IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01244 COA

CITY OF LAUREL APPELLANT

v.

WILLIAM E. WALLACE APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: WILLIAM S. MULLINS, III

ATTORNEY FOR APPELLEE: C. EVERETTE BOUTWELL

NATURE OF THE CASE: ZONING

TRIAL COURT DISPOSITION: CITY ZONING DECISION REVERSED

MOTION FOR REHEARING FILED:8/14/97

CERTIORARI FILED: 10/22/97

MANDATE ISSUED: 2/12/98

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

McMILLIN, P.J., FOR THE COURT:

This case comes to this Court as an appeal by the City of Laurel from a judgment of the Circuit Court of Jones County sitting as an intermediate appellate court under section 11-51-75 of the Mississippi Code of 1972.

The circuit court set aside a determination by the Laurel City Council that certain real property leased by Mark Warren for business purposes was zoned "CBD" (Central Business District) and thus exempt from the requirement of providing any off-street customer parking. The matter had been raised with the City through an informal complaint lodged by an adjoining business owner, William E. Wallace (the appellee before this Court). Wallace claimed that the lack of adequate parking for Warren's business was causing congestion in the area and was disrupting Wallace's business efforts. Wallace claimed that the requirements of the zoning ordinance for off-street parking applied to Warren's business since it was being operated in an R-3 Zone. That zone classification does not have the same exemption from off-street parking as does the Central Business District Zone.

The circuit court found, as a matter of fact, that the property was not within the Central Business District Zone, and that, therefore, the business operated by Warren would require the number of off-street parking places mandated by the City's zoning ordinance. The court further ordered the City to enforce the provisions of the ordinance by revoking Warren's previously-issued business permit. The City perfected this appeal, claiming that its determination concerning the necessity of off-street parking was correct.

We affirm the circuit court on the merits, but differ somewhat as to the proper course to remedy the city's erroneous determination.

## I.

## Preliminary Background

After Wallace lodged his complaint concerning Warren's non-compliance with the parking requirements of the zoning ordinance, the City's Zoning Administrator investigated and determined that Warren was, in fact, out of compliance. He issued formal notice to Warren to rectify the parking situation or face the revocation of his business permit. After Warren was unable to provide the necessary parking spaces, the Zoning Administrator formally notified him that he would be required

to cease doing business at that location. The notice informed Warren of his right to appeal that determination to the City's Zoning Board. Rather than appealing, Warren filed a request with the Zoning Board for a variance, in effect asking the Zoning Board to waive strict enforcement of the ordinance and permit him to operate with less than the required number of spaces.

When this variance request came on for consideration before the Zoning Board the following action was taken as reflected in the board's official minutes:

Mr. Harry Bush voiced his understanding of the property being situated in the Central Business District and this district under section 408.04.03 in the Zoning Ordinance states, "There shall be no parking requirements for structures located in the CBD." With this information it was also documented that the tax rolls describe this property as CBD and the Comprehensive Development Plan, pages 77-78, indicate also it being in the CBD. Therefore, it was unanimously agreed upon that no parking requirements would be forced on Mr. Warren's business at 226 Short 6th Street.

Although the record is not perfectly clear, it appears that Wallace appealed this decision to the Laurel City Council and the Council affirmed the ruling of its Zoning Board. From that ruling, Wallace perfected his appeal to the circuit court, where he prevailed.

II.

Discussion

Courts have limited authority to interfere with governmental action taken by the municipalities of the State. Unless the action is found to be arbitrary, capricious or unreasonable, the court should decline to interfere. *McWaters v. City of Biloxi*, 591 So. 2d 824, 827 (Miss. 1991).

Nevertheless, even under this limited scope of review, we are satisfied that there is no reasonable basis to support the finding by the City of Laurel that this property was located in the City's Central Business District. The matter of regulating the use and development of real property by a municipality through a zoning ordinance is tightly controlled by state statute. *See* Miss. Code Ann. §§ 17-1-3 to -19 (1972). The statute contemplates a zoning ordinance that will include an "official zoning map" to reflect the applicable zoning boundaries of the various classifications. Miss. Code Ann. § 17-1-15 (1972). "It is well established that a zoning map may be incorporated in a zoning ordinance by reference to it." *Ballard v. Smith*, 234 Miss. 531, 540, 107 So. 2d 580, 583 (1958). Laurel's zoning ordinance specifically incorporates the official zoning map into the ordinance. This official map is to be kept and maintained in the offices of the Zoning Administrator. There is no dispute that this zoning map shows the property in question to be zoned R-3.

The "understandings" of a member of the Zoning Board cannot be substituted for facts reflected on the zoning map. Neither may a notation on the tax rolls purporting to reflect the zoning classification of a particular parcel serve to alter the zoning map, which carries the weight of a duly-enacted ordinance of the City. Finally, there is no authority for the proposition that a "Comprehensive Development Plan," whether formally adopted by the City or not, constitutes a repeal or modification of existing zoning boundaries reflected on the zoning map. Such a comprehensive plan may be the first step toward an overall re-evaluation of a City's existing zoning scheme, but, if it is to have the

force of law, the changes suggested in the comprehensive plan must be formally enacted as an amendment to the zoning ordinance itself. This process, by statute, requires fifteen days' notice and public hearing on the proposed changes. Miss. Code Ann. § 17-1-17 (1972). There is no indication in this record that Laurel's zoning ordinance was formally modified or amended to conform to any suggestions contained in the plan. This Court has reviewed the language of the comprehensive plan relied upon by the City of Laurel to suggest that the property was a part of the Central Business District. We find the passage to be nothing more than historical narrative, imprecise to the point of being vague, and certainly substantially inaccurate when compared to the actual zoning boundaries enacted by the Laurel zoning ordinance.

On these facts, the Zoning Board was manifestly in error in its determination, and the Council was equally so in affirming the Zoning Board. The question of the zoning of any parcel of property within the corporate limits of the City of Laurel can be determined from one source and from one source only -- namely, by reference to the official zoning map of the City. Until that zoning map is amended by action of the Council meeting all the formalities of the zoning ordinance and the state statutes governing such matters, all interested parties are bound by the provisions of the map. Even had the comprehensive plan relied on by the city been intended to have the force of law, we are satisfied that its adoption could not, in itself, alter existing zoning. In *Key Petroleum, Inc. v. Housing Authority of Gulfport*, the supreme court held that adoption of an Urban Renewal Plan that contemplated some zoning changes did not itself effect the changes. *Key Petroleum, Inc. v. Housing Authority of Gulfport*, 357 So. 2d 920, 921-22 (Miss. 1977). The court confirmed that such changes, suggested as desirable in the plan, could nevertheless be implemented only by a subsequent amendment of the zoning ordinance in accordance with the terms of section 17-1-17 of the Mississippi Code of 1972, which defines the procedure for zoning changes. Miss. Code Ann. § 17-1-17 (1972).

We, therefore, conclude that the circuit court was correct when it overturned the City's determination that Warren's property was within the Central Business District and thus exempt from the off-street parking requirements of the City's ordinance. However, we observe that this proceeding began with an application by Warren for a variance from the parking requirements, not for a determination that his property was exempt from those requirements. The Zoning Board's sua sponte determination that Warren's property was within the Central Business District rendered his application moot. However, this Court has now set aside that determination, and procedural due process considerations dictate that Warren should be entitled to consideration of his variance request on the merits. Thus, we conclude that, insofar as the circuit court ordered the City to revoke Warren's business permit without further proceedings, the court was in error. This matter should more properly be reversed and remanded to the City of Laurel with direction that it proceed according to the terms of its zoning ordinance to deal with Warren's present non-compliance regarding parking requirements and with his variance request. Because of the public notice requirements that must precede consideration of the variance request, the appellee in this cause, William E. Wallace, as Warren's business neighbor, will have the opportunity to appear and express such opposition to the request as he deems appropriate.

## III.

## Cross Appeal

Wallace cross-appealed claiming that the trial court erred in denying him attorney's fees. He argues that the City's claim that Warren's property was located in the Central Business District was frivolous. He asserts that, as a result, he is entitled to attorney's fees under the Litigation Accountability Act of 1988. *See* Miss. Code Ann. §11-55-1 to -15 (Supp. 1996). Though the City was patently wrong in its position, the circuit court apparently concluded that the City's defense was not undertaken "without substantial justification," or "interposed for delay or harassment." *See* Miss. Code Ann. § 11-55-5(1) (Supp. 1996). These findings are a necessary prerequisite to imposing attorney's fees under the Act. Decisions in such matters are entrusted to the circuit court's sound discretion, and we are unconvinced that the court's decision constituted an abuse of discretion. As a result, we affirm the trial court's denial of award attorney's fees to Wallace.

**ON DIRECT APPEAL, THE JUDGMENT OF THE CIRCUIT COURT OF JONES COUNTY IS AFFIRMED INSOFAR AS IT FOUND MANIFEST ERROR IN THE CITY OF LAUREL'S DETERMINATION THAT THE WARREN PROPERTY IS LOCATED IN THE CITY'S CENTRAL BUSINESS DISTRICT. INSOFAR AS THAT JUDGMENT DIRECTED THE IMMEDIATE REVOCATION OF WARREN'S PERMIT TO CONDUCT HIS BUSINESS ON THE SITE, IT IS REVERSED, AND THIS CAUSE IS REMANDED TO THE CITY OF LAUREL FOR FURTHER PROCEEDINGS CONSISTENT WITH THE TERMS OF THIS OPINION. ON CROSS-APPEAL, THE JUDGMENT OF THE COURT DENYING WALLACE'S REQUEST FOR ATTORNEY'S FEES IS AFFIRMED. COSTS OF THE APPEAL ARE ASSESSED TO THE APPELLANT, CITY OF LAUREL.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**