

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2019-CC-01459-COA**

**WARING INVESTMENTS, INC.**

**APPELLANT**

**v.**

**CITY OF BILOXI, MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT:	09/12/2019
TRIAL JUDGE:	HON. LAWRENCE PAUL BOURGEOIS JR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT, SECOND JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT:	WAYNE L. HENGEN
ATTORNEY FOR APPELLEE:	PETER C. ABIDE
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
DISPOSITION:	AFFIRMED - 12/08/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**EN BANC.**

**CARLTON, P.J., FOR THE COURT:**

¶1. Waring Investments Inc. (Waring) sought to rezone a 4.4 acre parcel of land in Biloxi, Mississippi, from “low-density single-family residential” to “neighborhood business” to construct a convenience store and gas station. The City of Biloxi (the City) denied Waring’s rezoning request, and on appeal, the Harrison County Circuit Court affirmed the City’s decision. On appeal from the circuit court’s judgment, Waring argues the City’s decision was arbitrary, capricious, and not supported by substantial evidence. Finding no error, we affirm the circuit court’s judgment.

**FACTS**

¶2. On November 9, 2017, Waring filed with the Biloxi Planning Commission (the Planning Commission) an application to amend the district zoning map to rezone a 4.4-acre land parcel at the intersection of Rue Sanchez and Highway 67 from low-density single-family residential to neighborhood business. Waring sought the rezoning to build a convenience store and gas station at the intersection. On December 21, 2017, the Planning Commission held a public hearing on Waring’s application. During the hearing, Waring asserted that the character of the neighborhood had changed to the extent necessary to justify the rezoning and that a public need existed for the convenience store and gas station. Waring supported its argument with maps, surveys, aerial photographs, and expert reports. Thirteen concerned citizens, most of whom resided or owned land near the proposed building site, attended the hearing and voiced their opposition to the rezoning. The Planning Commission also received two letters of opposition from landowners not in attendance. After considering all the evidence, the Planning Commission voted as follows: six members approved Waring’s rezoning application, six members opposed the application, and two members abstained. Following the resulting tie vote, the Planning Commission forwarded Waring’s application to the Biloxi City Council (the City Council) with “no recommendation” to allow the City Council to dispose of the application as it deemed appropriate.

¶3. The City Council conducted a public hearing on February 20, 2018. Waring again presented its evidence to support the rezoning, and nine concerned citizens, eight of whom resided or owned land near the proposed building site, attended and objected to the rezoning. After considering the attendees’ evidence and arguments, all six of the City Council members

who attended the hearing voted to deny Waring’s application.<sup>1</sup>

¶4. Waring sought judicial review of the City Council’s decision and filed an agreed bill of exceptions with the circuit court. The circuit court found that the City Council had “undoubtedly” given “significant weight to the testimony of the concerned homeowners” who attended the public hearing. The circuit court also noted that the members of the City Council “gave brief statements as to their respective reasoning in denying the requested rezoning” and that the City Council ultimately denied the rezoning request because it “did not feel . . . [Waring] had met its burden of proving public need and change in the character of the neighborhood.” After concluding that the City Council’s decision was fairly debatable and neither arbitrary nor capricious, the circuit court affirmed the denial of Waring’s application. Aggrieved, Waring appeals.

#### STANDARD OF REVIEW

¶5. We only reverse “a zoning authority’s decision if the decision was ‘arbitrary, capricious, discriminatory, illegal, or without substantial evidence.’” *White v. City of Starkville*, 283 So. 3d 189, 192 (¶5) (Miss. Ct. App. 2019) (quoting *City of Jackson v. Allen*, 242 So. 3d 8, 13 (¶18) (Miss. 2018)). “Evidence is substantial when ‘reasonable minds might accept it as adequate to support a conclusion.’” *Trappey v. Newman*, 281 So. 3d 58, 61 (¶8) (Miss. Ct. App. 2019) (quoting *Como Steak House Inc. v. Bd. of Supervisors*, 200 So. 3d 417, 422 (¶15) (Miss. 2016)). Where “the matter is fairly debatable[,]” this Court “decline[s] to disturb a zoning authority’s decision . . . .” *White*, 283 So. 3d at 192 (¶5). “Because a

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<sup>1</sup> One member of the City Council was absent from the hearing.

‘governing body’s decision carries a presumption of validity,’ the party asserting the decision’s invalidity bears the burden of proof.” *Id.* (quoting *Speyerer v. Bd. of Supervisors of Madison Cnty.*, 139 So. 3d 771, 774 (¶10) (Miss. Ct. App. 2014)).

## DISCUSSION

¶6. “Before a zoning authority rezones property, the applicant must show by clear and convincing evidence that either (1) ‘there was a mistake in the original zoning’ or (2) ‘the character of the neighborhood has changed to such an extent as to justify rezoning, and a public need exists for rezoning.’” *White*, 283 So. 3d at 192 (¶6) (quoting *Beard v. City of Ridgeland*, 245 So. 3d 380, 388 (¶25) (Miss. 2018)). Here, the parties have raised no argument that a mistake occurred in the original zoning. Thus, the only issue before this Court is whether a change in the character of the neighborhood, combined with a public need, justified Waring’s requested rezoning. Waring argues that the record reflects clear and convincing evidence of both a change in character to the neighborhood and a public need for the requested rezoning. As a result, Waring asserts that the City Council’s denial of the rezoning application was not fairly debatable. Waring therefore asks this Court to reverse the circuit court’s judgment and to render judgment in Waring’s favor.

¶7. “Amendments to zoning ordinances ‘must be made after careful consideration because investments in land and property are significant financial decisions, and a landowner should be able to rely upon a zoning plan to maintain the use and value of his property.’” *Beard*, 245 So. 3d at 388 (¶25) (quoting *Roundstone Dev. LLC v. City of Natchez*, 105 So. 3d 317, 321 (¶17) (Miss. 2013)). In deciding Waring’s rezoning request, the members of the City

Council were not limited to only Waring’s evidence but were “free ‘to consider the statements expressed by all the landowners at the hearing, as well as to call upon their own common knowledge and experience in their town.’” *Roundstone Dev. LLC*, 105 So. 3d at 322 (¶22) (quoting *Bd. of Aldermen of Bay Springs v. Jenkins*, 423 So. 2d 1323, 1327 (Miss. 1982)). The Mississippi Supreme Court has held “that such considerations are sound and practical and should be respected unless the findings are arbitrary, capricious, and unreasonable.” *Id.* (citation and internal quotation mark omitted).

¶8. As discussed, nine concerned citizens attended the City Council’s public hearing and objected to Waring’s rezoning request. Eight of the nine citizens either resided or owned land near the proposed building site. The residents asserted that the character of their neighborhood had not changed—especially not to the extent needed to justify the rezoning. Further, the residents contended that the addition of the proposed convenience store and gas station would result in changes that were uncharacteristic of their neighborhood’s established environment. The residents also argued that no public need existed for the convenience store and gas station. They voiced numerous concerns that included the following: potential flooding and waste-water runoff; increased traffic and safety hazards; decreased property values; increased difficulty obtaining home financing; the availability of other potential locations for the convenience store and gas station; and the existence of other gas stations in the area.

¶9. After considering all the arguments and evidence, four of the six City Council members explained their reasons for denying Waring’s rezoning request. The first City

Council member referenced the obligation he felt to represent the people he served as an elected official. Placing an emphasis on the objections the concerned citizens had raised in opposition to the rezoning request, the council member voted to deny Waring's application.

¶10. A second council member found that both sides had made compelling arguments regarding the character of the neighborhood and that Waring had "almost [presented] clear and convincing evidence that there was a change in the character of the neighborhood." The council member ultimately concluded, however, that Waring had presented insufficient evidence to establish that a change had occurred to the extent necessary to justify rezoning. The council member found rezoning was especially unwarranted when he considered the lack of change to the neighborhood's character in conjunction with the requirement to prove a public need for the rezoning. Stating that he found Waring had failed to satisfy both elements necessary for rezoning, the second council member explained that he had to vote against Waring's request.

¶11. A third council member stated that he found no change in character to the neighborhood at issue although changes had occurred across the river from the proposed building site. The third council member further concluded that no public need existed for the convenience store at the proposed location and that other possible locations for the convenience store existed. As a result, the third council member stated that he also could not support Waring's request. A fourth council member noted that no commercial development had really occurred in the area at issue for about the past fifteen years, and he found that no compelling public need existed for a convenience store and gas station at that particular site.

¶12. Upon review, we find the record reflects substantial evidence to support the City Council's conclusion that Waring failed to prove both a change in the neighborhood's character sufficient to justify rezoning and a public need for rezoning. *See White*, 283 So. 3d at 192 (¶6). Because the City Council's denial of the rezoning request was fairly debatable and neither arbitrary nor capricious, we decline to reverse the circuit court's judgment upholding the City Council's decision. We therefore find this issue lacks merit.

### CONCLUSION

¶13. Because the record contains substantial credible evidence to support the City Council's denial of Waring's application, we find no error in the circuit court's determination that the City Council's decision was fairly debatable and was neither arbitrary nor capricious. We therefore affirm the circuit court's judgment upholding the City Council's rezoning decision.

¶14. **AFFIRMED.**

**BARNES, C.J., WILSON, P.J., GREENLEE, WESTBROOKS, McDONALD,  
LAWRENCE AND McCARTY, JJ., CONCUR.**