IN THE COURT OF APPEALS 10/17/95

OF THE

STATE OF MISSISSIPPI

NO. 93-CC-00018 COA

W. KINGSTON BLENIS

APPELLANT

v.

NEL-WIN CONCERNED PROPERTY OWNERS,

AN UNINCORPORATED ASSOCIATION, LLOYD BARNETT, RUSSELL MCKINNEY, GEORGE BRUCH, JAMES CHANDLER, PHYLLIS Y. CARNEY, LUTHER HAROLD FAHR, DAVID GOODMAN, ROBERT W. HOOD, RICK HOWE, EDITH HURLBURT, JAMES JOBE, RICHARD KELSEY, GENE AND FAYE LUSBY, WILLIAM G. NOLEN, RICHARD OSBORNE, RONNIE OSBORNE, DON POINDEXTER, HERB AND MARILYN PORTER, JOE RATCLIFF, JAMES ROBBINS, THOMAS ROBINSON, AARON RUSSELL, ROY SHEFFIELD, FRANK SMITH, RICHARD STARNES, JOHN STOREY, JOHN TUCKER, JOHN AND GLENDA WHITE, ELLIS WILLIAMS AND LILLY CREPPEL, ALFRED YEARWOOD, AND ELIZABETH YOUNG, JAMES BRIMHALL, SR., PATRICIA KELSEY, JOYCE NOLEN, JAMES OVERTON, MARY JANE ROBISON, ELSIE ROWLETT, THELMA STARNES, ELOISE STOREY, GERALD WEBSTER AND GORDON WILSON

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. JAMES E. THOMAS

COURT FROM WHICH APPEALED: TUNICA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DANA J. SWAN

ATTORNEY FOR APPELLEES:

JAMES A. PEDEN, JR.

NATURE OF THE CASE: CIVIL: REZONING

TRIAL COURT DISPOSITION: VACATED THE ORDINANCE REZONING THE PROPERTY AND DISMISSED THE PETITION FOR REZONING

BEFORE BRIDGES, P.J., DIAZ, AND KING, JJ.

DIAZ, J., FOR THE COURT:

W. Kingston Blenis (Blenis) applied to the Tunica County Board of Supervisors to rezone his property from a classification of "A-1" Agricultural District to a classification of "C-2," Highway Commercial District in order to open a gambling boat. The Board granted his petition. Nel-Win, et. al (Nel-Win), protested and appealed the decision to the circuit court. The Honorable James E. Thomas, sitting as special judge, reversed the order of the Board of Supervisors. Aggrieved, Blenis appeals asserting the following issues: (1) Whether the circuit court applied the correct standard of review; (2) whether the circuit court erred in finding that the actions of the Board of Supervisors were fairly debatable; and (3) whether the circuit court erred in finding that the action of the Board of Supervisors amounted to spot zoning. Finding no reversible error, we affirm.

THE FACTS

In 1973, the Tunica County Board of Supervisors enacted a Zoning Ordinance for the County. Under the zoning map that was adopted as part of the Ordinance, the Board placed the subject property and surrounding area of Tunica Cutoff Lake in a classification of "A-1"Agricultural District. Under Section 409.1 of the Tunica County Zoning Ordinance, the only uses permitted in the "A-1" Agricultural Districts are agricultural uses and single family residences. Since the Zoning Ordinance was adopted, several fishing camps as well as numerous residences have been built along the eastern shore of the lake. In 1989, Nel-Win Camp Subdivision was platted as a residential subdivision with restrictive covenants, one of that being a prohibition on the use of the lots for other than residential purposes. Blenis operates a bait shop/lounge that is arguably in violation of the zoning ordinance.

After gaming became lawful in Tunica County, Blenis filed an initial application with the Tunica County Planning Commission. He sought to rezone the subject property located in Nel-Win Subdivision on the east shore of Tunica Cutoff Lake from A-1, agricultural, to C-2, commercial highway. In accordance with an agreement, Southern Elegance Cruise Lines of Mississippi, Inc. would seek a license from the Mississippi Gaming Commission to bring in a gaming vessel. The Board approved his application and passed a zoning ordinance accordingly. The opponents appealed to the circuit court, which reversed the Board’s decision to rezone.

DISCUSSION

STANDARD OF REVIEW

It is a firmly established rule that 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. *Board of Alderman v. Conerly*, 509 So. 2d 877, 883 (Miss. 1987). 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. The state supreme court has clearly stated the burden of proof in a rezoning case in *Sullivan v. City of Bay St. Louis.* In *Sullivan*, the court states:

> The burden of proof was upon the appellees to show that the character of the neighborhood had changed to such an extent that it justified rezoning and there was a public need for rezoning the property. Unless the evidence is clear and convincing as to those requirements, the action of the rezoning board has been held to be arbitrary, capricious and discriminatory.

Sullivan v. City of Bay St. Louis, 375 So. 2d 1200, 1201 (Miss. 1979).

In light of the above, we find that the trial court applied the correct standard of review when it reversed the Board's decision to rezone.

CHANGE IN ZONING

The burden of proof to support the requested change is upon the applicant. *Id.* Moreover, the requirements for reclassification must be shown by clear and convincing evidence. *Id.* On prior occasions, [the Mississippi Supreme Court] has recognized the presumption that comprehensive zoning ordinances adopted by municipal authorities are well planned and adopted to be permanent. *Wright v. Mayor of Jackson*, 421 So. 2d 1219, 1222 (Miss. 1982). In 1973, the Tunica County Board of Supervisors passed a Comprehensive Plan zoning the subject property as A-1, for agricultural and residential purposes. Since then, the area has grown as a residential area.

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 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. *Conerly*, 509 So. 2d at 886. In the hearing before the Zoning Board, Blenis failed to present any evidence that there was a mistake in the original zoning, or that there was a substantial change in the neighborhood. In fact, there is substantial evidence to the contrary. Instead of addressing the pertinent issues at the Zoning Board hearing, the applicant discussed construction plans including a proposal to build a parking lot, plans regarding sewage disposal, and a shuttle bus service to run between the casino, and the off site parking lot they proposed to build. Nel-Win, on the other hand produced expert and local residents' testimony opposing the rezoning. Nel-Win's expert, an urban planner, stated reasons why the area is unsuitable for a casino. Such reasons include, traffic congestion, fire and safety hazards, overcrowding, and

mixing incompatible land uses. In *Martinson v. City of Jackson*, the Supreme Court of Mississippi stated:

> In the instant case, there was no evidence to show that the original zoning was erroneous. Likewise, the evidence failed to establish that since the adoption of the zoning map there had been any such change in the character of the neighborhood as to justify a reclassification.

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> There being no proof of mistake, change, or confiscation, we are unable to find any support for the Council's action in rezoning.

Martinson v. City of Jackson, 215 So. 2d 414, 417-18 (Miss. 1968). Likewise, we are unable to find any proof of mistake, or change in the present case.

The circuit court cites to *Thrash v. Mayor of Jackson* in determining whether there has been a substantial change in the neighborhood. We feel this case is dispositive. In *Thrash*, the court upheld the rezoning of a residential district in Jackson to a special use district based on a substantial change in the neighborhood and public need for rezoning. In *Thrash*, the applicants for rezoning sought to rezone a flood prone tract of land from single family resident use to special use/ recreational in order to construct a multi-field soccer complex. The facts considered in determining change and need included an absence of recreational facilities in the area, the increased need for additional facilities, and that the flood way had made the area unsuitable for residential purposes. In that case, the subject property had changed so much that it was no longer reasonable to be put to the principal use for which it had been zoned. *Thrash v. Mayor of Jackson*, 498 So. 2d 801, 807 (Miss. 1986).

This case is clearly distinguishable from *Thrash*. In this case, the subject area has developed residentially as was contemplated in the future land use map of the Tunica County Comprehensive Plan. The Nel-Win Camp Subdivision, containing many weekend and vacation homes has restrictive covenants prohibiting use of the lots for other than residential purposes. The area has grown residentially in accordance with the Comprehensive Plan. Furthermore, there are comparable sites more suitable for gaming activities such as Moon Landing, and Buck Lake where Tunica County has already authorized gaming.

SPOT ZONING

When the validity of a rezoning ordinance is at issue, one test for arbitrariness is to look at the rezoning in the context of the comprehensive plan as the same may have evolved and been amended. *Woodland Hills Conservation. Ass'n. v. City of Jackson*, 443 So. 2d 1173, 1181 (Miss. 1983). Where the reclassification does no substantial violence to the growth scheme of the comprehensive plan and varies in no major respect from zoning classifications in the surrounding area, it will generally not be disturbed on judicial review. "Spot zoning" on the other hand, is generally condemned. *Woodland Hills Conservation Ass'n.*, 443 So. 2d at 1181 (citations omitted). The term "spot zoning" is ordinarily used where a zoning ordinance is amended reclassifying one or more tracts

or lots for a use prohibited by the original zoning ordinance and out of harmony therewith. *McKibben v. City of Jackson*, 193 So. 2d 741, 744 (Miss. 1967).

> Spot zoning amendments are those which by their terms single out a particular lot or parcel of land, usually small in relative size, and place it in an area the land use pattern of which is inconsistent with the small lot or parcel so placed, thus projecting an inharmonious land use pattern.

Cowan v. Gulf City Fisheries, Inc., 381 So. 2d 158, 163 (Miss. 1980) (citations omitted). When an area develops in accordance with a comprehensive zoning plan, and there is no allegation that a mistake was made in the original plan, a request for spot zoning should be denied absent proof of a mistake in the original plan or proof of change in the character of the neighborhood justifying rezoning in the interest of public welfare. *Jitney Jungle, Inc. v. City of Brookhaven*, 311 So. 2d 652, 654 (Miss. 1975). The instant facts fall squarely within these definitions, and in the absence of the needed justification to rezone, we must agree with the circuit court.

CONCLUSION

As an applicant for rezoning, Blenis failed to meet his burden of proof. We find that the trial court applied the correct standard of review in finding that there was no mistake in the original zoning, nor has there been a substantial change in the neighborhood so that public need warranted change. Accordingly, we must affirm the judgment of the Tunica County Circuit Court.

THE JUDGMENT OF THE TUNICA COUNTY CIRCUIT COURT VACATING THE REZONING ORDINANCE AND DISMISSING THE PETITION FOR REZONING IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., NOT PARTICIPATING.