

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

**AUREUS INVESTMENT GROUP, LLC
AND WAFFLE HOUSE, INC.**

APPELLANTS

VERSUS

CAUSE NO. A2402-2013-00130

THE CITY OF BILOXI, MISSISSIPPI

APPELLEE

OPINION

Aureus Investment Group, LLC and Waffle House, Inc. appeal a decision of the City of Biloxi, Mississippi. Upon review, this Court finds no error and affirms.

FINDINGS OF FACT

Appellant Aureus Investment Group, LLC ("AIG") is the owner of three parcels of land measuring approximately fifty-five hundredths (0.55) of an acre located on the southwest corner of the intersection of 1st Street and Myrtle Street in the City of Biloxi, Mississippi ("subject property"). AIG entered into a contract to sell the subject property to Appellant Waffle House, Inc. ("Waffle House"), whereby Waffle House would acquire the subject property for the purpose of constructing and operating a Waffle House Restaurant on the subject property. In order to facilitate the development, Appellants submitted an application to the City of Biloxi Planning Commission ("Planning Commission") requesting a zoning map amendment to change the zoning classification of the subject property from RS-5 (high density single family residential) to NB (neighborhood business).

On October 3, 2013, the Planning Commission conducted a public hearing regarding the Appellants' request for a zoning map amendment. Counsel for Appellants, Robert Schwartz, as well as Waffle House's representative, Ken Williams, offered testimony in support of the zoning change. Specifically, Mr. Williams noted the changes in the character of the neighborhood and explained that

the changes to building codes and insurance requirements following Hurricane Katrina have rendered the property no longer suitable for residential purposes. Moreover, Mr. Williams testified that the subject property would be compatible with the Comprehensive Plan of the City of Biloxi and the existing zoning of the surrounding properties. Additionally, Mr. Williams explained that the proposed restaurant served a public need in the neighborhood as there were no restaurants in the area other than those located inside the casinos.

Also present at the hearing were Michael Cavanaugh, counsel for New Palace Casino, as well as Britt Singletary, counsel for Golden Nugget Casino, who spoke in opposition to the proposed zoning change. Father Greg Barras, Pastor of St. Michael Church, further spoke in opposition to the zoning change.

Following the public hearing, the Planning Commission found Appellants demonstrated a substantial change in the conditions and character of the neighborhood and the proposed development was compatible with the neighborhood. Additionally, the Planning Commission found the proposed zoning change was nothing more than an extension of the NB zoning classification of the adjoining properties. Finally, the Planning Commission found the development fulfilled a public need and met the criteria for the requested NB zoning designation. As a result, the Planning Commission approved Appellants' zoning request by a vote of 11-1.

Since the Planning Commission is only a recommending body, the matter was presented to the Biloxi City Council for consideration on October 22, 2013. A proposed ordinance was read before the City Council for the zoning map amendment to authorize a change in zoning from RS-5 to NB for the subject property. Councilman George Lawrence, the elected councilman for Ward 1 in which the subject property is located, moved to deny the zoning map amendment. Thereafter, Mr.

Schwartz and Mr. Williams were given an opportunity to address the application for zoning map amendment. Mr. Cavanaugh as well as Mr. Singletary and Jim Hoskins, General Manager for the Golden Nugget Casino, spoke in opposition to the zoning change.

Following discussion, the City Council voted 5-2 to deny the Appellants' request for a zoning map amendment. Specifically, the City Council found that there had been no change in the character of the neighborhood and that no identifiable need had been established.

Appellants now appeal the decision of the Biloxi City Council as being arbitrary, capricious, unreasonable, unconstitutional, illegal, and not based upon substantial evidence.

STANDARD OF REVIEW

In zoning cases, the circuit court sits as an appellate court and will not set aside the decision of the city council "unless clearly shown to be arbitrary, capricious, discriminatory, illegal or without substantial evidence." *Drews v. City of Hattiesburg*, 904 So.2d 138, 140 (Miss. 2005). The court will not substitute its judgment as to the wisdom or soundness of the municipality's action. *City of Jackson v. Aldridge*, 487 So.2d 1345, 1347 (Miss. 1986). 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). Where the point in the controversy is "fairly debatable," this court has no authority to disturb the action of the zoning authority. *Faircloth v. Lyles*, 592 So.2d 941, 943 (Miss. 1991). Where there is substantial evidence supporting both sides of a rezoning application, the decision must be said to be fairly debatable. *Burdine v. City of Greenville*, 755 So.2d 1154, 1157 (Miss. Ct. App. 1999).

In *Childs*, the Mississippi Supreme Court noted that zoning decisions are legislative in nature and held:

[A]ll presumptions must be indulged in favor of the validity of zoning ordinances. It is presumed to be reasonable and for the public good. It is presumed that the legislative body investigated it and found conditions such that the action which it took was appropriate. The one assailing the validity has the burden of proof to establish that the ordinance is invalid or arbitrary or unreasonable as to his property, and this must be by clear and convincing evidence.

Childs, 1 So.3d at 861.

CONCLUSION OF LAW

In order to have property rezoned, the applicant must establish by clear and convincing evidence that (1) there was a mistake in the original zoning or (2) the character of the neighborhood has changed since the date of the last request for rezoning and that public need exists for rezoning. *Northwest Builders v. Moore*, 475 So.2d 153, 156 (Miss. 1985). Here, it is undisputed that there was no mistake in the original zoning. Thus, the issue becomes whether the character of the neighborhood has changed since the date of the last request for rezoning and whether there is a public need for rezoning.

I. Change in the character of the neighborhood since the date of the last request for rezoning

Here, the subject property was rezoned in September 2010 and was again zoned RS-5. Thus, Appellants must show by clear and convincing evidence that the character of the neighborhood has changed since September 2010.

Appellants first assert "the impacts of Hurricane Katrina have made it virtually impossible to sustain a residential development in the neighborhood in which the subject property is located." However, the question is not whether the character of the neighborhood has changed since Hurricane Katrina in August 2005, but whether the character of the neighborhood has changed since September 2010, the last request for rezoning. In support of their assertion that the character of the

neighborhood has changed, Appellants rely on Mr. Williams's testimony regarding an increase in elevation requirements, an increase in flood insurance costs, and an increase in property values. However, all of these issues were discussed and considered when the City of Biloxi adopted the Land Development Ordinances in September 2010.

Appellants further assert, as evidence of a change in the character of the neighborhood, that the subject property is surrounded in all directions by areas zoned for commercial or business development. Specifically, Appellants assert, "the subject property is neighbored by at least two casinos, the Maritime and Seafood Industry Museum, and a church." However, the property where the Maritime and Seafood Industry Museum is located was zoned commercial before the City of Biloxi adopted the Land Development Ordinances in September 2010. Moreover, the Maritime and Seafood Industry Museum, the Golden Nugget Casino, the Palace Casino, as well as St. Michael Church all existed in their current locations prior to the City's adoption of the Land Development Ordinances in September 2010. As noted by Mr. Cavanaugh during the hearing before the Planning Commission, "the Seafood Industry Museum that is coming back is not new, that is a replacement. The Palace Casino, of course, is not new, that was there before the storm. And all of this property that was residential before is still residential. The Golden Nugget has gone through a tremendous expansion and the new Palace Casino has gone through a tremendous expansion and investment, but they are not new and not changing the character of the neighborhood."

Additionally, Appellants assert the proposed rezoning of the subject property to "NB" would serve only as an extension of the zoning designations of the surrounding properties. However, a review of the zoning map indicates that the only adjacent properties zoned "NB" are to the east of

¹Mr. Cavanaugh gave similar testimony before the Biloxi City Council.

the subject property. Those surrounding properties to the north, south, and west are zoned RS-5.

II. Public Need

Appellants assert the Waffle House development “would offer Biloxi’s citizens residing in and around the area a restaurant or eatery that is not located within the walls of a casino, as is their only option today.” Appellants further assert Waffle House would make a \$1.3 million investment into the area and create thirty to forty new jobs. However, there was testimony before both the Planning Commission and the City Council which indicated there were already four Waffle House Restaurants in Biloxi and if the area was commercialized, it would “totally prevent any kind of family life ever occurring and pretty much snuff out the growth of St. Michael. . . .”

III. Councilman Lawrence

Appellants argue Councilman Lawrence should have been disqualified from discussion since he had been influenced by the Golden Nugget Casino and had a personal interest in the proceeding and its outcome, as he owns real property located adjacent to the subject property. However, members of the City Council are permitted to not only consider the information presented at the hearings but they may also consider their common knowledge and the familiarity with the area in question. See *Fondren North Renaissance v. City of Jackson*, 749 So.2d 974 (Miss. 1999); *Collins v. Mayor and Council of the City of Gautier*, 38 So.3d 677 (Miss. Ct. App. 2010). Additionally, as property owners in the area, Golden Nugget Casino and Palace Casino had a right to talk to city council members and voice their concerns. Furthermore, Councilman Lawrence is required to own property in the area in order to be a councilman. Moreover, the Land Development Ordinance for the City of Biloxi, which Appellants’ rely on in support of their argument that Councilman Lawrence should have been disqualified, does not apply to members of the City Council.

The Resolution adopted by the Biloxi City Council states that the City Council's decision was "based upon a determination that there has been no change in character of the neighborhood and no identifiable need has been established." The Resolution passed by a vote of 5-2. As such, Councilman Lawrence's vote was not determinative and his comments regarding the Golden Nugget Casino did not bind the City Council, as the City Council speaks only through its minutes.

IV. Due Process Rights

Appellants argue the City Council "circumvented the statutory procedural requirements for consideration of an ordinance and further violated the fundamental due process rights of the Appellants." Specifically, Appellants argue that the ordinance for the zoning map amendment was not read and kept on file for at least two weeks and a public hearing was not held as is required by Miss. Code Ann. § 21-13-3. However, an ordinance has to remain on file and be read for two consecutive weeks only if it is going to be passed. Here, the ordinance was denied. There is nothing prohibiting a member of the City Council from moving for a resolution to deny the ordinance at its first reading.

Also, there is nothing to suggest a public hearing was mandatory before the City Council in this case. A public hearing had already been held before the Planning Commission and the City Council had the authority to rely on the information that was presented to the Planning Commission and either accept or reject the Planning Commission's recommendations. Moreover, the City Council heard much discussion from both sides regarding the request for zoning change.

Conclusion

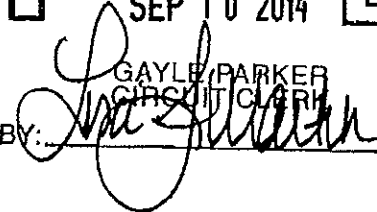
Overall, there is substantial evidence in the record to support the City Council's decision that there has been no change in the character of the neighborhood since the date of the last request for

rezoning and that no public need exists for rezoning. The City Council heard testimony and considered substantial evidence supporting both sides of the rezoning application. As such, its decision was fairly debatable and was not arbitrary, capricious, discriminatory, illegal or without substantial evidence. Accordingly, the Biloxi City Council's decision should be affirmed. It is, therefore,

ORDERED AND ADJUDGED that the decision of the City of Biloxi, Mississippi is hereby AFFIRMED.

SO ORDERED AND ADJUDGED, this the 10th day of September, 2014.


MICHAEL H. WARD
CIRCUIT COURT JUDGE

FILED
SEP 10 2014
GAYLE PARKER
CIRCUIT CLERK
BY:  D.C.