

IN THE CIRCUIT COURT OF HARRISON COUNTY

SECOND JUDICIAL DISTRICT, MISSISSIPPI

**LEONARD ALPERT, IZABELLA ALPERT
and THUY LAND PAWN SHOP, INC.**

APPELLANTS

VERSUS

CIVIL ACTION NO. A2402-15-136

CITY OF BILOXI, MISSISSIPPI

APPELLEE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER CAME ON FOR HEARING on June 16, 2016, on the appeal by Leonard Alpert, Izabella Alpert, and Thuy Land Pawn Shop, Inc. (“Appellants”) of the City of Biloxi’s (hereinafter “the City” or “the City Council”) approval of an application of Boyd Gaming Corporation (“Boyd”) to vacate and realign a portion of a public Right-of-Way, Fayard Street, measuring 26 feet in width by 83 feet in length and install and dedicate a new public Right-of-Way measuring 75' wide by 214' long. After having reviewed the Bill of Exceptions, all of the briefing, exhibits, and responses thereto, and having heard oral arguments in open court, and being fully advised in the premises, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about July 1, 2015, Boyd, owner of the property at 850 Bayview Avenue, which is located in Biloxi, Mississippi, submitted a Planning Commission Application whereby it sought

to vacate and realign a portion of a public Right-of-Way, Fayard Street, measuring 26 feet in width by 83 feet in length and install and dedicate a new public Right-of-Way measuring 75' wide by 214' long and submitted the plans for the vacation and new Right-of-Way with its application.

2. On August 6, 2015, the Planning Commission held a public hearing in the auditorium of the Dr. Martin Luther King, Jr. Municipal Building, 676 Dr. Martin Luther King, Jr. Blvd., Biloxi, Mississippi, to hear Case No. 15-040-PC, regarding Boyd's request to vacate a portion of Fayard Street and install and dedicate a new public Right-of-Way as stated in its Application.

3. At the August 6, 2015 hearing, Nancy Depreo with Seymour Engineering, appearing on behalf of Boyd, asked that the case be continued to the Planning Commission meeting of August 20, 2015 to allow Boyd time to meet with Coast Transit Authority regarding the location for a new bus stop in connection with the work to be done by Boyd to make it more convenient for the residents in the area and answered questions regarding pedestrian safety, utility easements and use of the proposed road and vacated portion of Fayard Street. After comments were received from audience members present at that time, the hearing was continued to the August 20, 2015 Planning Commission meeting.

4. On August 20, 2015, the Planning Commission continued the public hearing on Boyd's application regarding Planning Commission Case No. 15-040-PC, and Nancy Depreo with Seymour Engineering and Michael Cavanaugh, Esquire, representing Boyd made a presentation on the proposed vacation of Fayard Street and relocation and dedication of a new Right-of-Way for Fayard Street.

5. Nancy Depreo gave a power point presentation and stated that they were only vacating the first 75 feet of Fayard Street; that the current Fayard Street intersection with Bayview Avenue

does not allow for a sidewalk to continue alongside the pawn shop due to FEMA plans and that the sidewalk would end at the south boundary of the pawn shop property resulting in pedestrians using Fayard Street being required to walk in the street and cross Bayview Avenue diagonally to get to the entrance on the north side of Bayview Avenue. She stated realigning Fayard Street to align with the entrance on the north side of Bayview Avenue will be safer for pedestrians. She also stated the new design will provide a better turning radius for large vehicles turning from Bayview Avenue onto Fayard Street and that the pawn shop would be given 15 feet due to the vacation of Fayard at that point with access from Bayview.

6. At the August 20, 2015 Planning Commission hearing, Wayne Hengen, Esquire, 979 Howard Avenue, representing Appellants, owners at the pawn shop located at the intersection of Bayview and Fayard Street, addressed the Planning Commission, and stated that they opposed the vacation of Fayard Street on the grounds that the vacation and relocation of the portion of Fayard Street in Boyd's application only benefits Boyd. Hengen further stated no public good justifying the proposed vacation and realignment had been established. He further stated that the Appellants' parking for their business is on Fayard Street, has been for fifteen (15) years, and that the vacation of Fayard Street and the proposed realignment would eliminate their use of Fayard Street for parking and thus eliminate their business. Hengen further stated the Appellants gaining fifteen (15) feet of the vacated Fayard Street would not provide the Alpert's sufficient land for parking for their customers and employees.

7. Tammy Creel, 411 Croesus Street, also addressed the Planning Commission and stated that she too objected to the vacation of Fayard Street as giving public property to a private business and that Fayard Street should be left as it is and not grant the application. Mary Creel, 411 Croesus

Street, also addressed the Planning Commission and objected to the vacation and relocation of Fayard Street.

8. Jamie Dellenger, 2472 Sunkist Country Club Road, speaking on behalf of Dellenger's Sheet Metal Shop located on Fayard Street, stated that the Applicant met with the business owners on multiple occasions making sure that the process worked for it, that due to the way Fayard Street is situated now, the large trucks that deliver to their shop multiple times a day cannot make the turn at Fayard Street and Bayview Avenue, that the vacation and realignment of Fayard Street with the new Right-of-Way would eliminate this problem and that they supported the application.

9. Michael Cavanaugh then addressed the Planning Commission and stated that the relocation of Fayard Street to align with the entrance to the Imperial Palace Casino on the north side of Bayview Avenue and the improved turning lane and turning radius of the relocated Fayard Street would improve pedestrian safety and improve traffic turning onto Fayard Street. He also stated that Boyd was giving the City of Biloxi the land for the relocated Right-of-Way of Fayard Street.

10. Ed Shambra, Executive Planner, addressed the Planning Commission and stated that the staff reviewed the application for some time and found the proposed vacation and realignment better addresses the intersection and provides reasonable levels of safety, but expressed concern that some type of traffic control mechanism needs to be employed and stated the staff supported the application but would like to see it with a recommendation for a traffic signal.

11. Planning Commission member August Parker moved to approve Boyd's application, followed by discussion among commission members concerning whether the Alperets could legally park on Fayard Street, the use the Alperets could make of the fifteen (15) feet of land they would gain from the vacation, and the fact that traffic and overall safety would be improved as a result of the

project. The Planning Commission approved Boyd's Application as submitted on a vote of 8-4.

12. Thereafter, a timely appeal was filed and fee paid by the Appellants' attorney requesting a public hearing, but it was later determined not to be an appealable matter at that level. The Biloxi City Council at its regularly scheduled meeting on Tuesday, September 15, 2015, at 1:30 p.m. in the City Council Chamber of Biloxi City Hall located at 140 Lameuse Street, Biloxi, Mississippi, considered a resolution to approve an application request for vacation and realignment of a portion of Fayard Street. During the Mayor's Report portion of the meeting, Mayor Gillich asked Michael Cavanaugh and Nancy Depreo to give an update on the proposed resolution.

13. Michael Cavanaugh and Nancy Depreo stated the realignment addressed a dangerous intersection and presented a power point showing (1) the sidewalk placement to Bayview Avenue on the realigned Fayard Street that is not possible under the current layout of Fayard Street, which requires pedestrians to walk in Fayard Street as it currently exists with no sidewalk; (2) the new straight crosswalk which eliminates the diagonal crosswalk existing on the current layout of Fayard Street and improves the line of sight for left hand turns and reduces distance and time issues for left turning motorists; (3) the improved turning radius for large vehicles turning from Bayview Avenue onto Fayard Street making deliveries to businesses on Fayard Street and other residents along Fayard Street; (4) flashing lights and warning signs to alert motorists to the pedestrian crosswalk; (5) the improvements to and beautification of the parking lot south of Bayview Avenue, including lighting and landscaping; and (6) the land owned by Boyd Gaming Corporation donated to the City of Biloxi for the realignment of Fayard Street and the dedication to the City of the western vacated portion of Fayard Street as a utility easement. Wayne Hengen requested a public hearing.

14. Councilwoman Newman moved to approve the resolution and was seconded by

Councilman Deming. Discussion among Councilman Lawrence, Tisdale, Gines and Glavan concerned the ability of pawn shop customers to park along the curb of the realigned Fayard Street in the same manner they currently do on Fayard Street as it is presently laid out, the legality of parking on Fayard Street, either as it is now laid out or after the realignment, the additional land the pawn shop owners will acquire as a result of the vacation and the elimination of the hazard of drivers backing onto Bayview Avenue. During the discussion Michael Cavanaugh was asked if the parking lot would be restricted to only Imperial Palace patrons or if people wanting to go to the pawn shop could park in the parking lot surrounding the pawn shop. Michael Cavanaugh stated it would not be restricted to Imperial Palace patrons.

15. Upon completion of discussion, after a 5-2 vote, the City Council adopted the report and findings of the Biloxi Planning Commission, agreed with the recommendation of the Planning Commission and approved the requested Right-of-Way vacation and accepted the dedication of the new Right-of-Way as presented, finding as follows:

“...having determined that the standards for Right-of-Way abandonment have been met, specifically finding that the portion of improved Public Right-of-Way submitted for vacation is not now or in the foreseeable future of need to the City or its inhabitants, and that the dedication of new Right-of-Way, which will involve the realignment of Fayard Street (as depicted in Exhibit A), will prove beneficial to correcting deficiencies now experienced at this Fayard Street/Bayview Avenue intersection and is acceptable as submitted, subject to the applicant providing easement(s) of sufficient size and location, as determined by the City to accommodate any existing utilities or anticipated future utility or accessibility needs...” (emphasis added)

16. On September 22, 2015, Wayne Hengen appeared before the Biloxi City Council and requested reconsideration of the vote taken at the September 15, 2015, meeting due to concerns that the changes from the Planning Commission report and findings would not be set out in the resolution

voted on by the Council, primarily that there would be no vacation of Fayard Street. On September 23, 2015, Hengen sent to the Mayor, Council, and City Attorney, a letter advising that the changes were not in the drafted resolution.

17. Thereafter, on September 30, 2015, the Biloxi City Council held a special meeting to consider a resolution to amend Resolution No. 449-15 passed at the September 15, 2015 City Council meeting. Council President Gines asked for citizens comments and Wayne Hengen appeared on behalf of the Appellants. Hengen stated that the resolution gave Boyd the vacated western half of Fayard Street, leaving the Appellants the eastern half, a fifteen (15) foot wide strip of land, to use for parking, which does not meet Biloxi City Code, and was not in fact sufficient for vehicles to enter, park, turn around and leave, essentially eliminating any usable parking the Appellants now enjoy. Hengen further stated the Appellants have utilized Fayard Street as presently laid out for customer street parking since they acquired the property on December 1, 1999, that the resolution eliminated any parking the Appellants previously had on Fayard Street, that the vacation only benefitted Boyd, and asked that the City Council rescind Resolution 449-15.

18. Councilman Lawrence moved to approve a motion to amend Resolution No. 449-15 in order to clarify the intent of the City Council with regard to the description of the parcel location of Fayard Street and to provide curb cut for each lane of Fayard Street. Thereafter, discussion occurred among the council members along with Michael Cavanaugh, Gerald Blessey, and Mayor Gillich concerning the ability of customers of the pawn shop to utilize the Imperial Palace parking lot surrounding it, the verbal consent of Duncan McKenzie, General Manager of Imperial Palace, that anyone could utilize the parking lot, whether or not to vacate the north end of Fayard Street, the safety aspects of the vacation, how the east lane of the old Fayard Street that was vacated could remain in

place after the relocation of Fayard Street and be available for use by the Appellants, and the practical use of the vacated east portion of old Fayard Street and the Imperial Palace parking lot by the Appellants and their customers. Councilman Gines stated that the vacation and realignment still gave the Appellants the east fifteen (15) feet of old Fayard Street to utilize and as a result, the Appellants have the same situation they had with the old Fayard Street, and that Boyd was paying for all of the improvements that will improve the streets and the community and benefit the City of Biloxi.

19. Councilman Lawrence moved to amend the proposed amendment to Resolution No. 499-15 to not vacate the north end of Fayard Street but allowing no through traffic to Bayview Avenue, and it was seconded by Councilman Tisdale. Additional discussion occurred between council members, including questions to the City Attorney concerning the obligation of the City to provide parking to any business, whether a private road was being created, creating a curb cut close to an intersection, just changing Fayard Street from a throughfare to a dead end, the grandfathering of the Appellants' property, and that the implementation of the vacation and relocation improves the health, safety and welfare of the citizens of Biloxi. Thereafter by a vote of 3-4 the motion to amend the proposed amendment to Resolution No. 499-15 to not vacate the north end of Fayard Street failed. Councilman Gines then brought up the original motion to amend Resolution No. 499-15. Upon motion by Councilman Glavin and seconded by Councilman Newman, the motion was tabled by a vote of 4-3.

20. On or about September 23, 2015, Appellants filed a Notice of Appeal in the Circuit Court of Harrison County, Mississippi, Second Judicial District, with regard to the September 15, 2015 decision by the City Council.

CONCLUSIONS OF LAW

1. An appellate court will not disturb a decision of a governing board of authorities unless it is “unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency’s scope or powers; or violated the constitutional or statutory rights of the aggrieved party.” *Robinson v. Lincoln County Board of Supervisors*, 973 So.2d 288, 289-290 (Miss. Ct. App. 2008); *Mill Creek Properties v. City of Columbia*, 944 So.2d 67, 69 (Miss. Ct. App. 2006).

2. “The party challenging the governing body bears the burden of proof showing that the decision rendered is arbitrary, capricious, discriminatory, or beyond the legal authority of the city board, or unsupported by substantial evidence.” *McWatters v. City of Biloxi*, 591 So.2d 824, 827 (Miss. 1991).

3. “Substantial evidence has been defined as ‘such relevant evidence as reasonable minds might accept as adequate to support a conclusion’ or to put more simply, ‘more than a mere scintilla’ of evidence” *Hopkins v. City of Mendenhall*, 116 So.3d 166, 169 (Miss. Ct. App. 2013). For questions of law, a municipal board’s decision is reviewed de novo. Otherwise, the actions of a governing body of a municipality will not be set aside unless such action is clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without substantial evidentiary basis. *Id.*

4. The Court finds that the City’s decision was based on substantial evidence introduced at a public hearing before the Biloxi Planning Commission and the City Council, that the vacation and realignment of Fayard Street would improve public safety in the area and prove beneficial to correcting deficiencies now experienced at the Fayard Street/Bayview Avenue intersection, and therefore, was not arbitrary or capricious. The record before the City Council reflects that the

proposed partial vacation and realignment better addresses the intersection and provides reasonable levels of safety. The record before the Court reflects that the City Council found after hearing the matter that the portion of Fayard Street submitted for vacation *“is not now or in the foreseeable future of need to the City or its inhabitants, and that the dedication of the new Right-of-Way, which will involve the realignment of Fayard Street (as depicted in Exhibit A), will prove beneficial to corrective deficiencies now experienced at this Fayard Street/Bayview Avenue intersection and is acceptable as submitted.”* The testimony, the application and evidence presented to the Planning Commission and adopted and approved by the City Council as well as the City Council’s own findings reflect the substantial evidence present in this matter supporting this Court’s finding that the actions of the City in approving the partial vacation and relocation of Fayard Street was not arbitrary or capricious but was indeed based upon substantial evidence.

5. The Court finds that Appellants’ argument that their business, having been grandfathered in as a non-conforming use, is being deprived of their use of Fayard Street for they, their employees and their customers use for parking, is without merit. The record before the Court reflects that Fayard Street is a public two way street. Nothing in the record reflects any delineated parking spaces on Fayard Street. The record reflects that Fayard Street as presently laid out and the new realigned Fayard Street are public two way streets. Although Appellants argue that they have a right to park in the public street by reason of prior usage, Appellants provided no evidence or case law in support of this contention. The Court finds that the record reflects that Appellants’ business was grandfathered, but that all the grandfathering of this business did was allow it to continue to operate without providing its own separate parking, just as other grandfathered businesses do. The Court finds substantial evidence in the record that Fayard Street as presently laid out is a two way

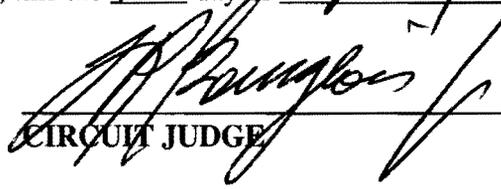
street; that Fayard Street as realigned is a two way street; that no designated parking spaces exist on Fayard Street as presently laid out; and that nothing will change except the location of the intersection of Fayard Street with Bayview Avenue, which improves the safety at this intersection.

6. Because the City's decision was based on substantial evidence, it cannot be considered arbitrary or capricious. The Mississippi Supreme Court has defined a decision as arbitrary when it is not done according to reason and judgment, but depending on the will alone, and an action as capricious if 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. *Miss. Dept. of Public Safety v. Raybon*, 138 So.3d 220, 225-226, quoting *Miss. Gaming Comm'n v. Pennebaker*, 824 So.2d 552, 556 (Miss. 2002) quoting *Miss. State Dept of Health v. Natchez Cmty Hosp.* 743 So.2d 973 977 (Miss. 1999). The Court finds that the record before it contains the entire minutes of the two hearings conducted by the Planning Commission, including letters and testimony of proponents and opponents of the application, as well as the minutes of the two City Council meetings at which proponents and opponents presented their evidence and Council members discussed the evidence, the facts, and their findings, by their vote, that the vacation and realignment of Fayard Street and its intersection with Bayview Avenue proves beneficial to correcting deficiencies now experienced at the Fayard Street/Bayview Avenue intersection and their finding that the vacation and relocation was for the benefit of the health, safety and welfare of the public. Given the testimony presented to the Planning Commission and accepted and adopted by the City Council, as well as the testimony presented at the City Council meetings and their findings that the vacation and relocation of Fayard Street was beneficial to the public and to correcting deficiencies at this intersection, the Court finds that the City's decision to approve the application cannot be said to be arbitrary or capricious.

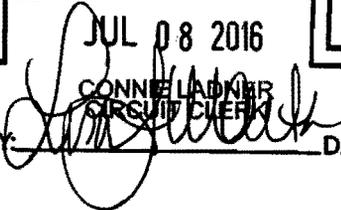
IT IS THEREFORE,

ORDERED AND ADJUDGED that the decision of the City of Biloxi to approve the request for vacation and realignment of a portion of Fayard Street is hereby AFFIRMED.

SO ORDERED AND ADJUDGED, this the 7th day of July, 2016.



CIRCUIT JUDGE

FILED
JUL 08 2016
CONNELLY
CIRCUIT CLERK
BY:  D.C.



RECEIVED
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TRANSPORT