IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN RE EARL CHILDS, et al. **NO. 2006-CA-00608**

APPEAL FROM THE CIRCUIT COURT OF HANCOCK COUNTY, MISSISSIPPI

BRIEF OF APPELLANTS EARL CHILDS, LORI GORDON, AMELIA KILLEEN, DAVID WHEELER, AND MARIA BEARD

ORAL ARGUMENT REQUESTED

ROBERT B. WIYGUL
MS Bar No. [redacted]
Attorney for Appellants
1025 Division St. Ste. C
Biloxi, MS 39530
Tel: (228) 374-0700
Fax: (228) 374-0725
Email: robert@waltzerlaw.com

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Court of Appeals may evaluate possible disqualification or recusal.

Ronald Artigues
Gex & Artigues
P.O. Box 47
Waveland, MS 39576-0047

Joseph R. Meadows
Meadows Riley Law Firm
P.O. Drawer 550
Gulfport, MS 39502

Donald Rafferty
P.O. Box 4252
Gulfport, MS 39502

Robert B. Wiygul
Waltzer & Associates
1025 Division St. Ste. C
Biloxi, MS 39530

Earl Childs, Appellant
Lori Gordon, Appellant
Amelia Killeen, Appellant
David Wheeler, Appellant
Maria Beard, Appellant
Hancock County Board of Supervisors, Appellee
Kudo Development, Intervenor
Paradise Properties, Intervenor

ROBERT B. WIYGUL
MS Bar No. 7348
Waltzer & Associates
1025 Division St. Ste. C
Biloxi, MS 39530
Phone No.: (228) 374-0700
Fax No.: (228) 374-0725
Email: robert@waltzerlaw.com

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ISSUES ON APPEAL

Is it arbitrary and capricious to rezone 1,000 acres from agricultural, residential and highway commercial to Commercial Resort Development, a new category allowing condominiums of unlimited height, based on a finding of an unspecified change in conditions, when there is no factual evidence of changed conditions in the record?

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW AND PARTIES

This appeal challenges the rezoning of approximately 1,000 acres of waterfront property located between Clermont Harbor and Bayou Caddy in Hancock County. On March 27, 2005, the Hancock County Planning Commission proposed to amend its ordinance to create a new zoning classification known as C-4 Commercial Resort Development. This zone authorizes the development of high rise condominiums, without height restrictions. On April 14, 2005, the Hancock County Planning Commission voted to create this new zoning classification and rezone the subject property from residential and commercial to C-4. The basis claimed for the rezoning was "change in condition" of the 1,000 acres rezoned. RE Doc. 5.[1]

On May 2, 2005, the Hancock County Board of Supervisors adopted the Planning Commission's recommendation without further findings or evidence. Record Exhibit 2.

On May 11, 2005, Appellants, landowners in the immediate adjacent area, timely filed a Bill of Exceptions, on the grounds that the rezoning decision was arbitrary and

[1] The record in this matter consists of the pleadings and orders in the Circuit Court, a transcript of the Circuit Court argument, and 55 unbound documents which were sequentially numbered as Exhibits and constitute the full record before the Hancock County Planning Commission and Supervisors. References to the 55 exhibits constituting record before the Planning Commission in the text of the brief will refer to the Exhibit number, for example "Record Exhibit 1." Documents reproduced in the Record Excerpts will be cited as "RE Doc. 1," for example.

capricious in that the record contains no factual information showing a change in condition of the 1,000 acres, as well as other grounds. Two developers, Paradise Properties and Kudo Development intervened asserting ownership of land in the subject area. On March 13, 2006, the Circuit Court of Hancock County affirmed the Planning Commission and Supervisors in a three page order. RE Doc. 2.

The property rezoned C-4 is described as property bounded by the Mississippi Sound on the East and Southeast; the centerline of Poinset Avenue on the East and Northeast and extending in a Northwesterly direction to the Southern line of the railroad right-of-way, the railroad right of way on the Northwest and the centerlines of Turkey Bayou and Bayou Caddy on the West and South. R. Exhibit 12, Proof of Publication. There is no map in the record of the uses, commercial or residential, presently existing in the area.

Appellants are residents of Hancock County with homes or land in the immediate vicinity of the property at issue. Earl Childs owns property at 5063 Poinset Avenue. Lori Gordon and David Wheeler reside at 6170 Poinset Avenue. Just to the east, Maria Beard resides at 5030 Bordages Street and Amelia Killeen resides at 7717 Bordages Street. Record Exhibit 7.

II. ZONING AND COMPREHENSIVE PLAN

Hancock County adopted a zoning ordinance and map effective January 7, 1997. Record Exhibit 24. This ordinance and map were prepared in accordance with Hancock County's 1991 Comprehensive Plan and land use map. Record Exhibit 24, §102; Exhibit 39. The Plan is a policy statement to guide development patterns through 2010. Record Exhibit 39, p. 3. The Plan acknowledges the need to balance the pro-growth sentiment

within the county and the desire to preserve the county's existing historical sites and sense of community history. *Id.*

The Plan identifies the water as one of the counties greatest assets and wetlands as the single most important variable for land uses. "Development within true wetlands could create serious environmental problems which could affect future and existing developments." Record Exhibit 39, p. 131. The plan recommends that critical wetlands in urban areas be zoned for low density residential and suggests a density of one unit per ten acres of wetlands. *Id.*, p. 131. The Plan's goals encourage tourism, with heritage and recreational tourism on equal footing with dockside gambling. *Id.*, p. 5.

The Comprehensive Plan anticipated the Bayou Caddy Casino would attract a package tour market. *Id.*, p. 129. The Ordinance classified the site and a strip along South Beach Boulevard to Poinset Avenue as C-2 (highway commercial). Record Exhibit 24, Exhibit 35, pp. 19. The Ordinance classified part of the subject area along Poinset Avenue as R-2 (medium density residential), and the remainder of the subject area as A-1 (general agricultural).

The record contains no instances of rezoning in the subject area or surrounding neighborhood. The record also contains no statistics or other information concerning businesses in the area, requests for rezoning in the past, or other information reflecting a change in condition of the area.

III. PROPOSED AMENDMENTS AND REZONING

Sometime during the week of February 7, 2005, a team from Rich Mountain Financial Consultants, specialists in high-rise construction financing, met privately with Hancock County Planning Commission (HCPC) director Mickey Lagasse regarding

rewriting the zoning ordinance. E-mail from Rich Mountain to Lagasse, included in RE Doc. 3. To have a "successful project with five star quality," Rich Mountain urged Lagasse, "The higher the better, leaving more open space on the ground. ... 40 stories is as a rule the break point in the cost of construction and appearance. 40 stories or 450' this will allow for high luxury ceilings within the 40 story limit." *Id.*

Apparently after obtaining copies of zoning ordinances from several other counties and municipalities, HCPC prepared a draft amendment of the Ordinance to create a C-4 district commercial resort district. Record Exhibit 1. The purpose of the commercial resort districts is to provide for areas for casinos and resort uses including, but not limited to hotels, condominiums, restaurants, daycare facilities, RV parks and other uses. *Id.* The proposed C-4 ordinance contains minimum lot and set back areas, a 70% maximum impervious surface area and no maximum building height. *Id.*

On March 27, 2005, HCPC published notice of its intention to amend the Hancock County Zoning Ordinance to create a C-4 district and to rezone the subject area C-4. Record Exhibits 3, 10-12. The record includes the text of the proposed amendment to the zoning ordinance, with an unattributed preface that reads,

> The proposed adoption and changes of additional Zoning Classification by the [HCPC] and a change to the text in the Hancock County Zoning Ordinance is being reviewed under section 907.01.02.[2] **Change in condition within the proposed areas,** The basis for this change is in accordance with the Hancock County Comprehensive Plan and will be enacted to promote the general welfare of the citizens of Hancock County.

Record Exhibits 1, 46 (emphasis supplied).

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[2] § 907.01.02 reads: "Change in Condition. Change or changing conditions in a particular area, or in the county generally, make an amendment to the ordinance necessary and desirable."

IV. PLANNING COMMISSION HEARING AND ACTION

The Planning Commission held a public hearing on April 14, 2005. RE Doc. 4. The meeting commenced with Mr. Scafide, attorney for the Planning Commission stating the following and then turning over to the public the opportunity to speak.

> The proposal is to amend Article 4 zoning ordinance to add C-3 commercial resort district and C-4 commercial resort district, including provisions related to permitted uses, conditional uses, lot requirements, yard requirements, accessory uses, master plans, height restrictions, parking and traffic regulations, building entities and landscaping requirements.

RE Doc. 4, at 2.

Mr. Lagasse stated that the proposed rezoning will allow existing uses to continue and will add uses such as restaurants and retail locations. *Id. at* 3. No presentation of the details of the rezoning or the reason for it was made on the record by the Planning Commission. No change in condition was discussed. No updated future land use study or economic study for this area was submitted. No data was presented to establish that any rezoning had occurred in the surrounding area of the subject property. No data, statistics or even testimony were submitted about actual increases in commercialization, road or utility infrastructure, or traffic capacity.

A number of citizens spoke against, and some in favor of the rezoning. A document captioned "Quality of Life?" was identified and later introduced in evidence, apparently after being signed by the author, James Manness, a landowner in the subject area and proponent of rezoning. RE Doc. 3. The document contains photographs of mobile homes on Poinset Street and other unidentified locations with Mr. Manness' comments on what he states is the poorly kept condition of the residences and lots.

There is one important omission in the transcript of the public hearing, which was pointed out at the Circuit Court. The transcript apparently does not contain all of the public comment on the rezoning. Thirteen speakers are in the transcript in the record. RE Doc 4. However, the Commission's handwritten record lists 14 more speakers, who actually spoke and whose position was identified as "For" or "Against." Record Exhibit 6. Appellant Lori Gordon's comments are not contained in the record, nor are those from Tim Killeen, Brice Phillips, Bob Davis, Ina Day, Millie Usher, Ms. Elsie, Faith Seawright, Wayne Clement and Tom Brewer. The speaker sheet tabulated speakers on the rezoning were 14 against and 13 for rezoning in notations "13(F) 14 (A)." Record Exhibit 6. At the conclusion of the hearing HCPC refused to extend the public comment period. RE Doc. 4, p. 32.

The findings regarding the map change are as follows:

> Whereas this Commission finds as follows with respect to the said map amendment:
>
> 1. **Conditions have changed in and around the area sought to be re-zoned which make an amendment to the Zoning Map necessary and desirable and in the public interest.**
>
> 2. The proposed map amendment is consistent with the goals and objectives of the Comprehensive Plan of Hancock County, Mississippi.
>
> 3. Existing uses of the property within the general area of the property in question do not conflict with and are compatible with and consistent with commercial resort uses.
>
> 4. The property in question is currently zoned C-2 (Highway Commercial) in part, R-2 (Medium Density Residential) in part and A-1 (General Agricultural) in part, but is now being planned for commercial resort to compliment and support the new Bayou Caddy Casino which is scheduled to begin operation later this year.

5. The property in question is not suited for commercial, residential and agricultural uses but rather is more likely suited for the kinds of uses allowed in a C-4 Commercial Resort District.

6. That the trend of development in the general area of the property in question calls for more commercial resort uses to support the commercial and recreational uses which will develop in conjunction with the Bayou Caddy Casino and the new sand beach adjacent thereto.

RE Doc. 5 (emphasis supplied). Other than the single sentence findings above, there were no factual findings or references to record materials to support the finding that there was a change in conditions in the area to be rezoned. The matter was then referred to the Hancock County Board of Supervisors for approval.

V. BOARD OF SUPERVISORS

On April 28, 2005, Intervenor Paradise Bay wrote Hancock County Board of Supervisors President Rocky Pullman to urge Hancock County Board of Supervisors to modify the C-4 zoning proposals. Record Exhibit 48. *Id.* The letter details topics and persons who will speak to the Board of Supervisors.

At the hearing on May 2, 2005, the Board of Supervisors by a four to one vote moved to adopt the C-4 zoning district amendment and the amendment of the zoning of the property at issue to C –4. Record Exhibit 2. There is no transcript of the testimony or deliberations of the Hancock County Board of Supervisors in the record. The Board of Supervisors made no further findings on the record.

VI. THE CIRCUIT COURT'S DECISION

On appeal to the Harrison County Circuit Court, the County and the Intervenors argued that the Planning Commission was entitled to "look out the window" and use its judgment to determine whether a change in condition had occurred. E.g. Circuit Court Tr. at 24. The County further argued that the Board of Supervisors "made their own

specific findings." Id. at 25. In fact, there are no such findings in the record. The County appeared to argue that the change in condition relied upon, although it is never specified at any point in the record, is that the area is "blighted." Id. at 28.

In an order entered March 13, 2006, the Circuit Court entered an order finding that: "There was substantial evidence that there was sufficient change in conditions to justify the creating of a new zone, the adopting of the C-4 district was supported by a majority of the residents, that the Board considered the public need and determined the public need supported the adoption of the ordinance." R. 115. The Circuit Court did not cite to any specific evidence in the record of changed conditions or specify the change in conditions it found to be supported by the record.

STANDARDS OF REVIEW

I. GENERAL STANDARDS OF REVIEW OF BOARD ACTIONS

In general, review of zoning decisions employs the same standard of review in this case as that used for administrative agency decisions. *Wilkinson County Board of Supervisors v. Quality Farms, Inc.*, 767 So.2d 1007 (Miss. 2000); *Hooks v. George County*, 748 So.2d 678, 680 (Miss. 1999) (findings of fact are subject to the "substantial evidence/arbitrary and capricious" standard of review, while matters of law are reviewed de novo).

Substantial evidence is "more than a mere scintilla of evidence" or "something less than a preponderance of the evidence but more than a scintilla or glimmer. The reviewing court is concerned only with the reasonableness of the administrative order, not its correctness." (citations omitted) *Miss. Dept. of Environmental Quality v. Weems*, 653 So.2d 266, 280-81 (Miss. 1995).

An action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 281. Appellate review under this standard may be deferential, but "it is by no means a 'rubber stamp.'" *McFadden v. Ms. St. Bd. of Medical Licensure*, 735 So.2d 145, 151 (Miss. 1999). This Court is not "relegated to wearing blinders" but instead must look at the full record to determine whether there is "such relevant evidence as accepted as adequate to support a conclusion." *Miss. St. Bd. Of Examiners v. Anderson*, 757 So.2d 1079, 1085 (Miss. App. 2000).

Critically for this case, the board or agency must clearly explain its factfinding and reasoning in order to allow review by the courts. Conclusory statements must be substantiated if they are to be upheld on appeal, because conclusory remarks alone do not equip a court to review the agency's reasoning. *McGowan v. Ms. State Oil & Gas Board,* 604 So.2d 312, 317 (Miss. 1992).

II. STANDARDS OF REVIEW ON REZONING

To be reversed, the zoning order must be shown to be arbitrary, capricious, discriminatory, beyond the legal authority of the city board, or unsupported by substantial evidence. *Red Roof Inns, Inc. v. City of Ridgeland*, 797 So.2d 898 (Miss. 2001). Neither the Supreme Court nor the circuit court should sit as a super-zoning commission. *City of Biloxi v. Hilbert,* 597 So. 2d 1276, 1281 (Miss. 1992). 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, or "fairly

debatable," and supported by substantial evidence. *City of Biloxi,* 597 So. 2d at 1281; *Ridgewood Land Co. v. Simmons*, 243 Miss. 236, 137 So. 2d 532 (1962). The decisions of municipal authorities in zoning matters, because they are legislative decisions, are presumed valid. *Woodland Hills Conservation Ass'n, Inc. v. City of Jackson,* 443 So. 2d 1173, 1180 (Miss. 1983). Given this presumption, the burden is upon the person seeking to set aside a local zoning decision to show it was arbitrary, capricious and unreasonable. *City of Clinton v. Conerly*, 509 So.2d 877, 885 (Miss. 1985).

SUMMARY OF THE ARGUMENT

This appeal is relatively straightforward. The Hancock County Planning Commission and the Board of Supervisors did not specify the "change in condition" which was the supposed basis for the rezoning of 1,000 acres to allow condominium buildings of unlimited height. The record has no information on rezoning, commercial development, or indeed any other change in condition of the area. The County suggests that the Planning Commission acted on its own knowledge, but that personal knowledge is not reflected in the record. The rezoning decision and the decision of the Circuit Court affirming it must be reversed, and the matter remanded.

ARGUMENT

I. ZONING STATUTE AND ORDINANCE

Hancock County's Zoning Ordinance provides for amendments and changes in Section 907. Five grounds for amendment are authorized. Hancock County's Zoning Ordinance § 907.01-01 to -05. In the case *sub judice*, Hancock County specified "Change in Condition" as the reason for the amendment. This section reads:

> Change in Condition. Changed or changing conditions in a particular area, or in the county generally, make an amendment to the ordinance necessary and desirable.

Record Exhibit 24, p. 45.

The hearing on the amendment shall be conducted and a record of such proceedings shall be preserved in the manner prescribed by the Board of Supervisors. § 907.02-04. *Id.*, p. 46. The Planning Commission shall make written findings of fact and submit same with its recommendation to the Board of Supervisors. Where the purpose and effect of the proposed amendment is to change the zoning classification of a particular piece of property, the Planning Commission shall make findings based upon the evidence presented to it in each specific case with respect to:

1. Relation of the proposed amendment to goals and objectives of the Comprehensive Plan of Hancock County, MS. § 907.02-06.01
2. Existing Uses of property within the general area of the property in question, Id at -06.02
3. Zoning classification of property within the general area of the property in question. Id. at -06.03
4. Suitability of the property in question to the uses permitted under the existing zoning classification, Id. at -06.04
5. Trend of development, if any, of the general area of the property in question, including changes if any, which have taken place in its zoning ordinance. Id. at -06.05.

Record Exhibit 24, p. 46.

II. JUDICIAL REZONING REQUIREMENTS

A rezoning action must comply not only with the statutes and ordinances but also judicially imposed requirements and standards. *Bd. of Aldermen, City of Clinton v. Conerly*, 509 So, 2d 877, 883, 885-86 (Miss. 1987). Over the years, the Supreme Court has "clearly delineated guidelines for the governing boards of municipalities and counties

in their decisions to approve or reject proposed amendments to zoning ordinances. ... Any governing board which fails to adhere to these guidelines does so at its peril." *Id.* at 883. These are set forth below.

1. Original Zoning Presumed Valid

A zoning ordinance is presumed to be reasonable and for the public good, and this presumption applies to rezoning as well as the original zoning, *"but not with the same weight, the presumption being that the zones are well planned and arranged to be more or less permanent, subject to change only to meet a genuine change in conditions."* (court's emphasis) *Id.* at 883. (Quoting *W. L. Holcolmb v. City of Clarksdale,* 217 Miss. 892, 65 So.2d 281 (1953)). In repeated decisions, it is emphasized that "The courts presume that the *original* zoning is well planned and designed to be permanent." (emphasis added) *Conerly,* 509 So.2d at 883. (collecting cases). Important reasons explain why Courts defer more strongly to the original zoning ordinance than to rezoning.

> It should be borne in mind, however, that while a duly enacted comprehensive zoning ordinance is not a true protective covenants agreement, it bears some analogy.
>
> Purchasers of small tracts of land invest a substantial portion of their entire lifetime earnings, relying upon a zoning ordinance. Without the assurance of the zoning ordinance, such investments would not be made. On this small area they build their homes, where they expect to spend the most peaceful, restful and enjoyable hours of the day.
>
> Zoning ordinances curb the exodus of city workers to a lot in the distant countryside. Indeed, the protection of zoning ordinances in municipalities, as opposed to no zoning in most county areas, encourage the choice of a city lot rather than a country lot for a home in the first instance. Zoning ordinances make city property more attractive to the prudent investor.
>
> In the absence of agreement between all interested parties, an amendment to a zoning ordinance is not meant to be easy. Otherwise, it would be a meaningless scrap of paper.

Mayor and Comm'rs v. Wheatley Place, Inc., 468 So.2d 81, 83 (Miss.1985).

For these reasons, Courts repeatedly have upheld the goal to preserve existing residential areas. *Saunders v. City of Jackson,* 511 So.2d 902, 906 (Miss. 1987), *Bridges v. City of Jackson*, 443 So.2d 1187, 1191 (Miss.1983) As Justice Robertson noted,

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

City of Jackson v. Wilson, 195 So.2d 470, 473 (Miss. 1967).

2. Proof of Mistake or Change and Public Need

Before a zoning board reclassifies property from one zone to another, there must be proof either (1) that there was a mistake in the original zoning, or (2) that the character of the neighborhood has changed to such an extent as to justify reclassification *and* that there was a public need for rezoning. *Id.* The requirements for reclassification must be shown by "clear and convincing evidence." *Id.* The clear and convincing burden of proof applies even when, as here, the zoning change was initiated without application. *Town of Florence v. Sea Lands,* 759 So.2d at 1224, ¶ 12.

3. Types and Sufficiency of Proof of Change

There is no single test for determining what is sufficient evidence of the extent of change necessary to support rezoning. *Florence,* 759 So.2d at 1227, ¶ 24. But the common thread is actual genuine change in the character of the neighborhood, and "proof to support it should not be difficult to produce." *Conerly* 509 So.2d at 886. The most prevalent proof is where property located nearby has been rezoned. *Harvey vs. Town of Marion*, 756 So.2d 835 (Miss. App. 2000) (nine zoning changes in area), *Fondren North Renaissance v. City of Jackson,* 749 So. 2d 974 (Miss. 1999) (28 zoning changes,

construction of schools, apartment buildings, offices, and condominiums), *McWaters v. City of Biloxi*, 591 So.2d 824, 826 (Miss. 1991) (4 zoning changes in neighborhood). *See also Northwest Builders, Inc. v. Moore*, 475 So.2d 153 (Miss. 1985) (surrounding area rezoned, highway converted from 2 to 4 lane), *Woodland Hills Conservation Assn Inc. v. City of Jackson*, 443 So.2d 1173 (Miss. 1983) (eight zoning changes nearby, and one-third along perimeter of property rezoned) Likewise, proof of actual increase in commercial uses and decrease in residential uses in the immediate area can demonstrate substantial change. *Luter v. Hammon,* 529 So.2d 625, 629 (Miss. 1988) (law office, fast food restaurant, insurance office, nursery and day care center added) *Bridges v. City of Jackson*, 443 So.2d 1187, 1189 (Miss. 1983) (dramatic increase in commercial usage and traffic counts) *Curry v. Ryan*, 243 So.2d 48 (Miss. 1967) (bank, discount store, large store, chain store added to area).

On the other hand, change premised upon forecasts of rapid change and growth is not a permissible substitute for credible evidence that the character of the neighborhood actually has changed. *City of Horn Lake v. Nail Road Joint Venture,* 588 So.2d 839, 841 (Miss. 1991) (rezoning denied for shopping center and apartment complexes, developer presented comprehensive study concluding county is "hottest...fastest growing" in state, no proof of changed conditions). In other words, rezoning solely to enable a landowner to realize tremendous profit is not sufficient. *City of Jackson v. Wilson* 195 So.2d at 473. Development that has occurred in accordance with a comprehensive zoning plan is not a material change of conditions justifying rezoning. *Cloverleaf Mall, Ltd. vs Conerly*, 387 So.2d 736, 740-41 (Miss. 1980). And an organized neighborhood desire for rezoning,

without more, is insufficient to justify rezoning. *City of Jackson v. Bridges,* 243 Miss. 646, 655, 139 So.2d 660 (1962).

This Court has approved changes based on substantial change where there has been serious deterioration and increased crime in the affected area. *Walters v. City of Greenville*, 751 So.2d 1206, 1210 ¶ 16 (Miss. App. 1999). On the other hand, rezoning is not warranted upon the arising of conditions such as unkempt and overgrown bushes, untidiness, or accumulations of trash or debris. *Patterson v. City of Jackson*, 285 So.2d 466, 467 (Miss. 1973).

4. Public Need

In addition to showing a change in the character of the neighborhood, there must be shown a public need for the rezoning. *Fondren North Renaissance v. City of Jackson*, 749 So.2d 974, 978 ¶ 13 (Miss. 1999). Public need is most commonly demonstrated through evidence of increased community need for the development. *Id.* at 979, ¶¶ 14, 17 (independent housing for elderly), *McWaters*, 591 So.2d at 824 (office space adjacent to mall). Virtually every time, this evidence is in the form of future land use plans obtained by the zoning authority or the proponent of rezoning. *Id., see also Luter v. Hammon*, 529 So.2d at 629, *Fondren*, 749 So.2d at 979, ¶ 14.

Proof of public need alone is insufficient without proof of substantial change in the surrounding neighborhood. *City of New Albany v. Ray* 417 So.2d 550, 552 (Miss. 1982) (need for elder housing). Likewise, an increase in tax revenues is a valid factor to consider but it is not alone enough to justify rezoning; other factors must be shown. *Fondren* 749 So.2d at 979, ¶ 16.

5. Content of the Record, Findings, and Evidence

Certain minimum requirements are necessary for the Court to exercise its statutorily and constitutionally mandated function of judicial review.

> 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.

City of Clinton v. Conerly, 509 So.2d at 886. The Court also has stated that specific findings on the criteria must be made and supported by substantial evidence.

> When we have before us an appeal from an action by a governing board rezoning property, unless the record contains specific finding by such board that one or both these two criteria have been met, and in addition thereto sufficient evidence to support such finding, we will inevitably conclude that the governing board acted arbitrarily, unreasonably and capriciously.

Conerly, 509 So.2d at 884. In cases where no specific finding is made, it is necessary that the record contain factual bases to support the required findings. *Faircloth v. Lyles*, 592 So.2d 941, 945 (Miss. 1991) (applicant submitted detailed land use analysis and history of mistake).

6. Proof of Change

The County specified as grounds for the amendments § 907.01.02 Change in Condition, which reads, "Changed or changing conditions in a particular area or in the county generally make an amendment to the ordinance necessary and desirable." Record Exhibit 46, p. 22. The Hancock County Planning Commission made conclusory findings that (1) "conditions have changed in and around the area sought to be rezoned" (4) the property to be rezoned "is now planned for commercial resort uses" and (6) "the trend of development in the general area of the property calls for more commercial resort uses."

RE Doc 5. The findings do not specify the change in conditions, or cite to any specific proof of any kind. In fact, none of these conclusory statements is supported by a single piece of evidence in the record before the Planning Commission.

There are 55 documents identified as exhibits, which constitute the record of this matter. RE Doc 3. Of these 55 documents, 50 consist of items such as copies of the Hancock County ordinance, the Comprehensive Plan, copies of the proposed C-4 language, ordinances from other jurisdictions, the conclusory findings above, petitions supporting or opposing the zoning change, and some other items that do not seem to have anything to do with the C-4 zoning change. [3]

The remaining 5 consist of the transcript of the public hearing, a document entitled "Visions of Clermont Harbor," the document entitled "Quality of Life . . . ?" submitted by a rezoning proponent, a letter from Paradise Bay of Mississippi to Harrison County Supervisor Rocky Pullman, and an e-mail from Edward Heath to Mickey LaGasse, also of Harrison County. These documents are quite brief and are all reproduced *in globo* as Document 3 of the Excerpts of Record submitted with this brief. There is simply nothing in any of these documents to show that there was a change in the conditions of this 1,000 acre area since zoning was adopted in 1997.

For example, the record lacks a single instance that property located nearby had been rezoned. The record lacks any study of the 1,000 acres rezoned. There is no evidence of actual increase in commercial uses and decrease in residential uses in the immediate area. Hancock County made a finding that "the trend of development in the general area of the property in question calls for more commercial resort uses to support

[3] For example, a letter from the Hancock County Amateur Radio Association exempts all Federal Communications commission licensed amateur radio towers from height restrictions. Record Exhibit 32.

the commercial and recreational uses which will develop in conjunction with the Bayou Caddy Casino and the new sand beach adjacent thereto." Yet there is no evidence of this supposed trend at any point in the record. There is no information concerning any proposed casino, other commercial development associated with it, or anything of that sort. There is not, as this Court has required, a map showing the circumstances in the area and the changes in the neighborhood.

Further, any casino which might be located in the area would be in keeping with the County's Comprehensive Plan. Substantial change is not proven where, as here, the development that has occurred or is proposed is in keeping with the comprehensive plan. *Cloverleaf Mall, Ltd. vs Conerly*, 387 So.2d 736 (Miss. 1980). In this case, the casino development that occurred and may re-occur at Bayou Caddy is in harmony with the Comprehensive Plan. Hancock County did not rely upon any market study or updated future land use plan containing any statistics or trend information to support a finding of substantial change.

In the Court below Hancock County did not refer to any specific evidence in the record supporting changed conditions, but primarily argued that the Planning Commission should be able to "look out the window" and determine whether to rezone. Planning Commissioners certainly should not be required to ignore their personal knowledge. But again, on this record, there is no articulation of this claimed personal knowledge for the Court to review. The law is clear that any such personal knowledge must also appear in and be part of the record:

> We have recognized that informality attends rezoning proceedings, and governing board members may take into consideration their personal knowledge and familiarity with their community (as indeed it would be well nigh impossible in reality to ignore), *Board of Aldermen of Bay Springs v. Jenkins, supra,* at 1327,

> this by no means suggests that, in order to justify rezoning, a board need not find the necessary criteria for rezoning by clear and convincing evidence and that it is not necessary that such evidence **appear in the record.** *Woodland Hills Cons. Ass'n. v. City of Jackson, supra,* at 1181, n. 8.

City of Clinton v. Conerly, 509 So.2d at 885-86 (emphasis supplied).

The equity and utility of requiring that the record reflect any personal knowledge relied upon is obvious. Reliance on personal knowledge that is never articulated or placed in the record prevents public participation in critical local decisionmaking, and will ultimately lead to decisions made on bad information. Perhaps more to the point here, without information set down in a record this Court cannot perform its statutory and Constitutional duty. If a claim of personal knowledge, never articulated and memorialized in a record, is enough to justify a 1,000 acre rezoning, then rezoning is essentially unreviewable.

Public bodies such as Planning Commissions are granted a great deal of deference on decisions like rezoning, and for a good reason. But that deference comes at the price of making a reasonable record and spreading the reasoning of the body on that record. As noted above, there is virtually nothing in this record by way of actual facts. In this case, the record to justify rezoning 1,000 acres and upsetting the settled expectations of homeowners is simply not there.

7. No Proof of Public Need

Hancock County also failed to establish public need: it failed to make findings or present evidence such as future land use studies demonstrating increased community need for the commercial resort development that rezoning would allow. *Cf. Fondren,* 749 So.2d at 979, ¶¶ 14, 17, ¶ 26, *McWaters*, 591 So.2d at 824, *Luter v. Hammon*, 529 So.2d at 629. Hancock County also failed to make any finding or present evidence of

increases in tax revenues, which in any event would not alone be enough to justify rezoning. *Fondren* 749 So.2d at 979, ¶ 16. Again, the universe for this appeal is not what Hancock County might possibly have thought as a basis for its decision – it is what Hancock County actually placed in the record. There is no record basis for a finding of public need.

CONCLUSION

For the foregoing reasons, Appellants urge the Court to reverse the Court below and render judgment in their favor, or alternatively to remand the matter for further factual development, and for such other relief to which they may be entitled.

Respectfully submitted this the 14th day of February, 2007.

ROBERT B. WIYGUL, MB [redacted]
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I, the undersigned, Robert B. Wiygul, of counsel to the Appellants, do hereby certify that I have this day emailed and/or mailed a correct copy by U.S. Mail, postage prepaid, of the foregoing APPELLANT'S BRIEF to:

Ronald Artigues
Gex & Artigues
P.O. Box 47
Waveland, MS 39576-0047
Attorney for Hancock County Board of Supervisors
rartigues@aol.com

Joseph R. Meadows
Meadows Riley Law Firm
P.O. Drawer 550
Gulfport, MS 39502
Attorney for Kudo Developers of Mississippi, LLC
jmeadows@datasync.com

Donald Rafferty
P.O. Box 4252
Gulfport, MS 39502
Attorney for Paradise Properties Group, LLC
drafferty7@aol.com

IN WITNESS WHEREOF, I have affixed my signature, this the 14th day of February, 2007.

Robert B. Wiygul
Waltzer & Associates
1025 Division St. Ste. C
Biloxi, MS 39530
Phone: (228) 374-0700
Fax: (228) 374-0725

CERTIFICATE OF SERVICE ON TRIAL JUDGE

I, Robert B. Wiygul, attorney for Earl Childs, Lori Gordon, Amelia Killeen, David Wheeler and Maria Beard, certify that I have this day filed a copy of the Brief and foregoing document by United States mail with postage prepaid on the following persons at this address:

Honorable Stephen B. Simpson
P.O. Box 1570
Gulfport, MS 39502

This the 14th day of February, 2007.

Robert B. Wiygul
Waltzer & Associates
1025 Division St. Ste. C
Biloxi, MS 39530
Phone: (228) 374-0700
Fax: (2280 374-0725