

**IN THE COURT OF APPEALS 1/31/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-01096 COA**

**STEVE NICOVICH AND ELLEN NICOVICH**

**APPELLANTS**

**v.**

**THE CITY OF BILOXI, MISSISSIPPI**

**APPELLEE**

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

TRIAL JUDGE: HON. JERRY OWEN TERRY SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

FOR APPELLANTS:

DAVID W. CRANE

RICHARD B. TUBERTINI

ATTORNEY FOR APPELLEE:

CHARLES K. PRINGLE

NATURE OF THE CASE: ZONING

TRIAL COURT DISPOSITION: AFFIRMED ZONING DECISION OF CITY OF BILOXI

BEFORE FRAISER, C.J., BARBER, COLEMAN, AND MCMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

This is a zoning case. On March 29, 1994 the City of Biloxi, Mississippi rezoned a parcel of land fronting on U.S. Highway 90, owned by Walker Tucei (Tucei), from R-1, single-family residential to R-3, multi-family residential for development of a forty-two-unit condominium complex. Steve and Ellen Nicovich (the Nicoviches), adjoining property owners, filed a bill of exceptions with the Circuit Court for the Second Judicial District of Harrison County, appealing the city's adoption of the rezoning ordinance. The circuit court affirmed the decision of the Biloxi city council. The Nicoviches filed a motion to reconsider, and the city filed a motion to strike the motion to reconsider. The circuit court denied both motions, and the Nicoviches appeal the circuit court's decision affirming the Biloxi city council's decision to rezone Tucei's property. They present the following issues on appeal:

I. THE CIRCUIT COURT ERRED IN AFFIRMING THE REZONING DECISION OF THE BILOXI CITY COUNCIL IN THE ABSENCE OF PROOF OF MISTAKE IN THE PREVIOUS ZONING OR PROOF OF SUBSTANTIAL CHANGE IN THE NEIGHBORHOOD.

II. THE CIRCUIT COURT ERRED IN AFFIRMING THE REZONING DECISION OF THE CITY OF BILOXI BECAUSE THE RESULT CONSTITUTES SPOT ZONING.

Finding no error, we affirm.

## FACTS

Tucei owns a 3.4 acre piece of property in Biloxi, Mississippi fronting on U.S. Highway 90. He desired to build a forty-two-unit luxury condominium complex on his property. The property is in a block bounded on the east by White Avenue, on the west by St. Jude Street, and on the north by Father Ryan Avenue. White Avenue is the only access from Highway 90 to Keesler Air Force Base. The property on both sides of White Avenue is zoned C-1, commercial. Father Ryan is a residential street, zoned R-1, single-family residential. Also located within the same block as Tucei's property are the Saxony Apartments, a forty-unit complex in an R-3 multi-family zone.

The property in question was zoned R-1 single-family at the time of Tucei's application for rezoning. He originally requested a change to C-1 commercial, but revised his application to request a change to R-3 multi-family use. Prior to 1983, the property in question was zoned C-1 commercial but was rezoned R-1 single-family in 1983. The rear 120 foot portion of Tucei's property that fronts on Father Ryan Avenue has always been zoned R-1 and was not included in the rezoning of the rest of Tucei's property. The Biloxi planning commission received Tucei's zoning application and held two public hearings to aid in determining its course of action. After much consideration, the planning commission recommended approval of Tucei's application to the city council. The city council held a third public hearing, and on March 29, 1994, adopted Ordinance No. 1717 by a 6-1 vote, which changed the zoning of the southern half of Tucei's property as requested (the rear 120 feet fronting on Father Ryan Avenue was not rezoned).

The Nicoviches filed their bill of exceptions to the circuit court. The circuit court affirmed the city council's decision to rezone the southern portion of Tucei's property, holding that the city council had "substantial evidence before it supportive of the re-zoning ordinance from R-1 to R-3."

Moreover, the circuit court found not only that there was evidence of mistake in the 1983 rezoning of the property from C-1 to R-1, but also that evidence supported the finding that the character of the neighborhood had changed to the extent to justify rezoning. In conclusion, the circuit court found that the city council's decision was neither arbitrary nor capricious and affirmed.

I. THE CIRCUIT COURT ERRED IN AFFIRMING THE REZONING DECISION OF THE BILOXI CITY COUNCIL IN THE ABSENCE OF PROOF OF MISTAKE IN THE PREVIOUS ZONING OR PROOF OF SUBSTANTIAL CHANGE IN THE NEIGHBORHOOD.

The law is settled as to the proof required by an applicant for rezoning:

Prerequisite to property reclassification from one use to another is proof by clear and convincing evidence either (1) that a mistake was made in the original zoning or, (2) that a change in the character of the neighborhood has occurred to such an extent as to justify rezoning and that a public need exists for such action. In determining the factual issues in rezoning, the [city council] could consider not only the information obtained at the hearing but also their own common knowledge and the familiarity with the ordinance area.

*Faircloth v. Lyles*, 592 So. 2d 941, 943 (Miss. 1991) (citations omitted). The Nicoviches argue on appeal that Tucei failed to prove a mistake in the original zoning, and failed to prove a change in the character of the neighborhood sufficient to justify rezoning. Our scope of review in zoning

matters is limited and well-settled:

The classification of property for zoning purposes is a legislative rather than a judicial matter. The order of the governing body may not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis. The action of the [city council] in enacting or amending an ordinance, or its action of rezoning, carries a presumption of validity, casting the burden of proof upon the individual or other entity asserting its invalidity. On appeal we cannot substitute our judgment as to the wisdom or soundness of the [planning commission's] action. We have stated that where the point in controversy is "fairly debatable," we have no authority to disturb the action of the zoning authority.

*Faircloth*, 592 So. 2d at 943 (citations omitted). Under this standard the Nicoviches have a heavy burden indeed. They must prove that the city council's decision and the circuit court's decision were arbitrary, capricious, illegal, or unsupported by substantial evidence. The city council rezoned the Tucei property on the recommendation of the planning commission, which held two public hearings, and after holding a public hearing of its own. Moreover, the circuit court made the following finding

in its opinion:

Though not specifically found, it is evident from the record that, consideration was given as to the mistake made in 1982 [sic], when the general zoning of beachfront property in the area from Porte Ave. (light house) to Rodenburg was changed from commercial to R-1. It is general knowledge or historical fact that since shortly after Hurricane Camille in 1969, the city of Biloxi has made efforts to encourage the rebuilding and redevelopment of beachfront properties. It is apparent that since there had been little commercial activity from 1969 to 1982 in this area that a change to R-1, except where commercial or multi-family structures had developed, would possibly stimulate development. Since 1982, only one (1) single family dwelling has been constructed and that is located in a R-3 zone with all other vacant properties remaining unproductive. This is within itself, substantial debatable evidence of mistake in the 1982 zoning revision. If not fairly debatable evidence of mistake, it justifies a label of "debatable evidence" of change in neighborhood circumstances and public need for rezoning.

In an attempt to stimulate growth along the Mississippi coast's shoreline, the zoning text and map committee in 1983 rezoned much of the area along U.S. Highway 90 to R-1. However, in the block of beachfront property in which the Tucei property is located, residential development did not occur as the zoning committee visualized in 1983. The zoning committee foresaw that development may not proceed as they visualized, and stated in its 1983 report, "In the event that the proposed beach front multi-family property develops consideration might be given to amending the Land Use Plan and zoning of existing single family areas to permit additional multi-family development." Many well meaning plans fail to come to fruition, as is demonstrated by the stagnant development and enjoyment of residential housing in Tucei's block along U.S. Highway 90. It is evident that the planning commission made a mistake in 1983 when it rezoned the property to R-1. The city council's recognition of the mistake, whether or not specifically labeled as a finding, is sufficient to support a finding of mistake in the 1983 rezoning. *Faircloth*, 592 So. 2d at 945 ("[W]hile recognizing the desirability of specific findings by the zoning authority on each considered issue, we will not reverse for a lack of such specificity where a factual basis for the action is disclosed."). The Nicoviches have failed to prove that the decision of the city council, which found a mistake had been made in the original zoning, was unsupported by evidence, was arbitrary, capricious, illegal, or discriminatory.

As stated earlier, the test for a rezoning application consists of two alternative prongs. The first prong required the applicant to prove mistake in the original zoning, and Tucei proved such mistake existed. The second prong required Tucei to prove a change in the character of the neighborhood sufficient to justify rezoning, coupled with a public need. The circuit court found that Tucei had successfully proved the required change in the neighborhood, and that a need existed for affordable, high density housing to fill the coast's ever growing needs. The circuit court pointed out that single family dwellings in the vicinity of the subject property were not in demand:

The past professional studies have targeted the particular property and area as ideal for high density development. There are four (4) existing single family dwellings within this block and two (2) have been for sale for a considerable time. The remainder of the block is

either vacant or is covered by a forty (40) unit apartment complex.

What may at one time have been an idyllic setting for grand single family homes is no longer suited for the type of development the planning commission envisioned over a decade ago. The neighborhood is replete with commercial development and is demonstrably suited for multi-family housing. The neighborhood has changed from a single family residential target to an area consistent with the purpose of multi-family zoning. Under our familiar standard of review, absent a showing that the city council's legislative rendering was arbitrary, capricious, illegal, discriminatory, or unsupported by substantial evidence, we are without authority to reverse.

## II. THE CIRCUIT COURT ERRED IN AFFIRMING THE REZONING DECISION OF THE CITY OF BILOXI BECAUSE THE RESULT CONSTITUTES SPOT ZONING.

The Nicoviches also complain of the oft cited error of spot zoning. They complain that rezoning Tucei's property while leaving it surrounded by R-1 zoning is tantamount to spot zoning and therefore impermissible. We disagree. Spot zoning is most often defined as a departure from the zoning of the surrounding area so severe as to ravish the comprehensive plan. In fact, variances and amendments in zoning ordinances have become so common and widespread that there is a question as to whether true spot zoning even exists anymore. If it does indeed still exist, it may sometimes be identified as a small piece of property rezoned in an obviously inconsistent manner and solely for the benefit of a private party. The Mississippi Supreme Court defines spot zoning as "a zoning amendment which is not in harmony with the comprehensive or well-considered land use plan of a municipality." *McWaters v. City of Biloxi*, 591 So. 2d 824, 828 (Miss. 1991). Not all zoning amendments amount to spot zoning. *Id.* A zoning amendment must be out of harmony with the original zoning, and each case must be judged on its own circumstances. *Id.* The property in the case sub judice was originally zoned C-1 commercial. At a later time, in an effort to stimulate beachfront development, the property was rezoned R-1. However, that reclassification has been found to be a mistake. Single family residential classification of the property did not achieve the goal of beachfront development. Instead, the development around the subject property has been commercial in nature. Moreover, there exists in the same block as the subject property a forty-unit apartment complex. The subject property was not rezoned to favor Mr. Tucei. On the contrary, the planning commission and the city council both found that there was a mistake in the original zoning, that the neighborhood had changed sufficiently to justify a rezoning, and that there existed a public need for the rezoning and the resultant development. This is not a case of spot zoning. *See McWaters*, 591 So. 2d at 828.

**THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT AFFIRMING THE BILOXI CITY COUNCIL'S REZONING DECISION IS AFFIRMED. COSTS ARE TAXED TO THE APPELLANTS.**

**BRIDGES, P.J., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., AND DIAZ, J., NOT PARTICIPATING.**

