue is fairly debatable." Id. "Where . . . there is substantial evidence supporting both sides of a rezoning application, it is hard to see how the ultimate decision could be anything but 'fairly debatable,' not 'arbitrary and capricious,' and therefore beyond [the court's] authority to overturn." Id.

The Record contains substantial evidence that the Board on February 19th considered the surrounding facts and made a decision based on reason and judgment. The Record reveals the following:

- The Board considered Mayor Rikard's February 15th memo outlining the positives and negatives of the two sites for which Keshani/Tinseltown had submitted simultaneous applications for theater approval along Goodman Road [R.E. 119].

- The Board was aware of the accurate zoning designations for the subject property and 8 adjoining or nearby properties which remained Agricultural-Residential [R.E. 127, 128].

- The Board considered the written and verbal presentations of the City's Planning Director, B.J. Page, and Associate City Planner, Laurette

Thymes, and the Applicant's representative, Hugh Armistead [R.E. 128, 129].

- The Board engaged in extensive discussion regarding the buffering of the Danny Butler residential property along the southwestern boundary of the Tinseltown site. Mayor Rikard and Laurette Thymes addressed the fact that buffering required by the City was to be constructed on the applicant's property, not adjacent sites [R.E. 130, 131].

- The Board considered comments from Alderwoman Hamilton, and opponents of the project, who expressed similar concerns as Mayor Rikard regarding the piece meal nature of the narrow, single-use development in an area designated as Planned Commercial [R.E. 131].

- The Board considered the proof both for and against the application, the full record of all proceedings, and their own common knowledge and familiarity with the area in question [R.E. 131].

- The Board approved as part of its minutes specific findings of fact supporting its decision to deny the application for Project Text and Preliminary Development Plan approval [R.E. 132, 133].

Obviously, the City and Tinseltown will continue to disagree as to whether the Board of Aldermen made the "right" decision on February 19th. That, however, is not the question before the Court. The Court is not to decide whether it would have made the same decision as the Board of Aldermen on February 19th. The appropriate standard of review is whether the Board's decision was reasonable and based on substantial evidence, a decision the Court makes without a reweighing of the evidence considered by the Board. City of Ocean Springs v. Homebuilder's Association of Mississippi, Inc., 932 So.2d 44, 48 (Miss. 2006). Childs v. Hancock County Board of Supervisors, 1 So.3d 855, 861 (Miss. 2009). The Record taken as a whole, in particular the minutes of the February 19, 2013 meeting of the Mayor and Board of Aldermen, clearly provides a substantial evidentiary basis supporting the Board's denial of the Tinseltown Plan.

In an effort to characterize the City's denial as arbitrary, Tinseltown has incorrectly stated that theaters are a permitted use in the City's C-4, Planned Commercial zone, and that the City violated its own Ordinance in denying the plan on February 19, 2013. Tinseltown repeatedly demonstrates in its briefs a failure to grasp the basic function of the City's Planned Commercial District. "Within a Planned Commercial District, there are no 'permitted uses' or 'conditional uses' in the conventional sense" (Zoning Ordinance, pg 5-49, R.E. 01). Rather, an applicant must propose uses for a planned commercial development that are derived from the lists included in the City's "O" Office, "C-1" Neighborhood Commercial, "C-2" Highway Commercial, and "C-3" General Commercial districts.

Theaters are not listed as either permitted or conditional uses in the "O" Office district. Theaters, but not drive-in theaters, are listed as a conditional use in the "C-1" Neighborhood Commercial district. Theaters such as that proposed by Tinseltown are not listed as either a permitted use or a conditional use in the "C-2" Highway Commercial district, although drive-in theaters are listed as a conditional use in "C-2." The only zone in Olive Branch where theaters are a permitted use is the "C-3" General Commercial District, which incorporates as a permitted use all listed conditional uses of the "C-1" district. Accordingly, the City's Zoning Ordinance is structured in such a way that theaters are prohibited in "C-2," only conditionally allowed in "C-1," permitted in "C-3," and theaters may be proposed as a use, subject to Board approval, in "C-4," Planned Commercial. Tinseltown's statement in its brief (pg. 21) that "the use of property as a theater in all of Olive Branch's commercially-zoned areas is specifically

authorized" is manifestly incorrect. The City of Olive Branch did not disregard any portion of its Ordinance in denying the Tinseltown plan.

Tinseltown further argues that the February 19, 2013 denial was the result of political pressure due to the upcoming May 2013 municipal elections. Tinseltown by footnote requests the Court to take judicial notice of elections, and then makes an "out-of-record" statement regarding the opposition faced by Aldermen in May 2013. If the Court is inclined to take judicial notice of the May 2013 municipal elections and to consider Tinseltown's out-of-record statement, the Court should consider the following information as well:

On January 15, 2013 a Tinseltown plan was erroneously approved by the Board on a 5-2 vote, as follows:

| | |
|---|---|
| Alderman George Collins | Aye |
| Alderman Dale Dickerson | Aye |
| Alderwoman Pat Hamilton | Nay |
| Alderman Harold Henderson | Aye |
| Alderwoman Susan Johnson | Aye |
| Alderman Don Tullos | Nay |
| Alderman David Wallace | Aye |

On February 19, 2013 the motion to deny the revised Tinseltown plan passed on a 6-1 vote, as follows:

| | |
|---|---|
| Alderman George Collins | Aye |
| Alderman Dale Dickerson | Nay |
| Alderwoman Pat Hamilton | Aye |
| Alderman Harold Henderson | Aye |
| Alderwoman Susan Johnson | Aye |
| Alderman Don Tullos | Aye |
| Alderman David Wallace | Aye |

Board members Dale Dickerson, Pat Hamilton, and Don Tullos voted consistently, either in support of or in opposition to the relevant motions, on both January

15th and February 19th. The difference in the outcomes was based on the voting of 4 Board members: George Collins, Harold Henderson, Susan Johnson, and David Wallace. It is important to note that the subject property is located in Ward 2, which is Alderwoman Pat Hamilton's ward. Of the 8 elected officials participating in the February 19, 2013 proceedings, the following represents their status with respect to the May and June municipal elections:

| | |
|---|---|
| Mayor Rikard | Did not seek re-election |
| Susan Johnson | Did not seek re-election (Ward 5) |
| George Collins | Unopposed (re-elected at-large) |
| Dale Dickerson | Faced opposition in Ward 6 (re-elected) |
| Pat Hamilton | Faced opposition in Ward 2 (re-elected) |
| Don Tullos | Faced opposition in Ward 1 (defeated) |
| Harold Henderson | Faced opposition in Ward 3 (re-elected) |
| David Wallace | Faced opposition in Ward 4 (re-elected) |

Tinseltown's less-than-subtle insinuation that the February 19th result was a product of political pressure fails to account for the fact that the four swing voters had no political incentive to vote one way or the other. Collins was unopposed, Johnson did not seek re-election, and Henderson and Wallace represent Wards 3 and 4 respectively, areas across town from the subject property. Mayor Rikard, who offered his perspective to the Board, was likewise not seeking re-election. The action of the Board on February 19, 2013 is entitled to a presumption of validity. Tinseltown's efforts to denigrate the motives of the Board fail to override such presumption, having failed to recognize the insignificant impact of the theater proceedings on the course of the municipal elections, and vice versa.

Tinseltown cites the 1969-70 Peden Law Journal article for the proposition that a Board decision without supporting expert testimony is somehow not based on substantial evidence. The current position of the Mississippi Supreme Court and Court of Appeals is

not so narrow. The case of Thomas v. Board of Supervisors of Panola County outlined the familiar standard:

> *Rezoning hearings are informal in nature. To determine the factual issues in rezoning requests, a board may consider information provided at the rezoning hearing, its own common knowledge, and its own familiarity with the area. The rules of evidence are misplaced in rezoning matters. The board also may consider any hearsay evidence that is admitted when it makes its decision. "It is both proper and desirable that rezoning decision makers consider information they have acquired outside the hearing room." In Board of Aldermen of Town of Bay Springs v. Jenkins this Court stated that "the hearing should be an informal, nonadversary proceeding in which the rules of evidence are not applicable" and reaffirmed that the mayor and board of aldermen were permitted to consider both sworn and unsworn statements at the hearing and their common knowledge and familiarity with the area.* 45 So.3d 1173, 1182 (Miss. 2010) [internal citations omitted].

In Board of Aldermen of Town of Bay Springs v. Jenkins the Supreme Court ruled in favor of a municipality which considered reliable, substantial, yet non-expert testimony in rendering a zoning decision. 423 So.2d 1323 (Miss. 1982). The Court's opinion recited the Bay Spring's Board Order containing its zoning decision, including the following portion:

> *It should be remembered that the Mayor and Board of Aldermen consists of men of the town not trained in the law, who are making a conscientious effort to do what is best for the town and its citizens, and we have taken into consideration things we know to be facts and things dictated by common sense. We take very seriously the zoning law, which has the effect of dictating to some degree what a person may do with his own property, but, on the other hand, we recognize the espoused purpose and design of the ordinance to protect the character of a community. In this instance we do not find that public necessity, convenience, or general welfare dictate or indicate that the particular zoning requested should be allowed.* Id. at 1327.

The Supreme Court cited this language with favor, setting forth the entire order of the Mayor and Board, and found that the order revealed the "officials' concern for,

interest in, and fairness to all parties concerned" and that the decision was not "arbitrary, unreasonable, or capricious." Id. at 1328.

At any rate, in addition to the credible lay testimony and findings of the Board of Aldermen on February 19, 2013, and contrary to Tinseltown's assertions, the Olive Branch Board did hear from experts during the course of the Tinseltown proceedings. The Board considered the report and input of B.J. Page, the City's Planning Director, and Laurette Thymes, Assistant City Planner. The Board received input from Steve Bigelow, City Engineer. The Board also heard, and was unpersuaded by, an extensive presentation by Hugh Armistead, the attorney representing Tinseltown at the February 19th hearing. The type of evidence considered by the Board of Aldermen, both lay and expert, both for and against the Tinseltown project, and the method employed by the City of Olive Branch in making the February 19th decision, is the exact type of evidence and manner of decision making that the Supreme Court time and again has considered to be "sound and practical," and a method "courts should respect." Id. at 1327.

## III. Estoppel

"The doctrine of equitable estoppel is indeed an extraordinary remedy which courts should invoke cautiously, only when necessary to prevent unconsicionable results." Sawyers v. Herrin Gear Chevrolet Company, Inc., 26 So.3d 1026, 1039 (Miss. 2010). While the doctrine may under certain facts be applied to governmental entities, including municipalities, "estoppel is not applied as freely against governmental agencies as it is in the case of private persons . . ." Carr v. Town of Shubuta, 733 So.2d 261, 265 (Miss. 1999). Tinseltown has requested the Court to invoke an equitable remedy that has

historically been applied sparingly, under limited circumstances, and only upon proof of the existence of the well-defined elements of the doctrine.

"[T]he following factual elements are a prerequisite to application of the doctrine:

(1) Belief and reliance on some representation;

(2) Change of position, as a result thereof;

(3) Detriment or prejudice cause by the change of position"

Suggs v. Town of Caledonia, 470 So.2d 1055, 1057 (Miss. 1985). Additionally, "as an essential prerequisite to application of the doctrine of estoppel the party to be estopped must have had knowledge of the situation." Id. In Suggs, the Mississippi Supreme Court held that the lower court erred in applying the doctrine of estoppel where the evidence was uncontroverted that the Mayor and Board of Aldermen of Caledonia were unaware that a convenience store was operated for twelve (12) years in violation of the municipality's ordinance. Id. at 1058.

The City would show unto the Court that Tinseltown lacked any vested right to rely on the Board's January 15th approval. Additionally, the City will show that the Record lacks evidence that Tinseltown in fact relied upon the January 15th action. Either theory defeats the equitable estoppel claim.

Tinseltown lacked any vested right to rely on the improperly approved January 15th Ordinance that was rescinded prior to it ever taking legal effect. As shown by the Record, the Board of Aldermen adopted an Ordinance approving the Project Text and Preliminary Development Plan for Tinseltown on January 15, 2013. This Ordinance states that it "shall take effect and be enforced as provided by law." [R.E. 57]. Miss. Code Ann. Section 21-13-11 controls the effective date of municipal ordinances. The

statute contains certain prerequisites for ordinances to take legal effect including, but not limited to, publication. The statute reads, in pertinent part, as follows:

*"No ordinance shall be in force for one (1) month after its passage"*

Had the January 15th Ordinance been certified by the municipal clerk, recorded in the ordinance book, and published as required by Miss. Code Ann. Section 21-13-11, the approval would still have been ineffective until February 15, 2013. The Board took action to rescind the approval well prior to the effective date of the Ordinance.

Additionally, the Board acted on January 28, 2013 to rescind the Ordinance prior to the minutes for the January 15th meeting being approved in accordance with law. Miss. Code Ann. Section 21-15-33 requires minutes to be adopted and approved at the next regular meeting of the Board or within thirty (30) days of the meeting. Only upon approval do the minutes have the legal effect of being valid from and after the date of the meeting. The Board of Aldermen rescinded the January 15th Ordinance prior to minute approval for the January 15th meeting, said minutes being approved at the Board's first regular meeting in February. As it concerns Tinseltown's equitable estoppel claim, Tinseltown chose, at its own peril and prior to the vesting of any development rights, to purchase the subject property:

- prior to the effective date of the January 15th Ordinance
- prior to the approval of the January 15th minutes
- following the January 28th rescission of the Ordinance

As Chancellor Khayat stated in his well recognized law journal article on zoning, "the governing authority may not properly authorize uses which conflict with the ordinance or which exceed its grant of power from the legislature." "Zoning Law in

Mississippi," 45 *MISS. L.J.* 365, 378, citing City of Pontotoc v. White, 93 So.2d 852 (Miss. 1957). Chancellor Khayat further discussed two Mississippi Supreme Court cases where the Court held "that no vested rights accrue to the holder of an improperly issued permit even though the holder has relied on the permit to his detriment." Id. In Delta Construction Company of Jackson v. City of Pascagoula, an applicant was issued a permit and subsequently borrowed $2,005,000 for construction purposes. 278 So.2d 436, 437 (Miss. 1973). Upon learning that the permit had been improperly issued, the city revoked the permit. Id. at 441. The Court noted the considerable expense the applicant had incurred, and in ruling that the city was not estopped from revoking the permit, the Court quoted from City of Jackson v. Kirkland, which contains the following excerpt:

> *"Generally speaking, a permit issued under mistake of fact or in violation of law confers no vested right or privilege on the person to whom the permit has been issued, and may be revoked, notwithstanding he may have acted upon it, and any expenditures made in reliance upon such permit are made at his peril."*

276 So.2d 654, 656 (Miss. 1973), quoting 6 A.L.R.2d 960, 962.

Admittedly, the permits at issue in both Delta Construction and Kirkland were administratively issued, rather than legislative acts of the governing authority. Nevertheless, the Board of Aldermen on January 15th was without authority to approve a commercial project text as a site-specific zoning ordinance for a tract that was, at the time, zoned "A-R," Agricultural-Residential. The City's C-4 zoning Ordinance contemplates from the outset that a project text is reviewed after zoning is established. [R.E. 01]. The uses which may be proposed for a C-4 development include those listed as permitted or conditional uses within the O, C-1, C-2, or C-3 districts. [R.E. 02]. The Board's January 15th approval of the Tinseltown Planned Commercial Project Text was beyond the power of the Board, given the current "A-R" zoning of the site. As an

approval granted "under mistake of fact or in violation of law" the January 15th approval conferred no vested right on Tinseltown and was properly rescinded by the Board on January 28th, prior to any act of Tinseltown in reliance on the approval.

If Tinseltown were found to have possessed a right to rely on the Board's January 15th approval of the Project Text and Preliminary Development Plan, Tinseltown cannot point to evidence in the Record demonstrating that it did, in fact, rely on the approval prior to the Board's discovery of the zoning error and rescission of the Ordinance. The Supreme Court of Mississippi has clearly held that actual reliance is a prerequisite element to an equitable estoppel claim. Tinseltown in its brief concedes that it was informed by City Staff nine (9) days after the January 15th approval that the subject property had not ever been rezoned to a commercial designation. Tinseltown's principal and counsel were present when the Board voted to rescind the January 15th approval at the January 28th special meeting. Nevertheless, on January 29th and thereafter, at its own peril, with full notice of a legally required and rescheduled February 19th public hearing that carried no presumptive outcome or result, Tinseltown chose to proceed to closing on its purchase of a portion of the subject property and the encumbrance of said property with a $5,000,000 Commercial Construction Deed of Trust. The Record is silent as to any acts of reliance by Tinseltown in the days between January 15th and January 28th. The only evidence of a change of position in the Record are the real estate transactions Tinseltown entered into in the days following the Board's necessary act of rescission of the prior approval. Accordingly, Tinseltown cannot point to evidence in the Record which would satisfy one of the essential, prerequisite elements of an equitable estoppel claim.

At most, nine (9) days transpired between the January 15th approval and the City taking steps to inform Tinseltown of the zoning database error and its intention to address the issue at a special meeting on January 28th. In Town of Florence v. Sea Lands, LTD, the Supreme Court recognized as an "adequate showing of reliance" a situation where a zoning designation had been in place for approximately nine (9) years prior to Sea Lands purchasing the property, with Sea Lands owning the site for about ten (10) more years before the City attempted a down-zoning in order to prevent the construction of multi-family housing. 759 So.2d 1221, 1229 (Miss. 2000). The Tinseltown Record contains no similar evidence which can reasonably be stated to provide an "adequate showing of reliance."

Further, Suggs identifies *knowledge on the part of the party to be estopped* as an additional, sub-element of an equitable estoppel claim. Suggs, at 1058. Tinseltown concedes in its brief that it was informed by City staff on or about January 24, 2013 of the zoning database error. The Record clearly reveals that the Mayor and Board of Aldermen learned of the A-R zoning of the subject property "subsequent to the January 15, 2013 meeting." [January 28, 2013 minutes; R.E. 68]. The Mayor and Board of Aldermen, on January 15, 2013, had no knowledge of the mistake of fact regarding the subject property's zoning. As soon as the Mayor and Board learned of the zoning database error, the Record reveals that they took steps to address the situation in advance of any action by Tinseltown in reliance on the January 15th approval.

Finally, Tinseltown's argument is that the Board of Aldermen was equitably estopped from denying the approval of the Project Text on February 19th. The February 19th proceeding was a legally required and properly noticed public hearing with no

predetermined or pre-mandated outcome. Although it is the City's position that the equitable estoppel claim is ineffective, if such a claim were going to be asserted it would more properly be considered in the context of the Board's January 28th rescission Order, an action of the Board that is not before this Court on appeal. The equitable considerations asserted by Tinseltown are related to the January 15th approval, which was rescinded on January 28th. On February 19th the Board of Aldermen was considering the Tinseltown project anew, without any forfeiture of its legislative authority to approve, deny, or modify the application as it reasonably deemed appropriate. The doctrine of equitable estoppel has no applicability to the only proceedings that are before the Court on appeal – the February 19th public hearing regarding the Tinseltown Project Text and Preliminary Development Plan.

## IV. *Res Judicata*

Tinseltown raised for the first time on appeal the doctrine of res judicata. The common law doctrine of res judicata does not provide a basis for reversal of the Board's February 19, 2013 denial of the Tinseltown Project Text. It is the position of the City of Olive Branch that the doctrine is inapplicable to the February 19th hearing. In the alternative, if the doctrine were applicable, application of res judicata to the February 19th proceedings would not produce the results sought by Tinseltown. The City of Olive Branch will address these alternative positions separately.

Res judicata must be applied to the "facts that then existed" when determining whether a municipality is prohibited from re-hearing a similar matter. Yates v. City of Jackson, 244 So.2d 724, 725 (Miss. 1971). Mississippi law has been clear for a half-

century that res judicata does not prohibit municipal consideration of a planning application when there has been a material change in circumstances or newly discovered evidence between the time of an original hearing and the time of a proposed subsequent consideration. Westminster Presbyterian Church v. City of Jackson, 176 So.2d 267, 270 (Miss. 1965).

In the present case, between the dates of the January 15, 2013 original consideration of the Tinseltown Project Text and the February 19, 2013 hearing, all interested parties learned of the accurate zoning designation for the subject property and 8 other adjoining or nearby properties. What was thought to be a solid block of C-4 Planned Commercial zoned property on January 15th was in reality a large area of A-R Agricultural-Residential property extending from the southwest boundary of the Tinseltown site westward all the way to Pleasant Hill Road. The prevalence of nearby A-R zoned property as well as the January 28, 2013 rescission Order constitute a materially different set of circumstances on February 19th as compared to the facts that existed on January 15th. The case of Miller v. City of Jackson cited by Tinseltown found res judicata applicable because the rezoning ordinance that was the subject of the dispute made no finding that there had been a material change in the character of the neighborhood. 277 So.2d 622 (Miss. 1973). Had the City of Jackson in Miller, as did the City of Olive Branch in the February 19, 2013 minutes, found that a material change in facts (or newly discovered facts) had occurred between the two relevant hearings, then res judicata would have been inapplicable in the Miller case.

Additionally, a municipality is not required to apply the doctrine of res judicata to a subsequent application that seeks a lesser variance or a different, more restrictive

classification. Yates, at 726. A city "is not required to apply the doctrine of res judicata when the new petition seeks a lesser variance than did the former petition . . ." Id. On January 15, 2013 the Board of Aldermen was presented a text of eleven (11) proposed permitted uses, and the Board of Aldermen considered the application in light of a Planning Commission recommendation for approval of eight (8) permitted and one (1) conditional use. By February 19, 2013 Tinseltown had revealed its intention of only operating a theater on Lot 2 of the site. Accordingly, on February 19th Tinseltown presented a text listing only one (1) permitted use for the lot it bought in the days following the January 28th rescission order.

The doctrine of res judicata has not been applied where the subsequent petition requests a more restrictive classification. Wright v. City of Jackson, 421 So.2d 1219, 1221 (Miss. 1982). City of Jackson v. Ridgway, 261 So.2d 458, 459 (Miss. 1972). It is clear that the text submitted to the Board for consideration on February 19th was more restrictive than the text submitted on January 15th, in that the February 19th text provided merely one (1) permitted use for Lot 2. Tinseltown sought a more restrictive use list on February 19th than that included in its original application. Thus, in accordance with the rulings in Yates, Wright, and Ridgway, the City was not required to apply the doctrine of res judicata.

Res judicata is further inapplicable to the February 19th hearing in that the Tinseltown plan had been revised to attempt a resolution of the buffering issues associated with the Butler A-R tract. Tinseltown attempted (unsuccessfully) to address objections to the project raised by Danny Butler, the owner of a residentially zoned tract adjacent to the southwestern boundary of the Tinseltown site. In its brief, Tinseltown

refers to the changes to its plan as "extensive" buffering which was not a part of the original application. Tinseltown included in its brief a Vermont case which referred to prior holdings stating that "a local planning agency or court may consider a second application which has been substantially changed to respond to objections to the first." In re Appeal of McGrew, 974 A.2d 619, 623 (Vt.2009) [Tinseltown Addendum p. 25].

In the alternative, if the Court were to find res judicata applicable to the February 19th proceedings, such a ruling would not properly result in the outcome sought by Tinseltown. Tinseltown relies on res judicata to argue that the Board was without power to deny the Project Text application. Res judicata, when applicable, is designed to prevent relitigation of issues. Wright, at 1221. Res judicata does not provide that certain outcomes are mandated at subsequent hearings involving the same parties and similar issues heard under different facts. If res judicata were applied to the February 19th Project Text hearing, it would not deprive the Board of Aldermen of the power to deny the Tinseltown application at said hearing. To the contrary, application of res judicata would have prohibited the hearing altogether.

The result of applying res judicata to the February 19th Project Text hearing would have been to have no hearing at all, leaving intact the Board's January 28th rescission Order, an action of the Board that is not before this Court on appeal. Tinseltown's argument represents a misapplication of the doctrine. The Vermont case cited by Tinseltown stands for the proposition that, under certain facts, the "successive application doctrine" deprives a zoning authority of the power to reconsider an application. In re Appeal of McGrew, 974 A.2d 619, 623 (Vt. 2009) [Tinseltown Addendum p. 25]. Res judicata prevents relitigation of issues under similar facts. "A

judgment bars a subsequent application for the same purpose where the facts upon which it is based are not changed and the conditions are substantially similar." City of Jackson v. Holliday, 149 So.2d 525, 528 (Miss. 1963).

In regard to Tinseltown's Project Text application, if applied, res judicata would have barred the subsequent application – the hearing itself – rather than mandate a particular outcome of the hearing. If res judicata had been applied as argued by Tinseltown, such a decision may have avoided the February 19th denial of the Project Text, but it would have left the January 28th rescission Order as the final proceeding related to the Tinseltown application.

Tinseltown's res judicata argument also fails due to Tinseltown's inability to prove an essential element of the claim. In order to assert res judicata, "the prior judgment must be a final judgment adjudicated on the merits." Doss v. Dixon, 2012-CA-01017-COA (¶8)(Miss. 2014). As set forth in the prior section, the January 15th approval was rescinded on January 28th, prior to it becoming a final decision on the merits. The rescission was approved prior to minute approval, prior to Ordinance publication, prior to the passage of one-month, and prior to the next regular meeting of the Mayor and Board. The January 15th approval was nullified by the Board on January 28th, that being the only reasonable course for the Board to take under the circumstances, thereby making the January 15th action inappropriate for purposes of serving as a benchmark for a res judicata claim related to the February 19th proceedings.

Res judicata is inapplicable to the Tinseltown proceedings of February 19, 2013 due to the change in underlying material facts as to the zoning of the adjoining and nearby tracts. Additionally, Tinseltown's application was different in nature in that it

contained a request for a narrowed list of permitted uses and it had been revised (incompletely) to address concerns over buffering of the Butler property. If the Court were to find that the City should have applied res judicata to the Tinseltown Project Text application on February 19th, the result would have been that no hearing would have been conducted at all, leaving intact the Board's January 28th rescission Order. Additionally, Tinseltown's res judicata argument ignores the fact that the January 15th decision was rescinded well prior to it becoming a final decision. For these reasons, the doctrine of res judicata provides no basis for the Court to reverse the Board's denial of the Tinseltown Project Text.

## CONCLUSION

The City of Olive Branch, acting through its Board of Aldermen, was empowered on February 19, 2013 to exercise its full legislative authority to review, approve, deny, or modify the Tinseltown Project Text and Preliminary Development Plan. At its most basic level, the Board's February 19th denial of the Tinseltown plan was a legislative determination to not adopt an Ordinance. Tinseltown argued for the first time on appeal before the Circuit Court that the Board's legislative authority was somehow limited on February 19th by application of the doctrines of *res judicata* and equitable estoppel. The Record, however, contains no evidence that Tinseltown in fact relied on the January 15th approval prior to the Ordinance being rescinded on January 28, 2013. Further, the Board of Aldermen lacked authority on January 15th to approve a commercial plan on property zoned Agricultural/Residential, and the rescission of the improper approval eliminated any preclusive effect the Ordinance may have had as to the Board's authority on February 19, 2013. The Record reveals that the Board's decision was based on substantial evidence, and given the limited standard of review, the Board's February 19, 2013 denial of the Tinseltown Project Text and Preliminary Development Plan should be affirmed.

## CERTIFICATE OF SERVICE

I, Bryan E. Dye, attorney for Appellee, do hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

William P. Myers, Esq.
Myers Law Group, PLLC
2042 McIngvale Road
P.O. Box 876
Hernando, MS 38632

Further, I hereby certify that I have mailed by overnight delivery service the document to the following non-MEC participants:

Hon. Robert P. Chamberlin
P.O. Box 280
Hernando, MS 38632

Louis Jay Miller, Esq.
Apperson Crump, PLC
6070 Poplar Avenue, Suite 600
Memphis, TN 38119-3972

This the 28th day of May, 2014.

/s/ Bryan E. Dye BED
**BRYAN E. DYE, MB NO. 100796**