

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-CA-00609 COA**

**LOVIE'S DAY CARE, INC.**

**APPELLANT**

**v.**

**CITY OF VICKSBURG**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	05/23/95
TRIAL JUDGE:	HON. FRANK G. VOLLOR
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID M. SESSUMS
ATTORNEY FOR APPELLEE:	PAUL KELLY LOYACONO
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	CITY REFUSED TO REZONE AREA TO ALLOW DAY CARE TO CONTINUE TO OPERATE AFTER CHURCH HAD DISOLVED.
DISPOSITION:	REVERSED AND RENDERED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

EN BANC

COLEMAN, J., FOR THE COURT:

This Court reverses the order of the Warren County Circuit Court which affirmed the decision of the Mayor and Board of Aldermen of the City of Vicksburg (Vicksburg) to deny an application of Lovie's Day Care, Inc. (Day Care), the Reverend Jimmie Bailey, and his wife, Lovie Bailey, to rezone their property from R-1 classification to CBR-4 classification. We reverse the order because Day Care's brief makes out an apparent case of error, and Vicksburg as appellee has filed no brief on its behalf.

**I. FACTS**

Chapel Hills Fellowship Church was originally founded in Vicksburg at 4216 Halls Ferry Road, but it later moved into a new church building which had been built at 3529 Wisconsin Avenue. The Wisconsin Avenue area had been classified as R-1 (single family residential) when Vicksburg annexed it in the 1970's. Vicksburg's zoning ordinance allowed a church to be built in any zoning classification, provided the church first obtained a special exception for its construction from the city's zoning board of appeals. On June 9, 1988, the city's zoning board of appeals granted a special exception to Wisconsin Avenue Development Corporation, which owned the property on which the new church was to be built, for the construction of the church. The special exception specifically included the provision that the church would be used as a daycare facility.

It was not until 1993 that the new church building was completed and occupied by the Chapel Hills Fellowship Church, for which the Reverend Jimmy Bailey served as minister and his wife, Lovie Bailey, managed the day care. In 1992 the Reverend Bailey became ill with his lungs, which illness affected his voice. In March, 1994 the Chapel Hills Fellowship Church disbanded, but Mrs. Bailey continued to operate Lovie's Day Care in a separate building located north of the church building and in the northeast quadrant of the intersection of Wisconsin, which runs north and south, and Enchanted Hills Street.

The State Board of Health had licensed Lovie's Day Care to accept ninety children; Lovie's Day Care had sixteen employees, and Jimmie Bailey testified that its operation grossed approximately twenty thousand dollars per month. Lovie Bailey had previously operated a second day care located on Lakepark Street, but in March or April of 1994, coincident with the disbanding of Chapel Hills Fellowship Church, Mrs. Bailey moved her day care located on Lakepark Street to Wisconsin Street. However, because the church had disbanded, the operation of the day care was no longer ancillary to the church; therefore, its continued operation in an area zoned R-1 violated the Vicksburg Zoning Ordinance. The Baileys, in whom title to the day care property was vested, rather than their corporation, Lovie's Day Care, Inc., applied to the Vicksburg Zoning Board to rezone the lot on which their day care operated from R-1 classification to CBR-4 classification. The zoning board denied their request, and they appealed to the city's mayor and board of aldermen, who properly conducted a public hearing on the matter.

Among those who appeared to support the Baileys' request to rezone the day care were three mothers whose children attended Lovie's Day Care and Doug Upchurch, a real estate developer and charter member of the original Vicksburg zoning board of appeals. The three mothers established that Lovie's Day Care was well run and conveniently located, that traffic ingress and egress from Wisconsin Street was safe, and that the better day care centers in Vicksburg had waiting lists for new attendees. Upchurch established that a Conoco station and convenience store were located in the southeast quadrant of the Wisconsin -- Enchanted Hills intersection, that an apartment complex was located in the northwest quadrant of that intersection, and that an electrical distribution facility was located in the southwest quadrant of the intersection. Upchurch further established that Lovie's Day Care and the church lot, which had been granted a special exemption, were the only remaining R-1 zoned areas on either side of Wisconsin Street from its intersection with Enchanted Hills Drive north to its intersection with Interstate 20. All other lots along either side of Wisconsin Street had been rezoned to accommodate, among others, a dentist's office, a mini-storage facility, another church, a barber shop, a rent-a-car office, and other businesses.

Those who appeared at the public hearing to protest the Baileys' request to rezone their day care lot were owners of houses located in the Enchanted Hills subdivision, which was located almost contiguous to the day care property on its east boundary. These residents of Enchanted Hills subdivision objected on the grounds that the children created excessive noise when they played outside, that the appearance of the metal building which housed the day care was objectionable, and that the police were twice called at night in response to disturbances which adults who were swimming in the pool recently built on the day care property had caused. One of the residents of the Enchanted Hills subdivision testified that he had lived in his home, the only home he had ever owned, for thirty years.

Several days after the public hearing concluded, the board of aldermen voted to deny the Baileys' request to rezone their property to CBR-4 classification, and the Baileys filed a bill of exceptions in the Warren County Circuit Court. That Court entered a written opinion and order which affirmed Vicksburg's decision to deny the reclassification of the day care property to CBR-4 classification. The Baileys then appealed to the Mississippi Supreme Court, which assigned their appeal to this Court.

## **II. RESOLUTION OF THE ISSUES**

In the brief, Lovie's Day Care sets out the following five issues for this Court's review, analysis, and resolution:

1. The Mayor and Board of Alderman of the City of Vicksburg were in error in failing to find that there had been a change in the area in question necessitating rezoning;
2. The Mayor and Board of Alderman of the City of Vicksburg erred in finding that there was no public need for such rezoning;
3. The decision of the Mayor and Board of Alderman of the City of Vicksburg was not supported by substantial evidence;
4. The highest and best use of the subject property is commercial;
5. The decision of the Mayor and Board of Alderman of the City of Vicksburg was contrary to the law and the facts of the case.

## **III. REVIEW, ANALYSIS, AND RESOLUTION OF THE ISSUES**

We have noted that the appellee, the City of Vicksburg, has not filed a brief or any other response to Lovie's Day Care's brief in which it assigned and argued these five issues. Rule 31(d) of the Mississippi Rules of Appellate Procedure provides:

If an appellee fails to file the appellee's brief as required, such brief, if later filed, may be stricken from the record on motion of appellant or on the motion of the appropriate appellate court. An appellee who fails to file a brief will not be heard at oral argument except by permission of the court.

M.R.A.P. 31(d). While Rule 31(d) does not specifically prescribe the consequence of an appellee's utter failure to file a brief, the Mississippi Supreme Court has previously held that, "the failure of the appellee to file a brief is tantamount to a confession of error and will be accepted as such unless we can with confidence say, after considering the record and brief of appellant, that there was no error." *Snow Lake Property Owners Corp. v. Smith*, 610 So. 2d 357, 360 (Miss. 1992) (citations omitted).

About the rezoning of property, the Mississippi Supreme Court has explained:

Our law is well settled that before property is reclassified from one zone to another, an applicant seeking rezoning must convince the zoning authorities either

(1) there was a mistake in the original zoning or

(2)(a) the character of the neighborhood has changed to such an extent as to justify rezoning and (b) that a public need exists for rezoning.

Neither the joint applicants nor the objectors have ever claimed or suggested there was a mistake in the original zoning. Accordingly, our task on appeal is to determine whether or not the record supports rezoning of the property in question on the basis of a substantial change in the character of the neighborhood and a public need for rezoning.

*McWaters v. City of Biloxi*, 591 So. 2d 824, 827 (Miss. 1991) (citations omitted). In the case *sub judice*, Lovie's Day Care does not argue that there was a mistake in the original zoning; instead, it argues that "the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need exists for rezoning." We find from our earlier recitation of the testimony presented at the public hearing that there was ample evidence to support Lovie's Day Care's argument on this issue.

In *City of Jackson v. Burns*, 302 So. 2d 508, 508 (Miss. 1974), the City of Jackson denied a petition to rezone a parcel of land from residential to commercial. Burns, the aggrieved property owner, appealed the city's denial of his petition to rezone to the Circuit Court of the First Judicial District of Hinds County, which reversed the order of the Jackson City Council. *Id.* As in the case *sub judice*, Burns, the appellee, did not file a brief or any response to the City's assignments of error on appeal from the circuit court's decision. *Id.* The supreme court opined:

This Court has recognized that the failure of the appellee to file a brief is tantamount to a confession of error and will be accepted as such. Since an answer to the appellant's brief cannot be safely made by us without our briefing the appellee's side of the case, which we are not called upon to do, the judgment of the lower court will be reversed.

*Id* (citation omitted). The supreme court continued:

When the case before us has been thoroughly briefed by appellant with a clear statement of the facts, and with apt and applicable citation of authorities so that the brief makes out an apparent case of error, we are not obliged to look to the record or to search through it to find something by which to avoid the force of appellant's argument, but we will accept appellant's brief as confessed.

We have meticulously considered the brief of the appellant, as well as the record, and we cannot say that we can with entire confidence affirm this case.

*Id* at 508-509.

The Mississippi Supreme Court reiterated this principle in *Westinghouse Credit Corp. v. Deposit Guar. Nat'l Bank*, 304 So. 2d 636, 637 (Miss. 1974): "Since the appellant's brief makes out an apparent case of error, we do not regard it as our obligation to look to the record to find a way to avoid the force of the appellant's argument." Because Vicksburg filed no brief in this case and because Lovie's Day Care's brief makes out an apparent case of error "with a clear statement of the facts, and with apt and applicable citation of authorities," we reverse the order of the Warren County Circuit Court affirming Vicksburg's denial of the Baileys' and Lovie's Day Care's petition to reclassify the lot on which the day care was situated from R-1 to CBR-4 classification and render judgment for the Appellant, Lovie's Day Care, Inc.

**THE DECISION OF THE MAYOR AND BOARD OF ALDERMEN OF THE CITY OF VICKSBURG DENYING LOVIE'S DAY CARE, INC.'S PETITION TO REZONE ITS PROPERTY AND THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY AFFIRMING THAT DECISION ARE REVERSED, AND JUDGMENT IS RENDERED FOR LOVIE'S DAY CARE. ALL COSTS OF THIS APPEAL ARE TAXED TO THE CITY OF VICKSBURG.**

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