



# CITY OF PRATTVILLE

**BILL GILLESPIE, JR.**  
MAYOR

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## CITY COUNCIL

**MIKE RENEGAR**  
PRESIDENT  
DISTRICT 5

**NATHAN D. FANE**  
PRESIDENT PRO TEMPORE  
DISTRICT 7

**ALBERT C. STRIPLIN**  
DISTRICT 1

**WILLIE WOOD, JR.**  
DISTRICT 2

**DEAN R. ARGO**  
DISTRICT 3

**TOM MILLER**  
DISTRICT 4

**RAY C. BOLES**  
DISTRICT 6

## City of Prattville Board of Zoning Adjustment

The minutes of the August 9, 2011 meeting of the  
City of Prattville Board of Zoning Adjustment  
were approved.

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Leo Jamieson, Chairman

9/13/11

Date



# CITY OF PRATTVILLE

**BILL GILLESPIE, JR.**  
MAYOR

## CITY COUNCIL

**MIKE RENEGAR**  
PRESIDENT  
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DISTRICT 6

**CITY OF PRATTVILLE  
BOARD OF ZONING ADJUSTMENT  
A G E N D A  
August 9, 2011  
4:00pm**

**Call to Order:**

**Roll Call:**

Chairman Leo Jamieson, Vice-Chairman John Gillian, Ms. Kitty Houser, Mr. Mac Macready, and Mrs. Jerry Schanep. Alternate Member: Commander Michael Whaley.

**Minutes:**

June 14, 2011

**Old Business:**

None

**New Business:**

1. 110809-01 ADMINISTRATIVE APPEAL:

Variance to place a manufactured home on property.  
231 County Road 29  
FAR Zoning District (Forest, Agricultural, Recreation)  
**The Estate of Madge Benefield, deceased, Petitioner**

*District 1*

**Miscellaneous:**

**Adjourn:**

**City of Prattville Board of Zoning Adjustment  
Minutes  
August 9, 2011**

**CALL TO ORDER:**

The regular meeting of the Prattville Board of Zoning Adjustment (BZA) was called to order by Chairman Leo Jamieson at 4:01 p.m. on Tuesday, August 9, 2011.

**ROLL CALL:**

Present: Chairman Leo Jamieson, Vice-Chairman John Gillian, Mrs. Kitty Houser, and Mrs. Jerry Schannep. Absent: Mr. Mac Macready.

Staff present: Mr. Joel Duke, City Planner and Ms. Alisa Morgan, Secretary.

Chairman Jamieson stated the governing rules for the Prattville Board of Zoning Adjustment according to the *Code of Alabama, 1975* and the procedure of the meeting.

**MINUTES:**

The minutes of the June 14, 2011 meeting were approved unanimously.

**OLD BUSINESS:**

None

**NEW BUSINESS:**

**ADMINISTRATIVE APPEAL**

**Variance to place a manufactured home on property.**

**231 County Road 29**

**FAR Zoning District (Forest, Agricultural, Recreation)**

**The Estate of Madge Benefield, deceased, Petitioner**

Mr. Duke introduced and reviewed the nature of the request of the administrative appeal. He stated that in May 2008 the BZA granted approval to allow a manufactured home on the property with the contingency that if the property is sold it would have to be removed and to be occupied strictly by the mother and grandparents of Michael Gillyard. He stated that the order and the minutes have a small discrepancy and it is the city attorney's opinion that the minutes carry as the official record of action. He stated that in early 2011 a complaint was received that the terms of the variance had been violated and inquiry by the Planning Department showed that one of the grandparents living in the unit died in 2009. He stated that he interpreted that the Board's May 13, 2008 variance required the presence of the mother and both grandparents and further issued an order that the unit be removed from the property. He stated that the estate of Madge Benefield has appealed his interpretation. He stated that they believe that the variance was granted to allow the manufactured home until the property was sold or the mobile home is vacated by the mother or grandparents, thus the appeal has stayed all further enforcement action by the Planning Department. He stated that the Board is being asked to clarify and interpret the May 13, 2008 variance.

Tonya Gillyard, petitioner representative, stated that they received the notice of violation from the city and was ordered to remove the manufactured home within 10 days. She stated that they contacted the office and explained that they did not believe that they were violating the order and Mr. Duke suggested that they file an appeal of his decision to clear up any discrepancy.

Chairman Jamieson opened the public hearing.

Lori Abbott, 227-A Co. Rd. 29, petitioner representative, spoke in favor to allow the manufactured home to remain on location. She stated that she lives next door to the applicant who is her sister. She stated that she supports her sister and brother-in-law in the care that they are giving to his parents and grandparents. She further stated that they did not believe that they were violating the variance when one of the grandparents died.

Vivian Gillespie, 235 Co. Rd. 29, adjacent property owner, spoke in opposition to allow the manufactured home to remain on location. She stated that she and her husband are directly affected by the violation by the manufactured home encroaching into the side yard lines. She stated that this request should not be considered as an administrative appeal because it should have been filed in May 2008.

Mr. Duke responded to Mrs. Gillespie's claim that the administrative appeal should have been filed in 2008. He clarified that the administrative appeal is to appeal his interpretation that the variance requires the continued presence of the mother and both grandparents based on the notice of violation sent to the Gillyards in April 2011.

Chairman Jamieson also clarified to Mrs. Gillespie that the administrative appeal is based on the 2011 notice of violation from the City of Prattville.

Mrs. Gillespie continued her opinion on why the manufactured home was in violation and should be moved. She presented a packed of information to the board. (Made a part of the minutes). Chairman Jamieson asked Mrs. Gillespie if she believe that the remaining occupants should move because of the death of one of the grandparents. Mrs. Gillespie replied, no.

Gerry Cimis, 141 N. Chestnut Street, spoke in opposition to the request being filed as an administrative appeal. He stated that the application was not filed within 10 days of the notice of violation. He stated that the variance was voided when one of the grandparents died in 2009. He that the only option is to grant another variance and the Board does not have the authority to grant a variance for a change of a variance for a prohibited use.

After no further comments, the public hearing was closed.

Chairman Jamieson called for motion to clarify the intent of the ruling of the May 13, 2008 variance for (229) 231 Co. Rd 29.

Mr. Gillian moved that Mr. Dukes ruling was in error and the variance was not in violation because of the death of one of the grandparents. The intent of the BZA in 2008 was for the mother or grandparents to live in the manufactured home until property is sold. The death of one or the other does not void the variance. Mrs. Schannep seconded the motion.

The motion to approve passed unanimously.

**MISCELLANEOUS:**

Mr. Duke asked that the board would consider an administrative work session. Also other classes for citizens would be offered by the fall of the year on planning and zoning. The board is to provide dates of availability.

**ADJOURN:**

After no further comments, questions or discussion the meeting was adjourned at 5:05.

Respectfully submitted,

A handwritten signature in cursive script that reads "Alisa Morgan".

Alisa Morgan, Secretary  
Board of Zoning Adjustment

**CITY OF PRATTVILLE BOARD OF ADJUSTMENT  
PUBLIC HEARING  
SPEAKERS SIGN-IN SHEET**

**MEETING DATE:** August 9, 2011

**PETITIONER:** The Estate of Madge Benefield, deceased

**ADDRESS OF PETITION:** 231 County Road 29

	NAME	ADDRESS
1.	<i>James Gillispie</i>	<i>229 Co Rd 29 36067</i>
2.	<i>LORI Abbott</i>	<i>227a Co Rd 29 36067</i>
3.	<i>Vivian Johnson</i>	<i>235 Co Rd 29 36067</i>
4.	<i>Dr Gerald Smith</i>	<i>141 N. Chestnut St. Prtville 36067</i>
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**CITY OF PRATTVILLE**  
 Board of Zoning Adjustment  
 Planning Department Staff Report



<b>DATE:</b>	5/24/11
<b>APPLICATION TYPE:</b>	Administrative Appeal (110614-01)
<b>PROPERTY LOCATION or DESCRIPTION:</b>	231 County Road 29
<b>PETITIONER(S) AND AGENT(S):</b>	The Estate of Madge Benefield, deceased. Representative: Michael Gillyard
<b>ZONING DISTRICT(S)</b>	FAR (Forest, Agricultural, & Recreation)
<b>REQUESTED ACTION:</b>	<p>Administrative Appeal</p> <p>The BZA granted approval for a variance on 5/13/08 to place a manufactured home 10' off property line at the petitioner's request. Mrs. Schannep moved to approve on the condition that if the property is sold the mobile home is to be removed; the mobile home is to be strictly occupied by the mother and grandparents of Michael Gillyard. Mr. Gillian seconded the motion. The amended motion to approve passed unanimously.</p> <p>The Zoning Administrator has interpreted that the variance requires the continued presence of the mother and two grandparents. The absence of one grandparent causes the mobile home to be in violation of the conditions of the variance and the Zoning Ordinance of the City of Prattville.</p>
<b>ZONING ORDINANCE REFERENCE:</b>	



# CITY OF PRATTVILLE

**BILL GILLESPIE, JR.**  
MAYOR

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## CITY COUNCIL

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PRESIDENT  
DISTRICT 5

NATHAN D. FANK  
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ALBERT C. STRIPLIN  
DISTRICT 1

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DISTRICT 2

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TOM MILLER  
DISTRICT 4

RAY C. BOLES  
DISTRICT 6

## MEMORANDUM

**DATE:** August 8, 2011

**TO:** Prattville Board of Zoning Adjustment

**FROM:** Joel T. Duke, City Planner 

**RE:** Administrative Appeal – August 9, 2011

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The single item on your August 9, 2011 agenda is an appeal of a decision made in my capacity as zoning administrator. I am providing additional information in this case because this type of appeal is rarely made to the Board, and most of the current members have not heard or ruled in such a case. Before addressing the specific agenda request by the Estate of Madge Benefield, I will review administrative appeals in general and how they differ from the more commonly requested variance.

Administrative appeals are one of the three powers granted to boards of zoning adjustment by Section 11-52-80 of the *Code of Alabama, 1975*. Subsection (d) (1) of Section 11-52-80 describes the administrative appeal as the power "To hear and decide appeals where it is alleged there is an error in any order, requirement, decision or determination made by an administrative official in the enforcement of this article or of any ordinance adopted pursuant thereto." In other words, the administrative appeal can be submitted to a board if an applicant believes the zoning administrator has made an error in interpreting a provision of the zoning ordinance. Administrative appeals differ from a variance. With variance requests, the applicant and the zoning administrator agree on the interpretation of the zoning ordinance, and the applicant is requesting an exception or relief from that provision. Administrative appeals exist to clarify and further establish the meaning of a city's zoning ordinance for the public and the city staff. When ruling on an administrative appeal, a board of zoning adjustment should receive testimony from the zoning administrator and the applicant and fully review the relevant section of the zoning

ordinance in question. The board may also consider requesting testimony from a city's attorney or other professionals outside the city staff. When ruling on an administrative appeal, a board may agree with the zoning administrator or offer a revised interpretation. Once issued, a ruling is recognized as if it is a part of a city's zoning ordinance.

On your August 9, 2011 agenda, the Estate of Madge Benefield is appealing my interpretation of a variance granted by the Prattville Board of Zoning Adjustment on May 13, 2008. Prior to her death, Ms. Benefield applied for a variance to permit the location of a double wide mobile home to the rear of a single family home located a 229 County Road 29. It was stated at the hearing that the property was being sold by Ms. Benefield to her daughter and son-in-law. Also stated at the hearing, the mobile home was to be used by the mother and grandparents of Ms. Benefield's son-in-law. The Board elected to grant a variance allowing for the trailer to be located in the rear yard of the single-family structure with a condition that the unit is removed if the property was sold or no longer occupied by Mr. Gillyard's mother and grandparents. The order listed on page 4 of the Board's minutes for May 13, 2008 states that, **"approval is granted on the condition that if the property is sold the mobile home is to be removed; the mobile home is to be strictly occupied by the mother and grandparents of Michael Gillyard."** Like all variances, this exception is viewed by the Planning Department a part of the zoning ordinance. Following receipt of the Board's variance, a mobile home was permitted for the property in the rear of 229 County Road 29.

A complaint was received earlier in 2011 stating that the terms of the variance had been violated. A subsequent inquiry by the Planning Department showed that one of the grandparents living in the unit to the rear of 229 County Road 29 died in 2009. I interpreted the Board's May 13, 2008 variance to require the presence of the mother and both grandparents. I further issued an order that the unit be removed from the property. The property is currently held by the Estate of Madge Benefield. The estate has appealed my interpretation (administrative ruling) of the Board's May 13, 2008 variance stating that they believe the variance was granted to allow the mobile home until the property was sold or vacated by the mother or grandparents. The appeal has stayed all further enforcement action by the Planning Department. The Board is being asked to clarify and interpret the May 13, 2008 variance.

Given the nature of this appeal, I will be available during the hearing to provide information concerning the nature of the appeal, background information on the case and testimony concerning my interpretation of the May 13, 2008 variance. I will not be able to offer assistance with the Board's ruling.

If you have any questions concerning this case, please do not hesitate to call or e-mail.

110614-01/A

Administrative Appeal  
Variance to place a mobile home on property

080513-06

PRATTVILLE BOARD OF ZONING ADJUSTMENT

PETITIONER: MADGE BENEFIELD  
229 COUNTY ROAD 29  
PRATTVILLE, AL 36067

REQUEST: VARIANCE TO PLACE A MANUFACTURED HOME ON  
PROPERTY.  
229 COUNTY ROAD 29  
FAR ZONING DISTRICT (FOREST, AGRICULTURAL, RECREATION)

ORDER

The above petition having been duly considered at a public hearing meeting before the Board of Zoning Adjustment of the City of Prattville, having been advertised in *The Prattville Progress*, a newspaper of general circulation in the city limits of Prattville, Alabama, and setting forth notice of the request for a variance to the Zoning Laws of Prattville, Alabama, as set out in the aforesaid petition and giving notice that a public hearing would be held on May 13, 2008 at the City Hall in Prattville, Alabama, and after due consideration of the party in interest, the Board of Zoning Adjustment of the City of Prattville **voted to approve the variance to place a manufactured home at property requested above contingent that it is occupied by the mother and grandmother of Michael Gillyard and that the manufactured home is to be removed if the single family home is sold.**

**IT IS THEREFORE ORDERED** the petition of Madge Benefield, 229 County Road 29, Prattville, AL is hereby approved.

**DONE THIS THE 13th DAY OF May 2008.**

BOARD OF ZONING ADJUSTMENT

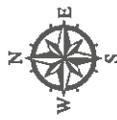
  
LEO JAMIESON, CHAIRMAN

  
ALISA MORGAN, SECRETARY

CITY OF  
PRATTVILLE, ALABAMA

231 CO RD 29  
Estate of Madge Benefield

1" = 200'



— STREETS

□ TAX PARCELS



Ryan Pichardo, G.I.S. Coordinator





# CITY OF PRATTVILLE

**BILL GILLESPIE, JR.**  
MAYOR

## CITY COUNCIL

**TOM MILLER**  
PRESIDENT  
DISTRICT 4

**MIKE RENEGAR**  
PRESIDENT PRO TEMPORE  
DISTRICT 5

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DISTRICT 1

**WILLIE WOOD, JR.**  
DISTRICT 2

**DEAN R. ARGO**  
DISTRICT 3

**RAY C. BOLES**  
DISTRICT 6

**NATHAN D. FANK**  
DISTRICT 7

April 28, 2011

Mr. Michael Gillyard  
229 County Road 29  
Prattville, Alabama 36067

**RE: Variance – 229 County Road 29**

Dear Mr. Gillyard:

On May 13, 2008, the Prattville Board of Zoning Adjustment approved a variance request by Madge Benefield allowing the placement of a manufactured home in the rear yard of 229 County Road 29. The Board of Zoning Adjustment's variance states that "approval is granted on the condition that if the property is sold the mobile home is to be removed; the mobile home is to be strictly occupied by the mother and grandparents of Michael Gillyard." (Prattville BZA Minutes, May 13, 2008 meeting, Page 4).

On March 11, 2011, you responded to an inquiry by this office concerning the residents of the unit approved by the BZA on May 13, 2008. You stated that one of your grandparents living in the unit died in 2009. The BZA variance requires the continued presence of your mother and the two grandparents. The absence of one grandparent causes the mobile home to be in violation of the conditions of the variance and the Zoning Ordinance of the City of Prattville.

This letter shall serve as an initial notice of violation. Within ten days, you must have the mobile unit permitted by the May 13, 2008 variance removed from the location at the rear of 229 County Road 29. If you have any questions concerning this notice, its requirements, or need to discuss a schedule for the unit's removal, you may contact this office at 334-361-3613 or [planning@prattvilleal.gov](mailto:planning@prattvilleal.gov).

Sincerely,

Joel T. Duke, AICP  
City Planner

Planning and Development Department  
102 West Main Street ■ Alabama 36067 ■ 334-361-3613 ■ 334-361-3677 Facsimile  
[planning.prattvilleal.gov](http://planning.prattvilleal.gov)

**Mail Provide**  
Receipt  
Identifier for you  
delivery kept  
**Reminders:**  
Mail may ONLY  
Mail is not available  
RANGE COVER  
please consider  
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City Of Prattville  
 Planning and Development Department  
 102 W. Main Street  
 Prattville, AL 36067  
 (334) 361-3614 Fax (334) 381-3877  
 www.prattvilleal.gov

110614-01

Administrative Appeal  
 Variance to place a mobile home on property

Application  
 Prattville Board of Zoning Adjustment

Application Type:  Use-On-Appeal  Variance  Administrative Appeal

**Applicant /Agent Information**

Notarized letter from the property owner is required if agent is used for representation.

Name: Michael J Gillyard  
 Street Address: 229 County Road 29  
 City: Prattville State: AL Zip: 36067  
 Phone Number(s): 358-6440 - cell-850-3783

**Property Owner Information**

if different than above

Name: Madge B. Benefield ← deceased (under probate)  
 Address of Property Owner: 227 County Road 29  
 City: Prattville State: AL Zip: 36067  
 Phone Number: (334) 365-2887 cell- 799-4009 (Ken)

**Property Description**

County Tax Parcel Number/Legal Description: 18-07-36-0-000-001-003

Current Zoning of Property: FAR Physical Address: 231 Co Rd 29

Proposed Use of Property (generally): \_\_\_\_\_

Describe Proposed Use or Variance: He already had variance granted for hardship, for mother & grandparents to live by us for help. We now need WORDING changed to allow the remaining residents to remain in home. For one or the other, as one passes away - the other can stay in the residence - until we sell our home. Then the

↑  
 Michael Gillyard

mobile home will be sold. Also no one else would live there. Only Sandra Gillyard OR Virgil Foust.



The following items must be attached to the application (check those items included):

- Tax record map from the Autauga County or Elmore County Tax Assessors Office
- Site sketch plan (drawn to scale) showing any property lines, required and proposed setbacks, existing and proposed structures and any additional information you believe will be helpful to the Board of Adjustment
- Application fees: Variance and Administrative Appeal - Fifty dollars (\$50), Use-on-Appeal - Two hundred fifty dollars (\$250).
- Names and address of all property owners immediately adjacent to the subject property (not required for administrative appeals). Adjacent properties include those directly across the street from the subject property.
- If person signing application is someone other than property owner, attach authorization to file application (i.e. notarized letter, real estate contract, etc.)

Hardship: The Board requests a statement of hardship to justify any variance application:

"To authorize upon appeal in specific cases such variance from the terms of the (zoning) ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provision of the (zoning) ordinance will result in unnecessary hardship and so that the spirit of the (zoning) ordinance shall be observed and substantial justice done." Code of Alabama, 1975, as amended. § 11-52-80(d) (3)

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I certify that I am the property owner, or authorized agent, and attest that all facts are true and correct. I do hereby certify that the property owner list attached to this application was obtained from the Autauga County Revenue Office, (Elmore County if applicable), and is a complete list of all real property owners adjacent to the parcel submitted for consideration. I also attest that I have read and understand what a hardship is according to the Code of Alabama, 1975, as amended.

James K. Benefield  
Printed Name

J. K. Benefield  
Signature

5-16-11  
Date

I the undersigned authority, a Notary Public in and for said County in said State, hereby certify that James H. Benefield, whose name is signed to the forgoing petition, and who is known to me, acknowledged same before me on this the 16<sup>th</sup> day of

May, 2011.

Andrea Dennis

Notary Public

My commission expires \_\_\_\_\_

NOTARY PUBLIC STATE OF ALABAMA  
COMMISSION EXPIRES 10/14/2018

would not be able to detect the encroachment.

There was no representative for the request. **Ms. Dismukes moved to table the item until the next meeting. Mr. Yelder seconded the motion.**

Chairman Jamieson asked if the item could be voted on without the representative being present. Mr. Duke stated that the petitioner did not have to be present for the vote. It was at the board's discretion to vote on the item since adequate information had been provided. **Ms. Dismukes withdrew her initial motion to hold and moved to reconsider the tabled item. Mr. Yelder seconded the motion.**

**The motion to reconsider the tabled item passed unanimously.**

Chairman Jamieson opened the public hearing.

- **Carolyn Morrast, an adjacent property owner, was present to get detailed information about the construction.**

**Ms. Dorsey moved consider the vote without the petitioner's presence. Mr. Gillian seconded the motion. The motion passed unanimously.**

The vote was called. **The BZA voted unanimously to approve the variance request to encroach into the front yard and rear yard setback at 850 Wilberforce Avenue.**

**VARIANCE**

**To encroach into the rear yard setback.  
515 Seasons Court  
R-2 Zoning District (Single Family Residential)  
Clay & Frances McBrien, Petitioners**

**Mr. Duke stated that the variance request is for an encroachment into the required 40' rear yard setback. The petitioner plans to attach the existing carport to the main dwelling with a breezeway. Once attached, the structure will be 18' from the rear yard setback.**

**Clay McBrien, petitioner, stated that the proposed breezeway would be approximately 8' wide sidewalk without walls. The existing carport is wood decking structure that matches the house. The proposed breezeway will be the same material; the roof on the breezeway will match the existing roof.**

Chairman Jamieson opened the public hearing. There were none to speak. The public hearing was closed.

The vote was called. **The BZA voted unanimously to approve the variance request to encroach into the rear yard setback at 515 Seasons Court.**

**VARIANCE**

**To place a manufactured home on property.  
229 County Road 29  
FAR Zoning District (Forest, Agricultural, Recreation)  
Madge Benefield, Petitioner**

**Mr. Duke stated that the property was recently annexed in the Prattville city limits. He stated that the request is to place additional living dwelling behind the main dwelling.**

**Michael Gillyard, petitioner representative**, stated that he is purchasing the existing home at 229 County Road 29. (He presented pictures of the property to the board). He stated that the mobile home would be placed there for his mother and grandparents whom he along with his wife helps with their care giving needs.

Chairman Jamieson opened the public hearing.

- **Steven Floyd, 278 Co. Rd. 29**, spoke in opposition to the request.

Mrs. Schannep asked if the mobile home would be tied in with the existing sewer. Mr. Duke replied that the mobile home should have a separate sewer. Evidence must be provided, given approval by the Autauga County Health Department.

The public hearing was closed.

Mrs. Schannep moved to amend that approval is granted on the condition that if the property is sold the mobile home is to be removed; the mobile home is to be strictly occupied by the mother and grandparents of Michael Gillyard. Mr. Gillian seconded the motion.

The motion to amend passed unanimously.

The amended motion to approve passed unanimously.

#### **VARIANCE**

**To allow a mobile home for office "temporary use".  
1026 South Memorial Drive  
B-2 Zoning District (General Business)  
Jules Moffett, Petitioner**

**Mr. Duke** stated that the variance request is for a structure to be used temporarily for a sales office. He stated that there is an existing variance granted for the use (November 20, 2001). The property is located on the corner of Smith Avenue.

**Jules Moffett, petitioner**, stated that he purchased the property with the mobile home on it. He received a variance to operate an office for 18 months in 2001. He stated that he had been sick and unable to construct a permanent structure since that time.

Chairman Jamieson opened the public hearing.

- **Frank Herron** business partner with Mr. Moffett spoke in favor of the request.
- **Nick Fank, 1023 S. Memorial Drive (The Swimming Hole)**, stated that he is not oppose to the temporary use but requested that the board be firm with time granted.

After no further comments, the public hearing was closed.

The vote was called. The BZA voted 4/1 to approve the variance to allow a mobile home for office "temporary use" on property at 1026 South Memorial Drive. The votes are as recorded: Favor- Mrs. Dismukes, Mr. Gillian, Mr. Yelder, and Mr. Jamieson. Oppose-Mrs. Schannep.

Exhibits A-J

A package of information submitted by Mrs. Vivian Gillespie on 8/9/11 BZA meeting.

**GENERAL GOVERNING RULES AND OPERATING PROCEDURES  
FOR THE CITY OF PRATTVILLE, ALABAMA  
BOARD OF ZONING ADJUSTMENT**

**ARTICLE I - AUTHORITY**

1.1 The Board of Adjustment for the City of Prattville, Alabama (hereinafter referred to as the Board) shall be governed by the provisions of Title 37, Chapter 16, Article 2, Section 781, Code of Alabama, as same may be amended, the Zoning Ordinance of the City of Prattville, and the rules of procedures as set forth herein as adopted by the Board.

**ARTICLE II - APPOINTMENT, REMOVAL AND VACANCIES**

2.1 **Appointment of Regular Members:** The Board of Adjustment shall consist of five (5) members to be selected and appointed by the Prattville City Council from among the electors residing in the city of Prattville, Alabama, for the term of three (3) years except that in the first instance one member shall be appointed for a term of three years, two for a term of two years and two for a term of one year. Thereafter each member appointed shall serve for a term of three years or until his successor is duly appointed.

**2.2 Removals and Vacancies:**

1. Members of the Board of Adjustment shall be removable by the City Council for cause upon written notification of charges and after a public hearing.
2. Upon resignation or other action resulting in vacancies in office, the Chairman shall inform the City Council as promptly as possible that such vacancy does exist. The City Council shall appoint a replacement to fill out the unexpired terms.

**ARTICLE III - OFFICERS, COMMITTEES**

3.1 **Selection of Chairman:** The Board shall elect a Chairman and Vice-Chairman, who shall be acting Chairman in the absence of the Chairman. Officers shall be elected at the first meeting following the appointment of members and shall serve for a term of twelve months.

3.2 **Duties of Chairman:** The Chairman (or in his absence the Vice-Chairman) shall preside at all meetings and hearings of the Board and decide all points of order and procedures. The Chairman shall appoint any committees which may be necessary.

3.3 **Secretary:** A Secretary shall be designated by the Board. The Secretary shall conduct all correspondence of the Board; keep a minute book recording attendance, the vote of each member upon each question, or if absent or failing to vote, indicating such fact; and records of examinations and hearings and other official actions; and shall carry such other official duties as may be assigned by the Board. Minutes of all meetings and hearings shall be filed in the Office of the City Clerk and shall become a matter of public record.

## **ARTICLE IV – MEETINGS**

**4.1 Meetings:** Meetings shall be opened to the public and shall be at the call of the Chairman and at such other times as the Board of Adjustment shall specify in its rules of procedure. The Secretary shall notify all members of the Board at least twenty-four (24) hours in advance of the called meeting.

**4.2 Special Meeting:** Special meetings may be called by the Chairman provided that at least twenty-four hours notice of such meeting is given each member.

**4.3 Public Notice:** At all meetings where appeals will be heard, proper public notice shall be given pursuant to Section 6.3.

**4.4 Quorum:** A quorum shall consist of four members, two of which may be supernumerary members.

**4.5 Vote:** The concurring vote of four (4) members of the Board shall be necessary to reverse any order, requirement, decision or determination of the properly designated administrative official, or to decide in favor of the applicant on any matter upon which it is first required to pass under the Zoning Ordinance, or to effect any variation in such Ordinance.

**4.6 Representation. Personal Interest:** Neither the Secretary nor any member of the Board shall represent or appear for any person in any matter pending before the Board. No member of the Board shall hear or vote upon an appeal in which he is directly or indirectly interested in a personal or financial way.

**4.7 Order of Business:** The order of business at all meetings shall be as follows: (a) roll call (b) reading of the minutes from previous meeting; (c) reports of committees; (d) unfinished business; (e) hearing of cases; (f) new business.

**4.8 Adjourned Meetings:** The Board may adjourn a regular meeting if all business cannot be disposed of on the day set, and, if the time and place of the continued meeting be publicly announced at the time of adjournment and is not changed after adjournment, no further notice shall be required.

## **ARTICLE V - POWERS AND DUTIES OF BOARD**

The Board of Adjustment shall have the following powers and duties:

**5.1 Administrative Review:** To hear and decide appeals where it is alleged there is an error in any order, requirement, decision, or determination made by the administrative official in the enforcement of the Zoning Ordinance.

**5.2 Special Exception:** To hear and decide only such special exceptions as the Board of Adjustment is specifically required to pass on by the terms of the Zoning Ordinance; to decide such questions as are involved in determining where special exceptions should be granted, including the interpretation and classifications of such uses not specifically defined in the Zoning Ordinance; to grant special exceptions with such conditions and safeguards as are appropriate or to deny such exceptions when not in harmony with the purpose and intent of the zoning ordinance.

**5.3 Variances:** To authorize upon appeal in specific cases variances from the terms of the Zoning Ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance would result in unnecessary hardship.

**5.4 Powers of Administrative Official:** In exercising the above powers, the Board may, in accordance with the terms of the Zoning Ordinance, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have the powers of the administrative official from whom the appeal is taken.

## **ARTICLE VI - APPEALS**

**6.1 Standing:** Appeals to the Board of Adjustment may be taken by any person aggrieved, or by an officer, department or board of the City.

**6.2 Filing Procedures:** Any appeal from the ruling of the Zoning Administrator concerning the enforcement of the provisions of the Zoning Ordinance may be made to the Board of Adjustment within ten (10) days after the date of the Zoning Administrator's decision which is the basis of the appeal. The person making the appeal must file with the officer whom the appeal is taken and the Board of Adjustment, a notice of appeal specifying the grounds for the appeal. Upon receipt of the completed form and payment of the appropriate fee, the Zoning Administrator shall immediately transmit to the Board of Adjustment all the papers constituting the record upon which the action appealed from was taken.

**6.3 Hearing:** When a notice of appeal has been filed in proper form with the Board of Adjustment, the Secretary shall immediately place the said request for appeal upon the calendar for hearing, and shall cause notices stating the time, place and object of the hearing to be served personally or by mail addressed to the party or parties making the request for appeal and to all adjoining property owners as given in the last assessment roll as submitted by the applicant. All mailed notices shall be sent to addresses as supplied by the applicant. Public notice shall also be given stating the time, place and purpose of such hearing. Additional notice shall be posted on the premises affected.

**6.4 Withdrawal of Appeal:** If the applicant wishes to withdraw the appeal at any stage prior to the determination by the Board, this fact shall be noted on the appeal applications, and appropriate copies, with the signature of the applicant attesting withdrawal. The original shall be retained by the Secretary and filed with the minutes. One copy of the appeal shall be returned to the applicant and one copy to the Zoning Administrator.

**6.5 Amendment of Appeal:** Amendment of the appeal may be permitted at any time prior to or during the public hearing; provided that no amendment shall so alter the appeal as to make it significantly different from its description in the notice of public hearing.

**6.6 Additional Information:** When deemed necessary, the Board may request the applicant to provide such information as may be needed to determine a particular case.

**6.7 Stay:** An appeal stays all proceedings in furtherance of the action appealed from unless the Zoning Administrator certifies to the Board of Adjustment after the notice of the appeal shall have been filed with him that, for reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order, which may be granted by the Board of Adjustment or, on application, by the court of record when due cause can be shown.

## **ARTICLE VII - SPECIAL EXCEPTIONS**

**7.1 Authority:** The Board is authorized to hear and decide special exceptions to the terms of the Ordinance upon which the Board is required to pass under the terms of the Zoning Ordinance; to decide such questions as are involved in determining where special exceptions should be granted, including the interpretation and classification of such uses not specifically defined in the Zoning Ordinance; to grant special exceptions with such conditions and safeguards as are appropriate, or to deny such exceptions when not in harmony with the purpose and intent of the Zoning Ordinance.

**7.2 Filing Procedures:** A completed application for a special exception accompanied by the appropriate application fee shall be filed with the Zoning Administrator. The completed application shall then be transmitted to the Board of Adjustments.

**7.3 Notice of Hearing:** Upon receipt of the completed application, the Secretary shall immediately place the said requests upon the calendar for hearing, and shall give proper notice in accordance with the provisions of Section 6.3.

**7.4 Standards for Special Exceptions:** Before any permit for a special exception is issued, the Board shall make written findings certifying that the special exception will not:

1. Be contrary to public interest and will insure that the spirit of the Zoning Ordinance shall be observed.
2. Permit the establishment within a district of any use which is prohibited.
3. Cause a substantial adverse effect to property or improvements in the vicinity or in the districts in which the proposed use is to be located.

**7.5 Conditions and Safeguards:** In granting special exceptions the Board may require conditions and safeguards as deemed appropriate to insure the intent of the Zoning Ordinance. Such conditions may relate to provisions for:

1. Ingress and egress to the property,
2. Off street parking
3. Refuse and service areas
4. Screening and buffer zones
5. Signs, exterior lighting
6. Required yards and open space
7. Other factors to promote compatibility with adjacent properties.

**7.6 Interpretation of Uses for Special Exceptions:** For uses not specifically identified as uses permitted on appeal in the Zoning Ordinance, the Board shall define such uses in terms of their performance, and classify such uses on the basis of their similarity and relation to previously identified uses. Where no similar uses have been specified as permitted on appeal, the use shall be deemed prohibited. In such instances, the Board may, if deemed appropriate, initiate a request for amendment of the Zoning Ordinance for such use and shall transmit such request to the City Council for consideration.

**7.7 Hearings and Determinations:** Hearings and Determinations on applications for special exceptions shall conform to the requirements set forth in Article IX.

**7.8 Non-transferability:** Any permit granted by the Board for special exception use shall pertain solely to that specific use at the specific location specified in the application for special exception permit. Such permit shall not be transferable to another use at that location or the same use at another location.

**7.9 Voidance of Special Exception Permit:** Failure of the applicant to conform to the conditions and safeguards specified by the Board in the special exceptions permit shall constitute a violation of the Zoning Ordinance and void the special exception permit

## **ARTICLE VIII - VARIANCES**

**8.1 Authority:** The Board is authorized upon appeal in specified cases to grant variances from the terms of the Zoning Ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance would result in unnecessary hardship.

**8.2 Filing Procedures:** A completed application for an appeal for variance accompanied by the appropriate application fee shall be filed with the Zoning Administrator. The completed application shall then be transmitted to the Board of Adjustment.

**8.3 Notice of Hearing:** Upon receipt of the completed application the Secretary shall immediately place the said request upon the calendar for hearing, and shall give proper notice in accordance with the provisions of Section 6.3.

**8.4 Standards for Variances:** Before any permit for a variance is issued, the Board shall make written findings certifying compliance with the following specific rules:

1. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands structures, or buildings in the same district;
2. That literal interpretation of the Zoning Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of the Zoning Ordinance;
3. That the special conditions do not result from actions of the applicant (self-imposed hardship);
4. That granting of the variance will not confer any special privilege on the applicant that is denied by this ordinance to other lands, structures, or buildings in the same district;

5. That granting of the variance is in harmony with the intent and purposes of the Zoning Ordinance;
6. That the variance will not adversely affect surrounding property, the general neighborhood, or the community as a whole;
7. That no non-conforming use of neighboring lands, structures, or buildings in the same district, and no permitted or non-conforming use of lands, structures, or buildings in other districts shall be considered grounds for the issuance of a variance;
8. That the variance will not allow the establishment of a use not permissible under the terms of the Zoning Ordinance in the district involved, or any use expressly or by implication prohibited by the terms of the ordinance in said district.

**8.5 Hardship:** In proving that a hardship has been imposed on the property as a result of the strict interpretation of the Zoning Ordinance, the following conditions cannot be considered pertinent to the determination of a hardship:

1. Proof that a variance would increase the financial return from the land.
2. Personal hardship.
3. Self-imposed hardship.

**8.6 Minimum Variance:** In granting variances, the Board shall grant only the minimum variance that will make possible the reasonable use of the land, building or structure.

**8.7 Conditions and Safeguards:** In granting variances the Board may require such conditions and safeguards as deemed appropriate to insure the intent of the Zoning Ordinance.

**8.8 Hearings and Determinations:** Hearings and determinations on appeals for variances shall conform to the requirements set forth in Article IX.

**8.9 Voidance of a Variance:** Failure of the applicant to conform to the conditions and safeguards specified in the terms of the variance, shall be deemed a violation of the Zoning Ordinance and voids the permit.

## **ARTICLE IX - HEARING, REHEARING, FINAL DECISIONS**

**9.1 Hearing:** An appeal shall be heard within 30 days from the time of filing unless the appeal is withdrawn. If amended, the appeal shall be heard within 30 days of the filing of the amendment. Appeals shall be heard in order of receipt of application; amended appeals according to the date of amendment.

**9.2 Order of Hearing:** The order of the hearing shall be:

- (a) Statement of Case by Chairman
- (b) Supporting Arguments by Applicant or his agent
- (c) Supporting Arguments by Others
- (d) Opposing Arguments by Persons at the Hearing
- (e) Rebuttal by Supporters Other than Applicant
- (f) Rebuttal by Opposition
- (g) Rebuttal by Applicant or Agent

The Chairman may establish appropriate time limits for the arguments which shall be equal for both sides. The Chairman may request that representatives be selected to speak for each side.

**9.3 Rehearing:** Where there is substantial change in facts, evidence or conditions, the Board may accept an application for rehearing. Any matter not previously reheard by the Board may be heard again on a motion adopted by unanimous vote for all members.

**9.4 Final Decisions:** Final Decisions shall be made by resolution within 35 calendar days of the last public hearing at which the appeal was considered. A concurring vote for four (4) members of the Board shall be necessary to reverse any order, requirement, decision or determination of the properly designated administrative official.

Findings of the Board shall be noted in the resolution and in the minutes. Any condition, safeguards or time limitations prescribed by the Board shall be included in the resolution. Notations concerning the decision shall be placed on the application. The original application and resolution shall remain in the files of the Board. One copy of the application and the resolution shall be returned to the applicant, and one copy of the resolution shall be returned to the Zoning Administrator.

#### **ARTICLE X – AMENDMENT**

**10.1 Amendment:** No rule herein shall be changed or waived without the affirmative vote of four members of the Board.

**10.2 Adoption:** These rules of procedure were adopted by the Prattville Board of Adjustment on April 1, 1975.

EX B B

080513-06

PRATTVILLE BOARD OF ZONING ADJUSTMENT

PETITIONER: MADGE BENEFIELD  
229 COUNTY ROAD 29  
PRATTVILLE, AL 36067

REQUEST: VARIANCE TO PLACE A MANUFACTURED HOME ON  
PROPERTY.  
229 COUNT ROAD 29  
FAR ZONING DISTRICT (FOREST, AGRICULTURAL, RECREATION)

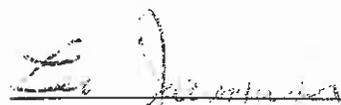
ORDER

The above petition having been duly considered at a public hearing meeting before the Board of Zoning Adjustment of the City of Prattville, having been advertised in *The Prattville Progress*, a newspaper of general circulation in the city limits of Prattville, Alabama, and setting forth notice of the request for a variance to the Zoning Laws of Prattville, Alabama, as set out in the aforesaid petition and giving notice that a public hearing would be held on May 13, 2008 at the City Hall in Prattville, Alabama, and after due consideration of the party in interest, the Board of Zoning Adjustment of the City of Prattville **voted to approve the variance to place a manufactured home** <sup>\*</sup> **at property** requested above *contingent that it is occupied by the mother and grandmother of Michael Gillyard and that the manufactured home is to be removed if the single family home is sold.*

**IT IS THEREFORE ORDERED** the petition of Madge Benefield, 229 County Road 29, Prattville, AL is hereby approved.

**DONE THIS THE 13th DAY OF** May **2008.**

BOARD OF ZONING ADJUSTMENT

  
\_\_\_\_\_  
LEO JAMIESON, CHAIRMAN

  
\_\_\_\_\_  
ALISA MORGAN, SECRETARY

*Recd 8/9/11 om*

August 9, 2011

ESTATE OF BENEFIELD VARIANCE  
MICHAEL AND TANYA GILLYARD VARIANCE

Board of Zoning Adjustment

City of Prattville

102 W. Main St.

Prattville, AL 36067

Dear Board Members:

I am writing you regarding the application for an Administrative Appeal by Tanya Gilyard, heir to Benefield Estate and representative agent for the other four heirs in regards to the Public Hearing on August 9, 2011. I and my husband currently live adjacent to the property in issue, and are directly aggrieved by the lack of enforcement of a variance that ceases to exist and allows the manufactured home to remain.

After a thorough review of all the relevant documents for this case, two things are apparent:

**First**, this application, by all the documentation provided, is not an Administrative Appeal. There is no mention of any Zoning

Administrator, nor does it specify the grounds for the appeal within ten (days) of the Zoning Administrator's decision. This is required under Article VI, section 6.2 Filing Procedures of the City of the General Governing Rules and Operating Procedures for the City of Prattville Board of Zoning Adjustment (see Attachment A). Rather this application is requesting a variance with different wording as to whom may live in the modular home.

**Second**, this application, apparently for a variance, **does not qualify for numerous reasons**, which I will enumerate after a brief history.

#### **Brief History:**

Madge Benefield applied for and was granted a variance on May 13, 2008 to allow a manufactured home on a FAR zoned lot at 231 County Road 29. This variance was contingent upon it being occupied by the mother, Sandra Gillyard, and grandmother, Nell Foust, of Michael Gillyard. (See Order, Attachment B). The hardship cited to care for elderly parents does not qualify as an unnecessary hardship pursuant to AL Code. The variance also fails to be a hardship of the land, is not unique to this lot, and was self-created, since the manufactured home was moved to this site from another city. The hardship was one of economics and convenience, which should never be the criteria to grant a variance.

On June 19, 2008 this 4.5-acre lot was subdivided at the owner's direction into a 4-acre parcel and a .43-acre parcel. The owner, Madge Benefield retained the .43-acre parcel, Parcel Number 1.003, where the manufactured home sat.

Tanya Gillyard applied for and was granted a variance on December 9, 2008 to allow the same manufactured home on a FAR zoned lot at 231 County Road 29 to encroach into the 10 foot side yard line. (Actually 20-foot side yard in a FAR zone) (See Order, Attachment C). The applicant Tanya Gillyard was not the owner of this property, yet she signed the application on October 23, 2008 certifying that she was the property owner. Again, this setback variance also fails to be a hardship of the land, is not unique to this lot, and was self-created since the mobile home and its structure was willfully placed on the property line and the parcel was then intentionally subdivided.

On November 2, 2009, Michael Gillyard's grandmother who was living in the manufactured home, died.

On May 16, 2011 James Benefield applied for an Administrative Appeal requesting a change in the previous variance with different wording as to whom may live in the modular home. This agenda item was removed from the meeting on July 12, 2011 because not all the heirs had signed the application.

On July 19, 2011 Tanya Gillyard and the other heirs applied for an

Administrative Appeal requesting a change in the original first variance (which is void) with different wording as to whom may live in the modular home.

### **REASONS THIS DOES NOT QUALIFY FOR A VARIANCE**

(1) Manufactured or mobile homes are not a permitted use or a permitted use on appeal in a FAR district. (See Zoning Ordinance Attachment D) Therefore they are a **prohibited use**. Board of Zoning Adjustment can only grant variances for uses permitted or uses permitted on appeal. They lack the authority to consider or issue variances for uses prohibited (McKay v. Strawbridge, 656 So. 2d 845 Ala. *ATCH. E* Civ. App. 1995) This would constitute rezoning, which can only be done in Prattville by the City Council.

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Even if you were to ignore reason 1 above, there are six additional reasons this application does not qualify.

2) **The original variance** issued May 13, 2008 allowing the manufactured home to be placed on the lot is **voided** since it was contingent on Michael Gillyard's grandmother living in the manufactured home and she died on November 2, 2009. According to the General Governing Rules and Operating Procedures for the City of Prattville Board of Zoning Adjustment, Article VIII, Section 8.9 Voidance of a Variance: "Failure of the applicant to conform to the conditions and safeguards specified in the terms of the variance, shall be deemed a violation of the Zoning Ordinance and voids the permit." Hence, the wording of this variance cannot be modified. The manufactured home should

have been moved off of the lot at this time.

- 3) The current July 19, 2011 application **describes no unnecessary hardship**. There is mention of additional names wanting to be added. This would not qualify as an unnecessary hardship since it is for personal or economic convenience. (Bd of Zoning Adjustment for Fultondale v. Summers, 814 So. 2d 851 Ala. 2001) *ATCH F*
  
- 4) The applicant is **not entitled to rely** or base their justification for a new mobile home variance request **on a previous mobile home variance** that was granted. (City of Russellville Zoning Board of Adjustment v. Vernon. 1010331 Supreme Court of Alabama May 24, 2002. Also the original variance ceased to exist on or about November 2, 2009. *ATCH G*
  
- 5) The hardship, if one exists, **does not relate to the land**, but rather to the individual applicants and family members. (Ex parte Chapman, 485 So. 2d 1161,1164 Ala 1968) *ATCH H*
  
- 6) The hardship, if one exists, **is not unique to this property**, compared to other surrounding properties. (Nelson v. Donaldson, *ATCH I* 50 So. 2d 244,251, Ala. 1951). Rather all the surrounding FAR district properties are prohibited from placing manufactured homes on their lots.

7) Finally the hardship, if one exists, **was originally self-created** back in 2008 when the family elected to move a manufactured home to this FAR lot despite it being prohibited anywhere in the district (Town of Orrville v. S 7 H Mobile Homes, Inc., 872 So. 2d 856 Ala. *Arch J* Civ. App. 2003). They could have elected to move this manufactured home to a district where it is allowed or build a home on the current lot. The hardship, if it existed, was perpetuated by the failure to move the manufactured home in November 2009 when the variance ended.

In closing, I do not feel this request for a variance or Administrative Appeal should be approved based on the above reasons founded in the Alabama Code. The applicants failed to comply with this Board's original May 13, 2008 Order and move the manufactured home. Tanya Gillyard then applied for a December 9, 2008 variance despite not being the owner but certifying on the application that she was the owner. Even if this Board believed they had the authority to issue such a variance, what would make you believe that they would obey another order?

To allow a continuance of name changes of whom may live in this mobile home based on ill health would be tantamount to running an elder care operation, which is prohibited.

Sincerely,

Vivian Gillespie

George A. Gillespie

Atch A: General Governing Rules and Operating Procedures for the City  
of Prattville Board of Zoning Adjustment

Atch B: Board of Zoning Adjustment Order, May 13, 2008

Atch B1: Survey of June 19, 2008 for .43-acre parcel number 1.003

Atch C: Board of Zoning Adjustment Order, December 9, 2008

Atch D: FAR District Zoning, City of Prattville

Atch E: McKay v. Strawbridge, 656 So. 2d 845 Ala. Civ. App. 1995

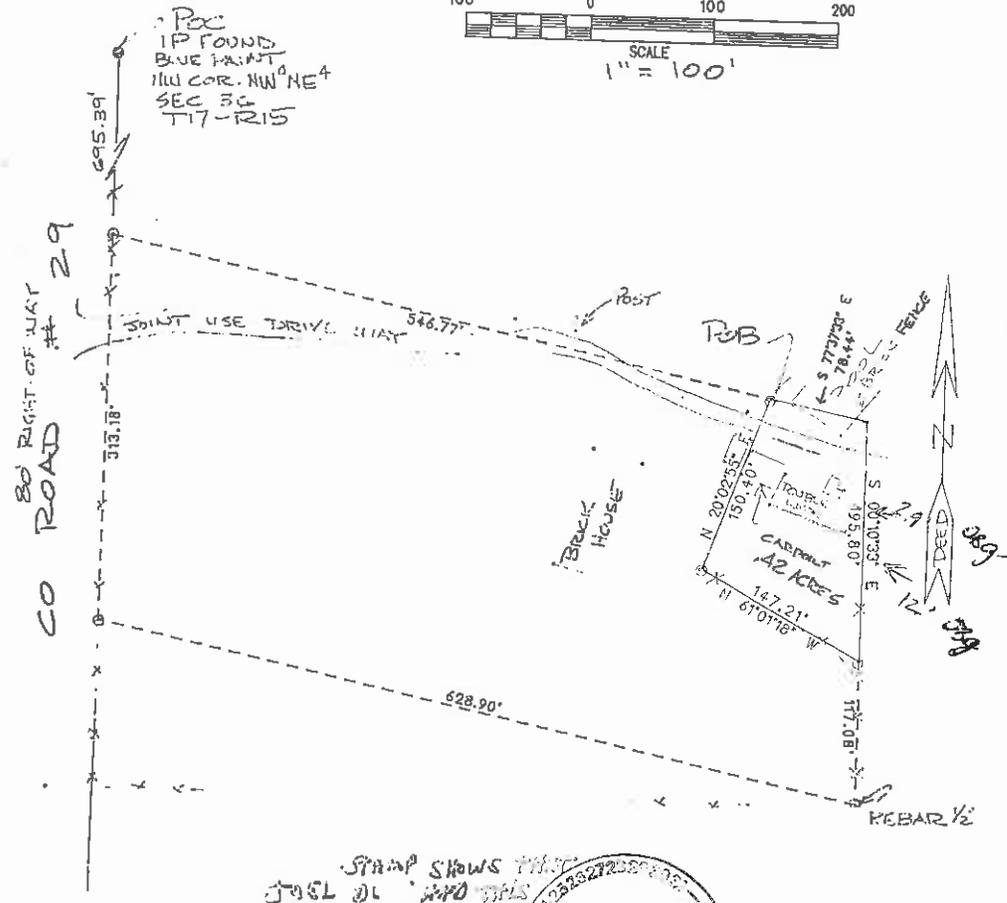
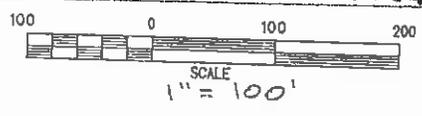
Atch F: Board of Zoning Adjustment for Fultondale v. Summers, 814 So.  
2d 851 Ala. 2001

Atch G: City of Russellville Zoning Board of Adjustment v. Vernon.  
1010331 Supreme Court of Alabama May 24, 2002

Atch H: Ex parte Chapman, 485 So. 2d 1161, 1164 Ala 1968

Atch I: Nelson v. Donaldson, 50 So. 2d 244, 251 Ala. 1951

Atch J: Town of Orrville v. S & H Mobile Homes, Inc., 872 So. 2d 856 Ala. Civ. App. 2003



STAMP SHOWS THAT  
 JOEL D. AND BRIS  
 IN FOR MORTGAGE IN  
 NOVEMBER 2008  
 PROOF GILL/BLAS  
 DID NOT OWN  
 PROPERTY  
 THIS WAS APPROPRIATE SITE PLAN  
 FOR 42-ACRE PARCEL NOT 1969  
 SURVEY FOR 4.29-ACRES



STATE OF ALABAMA  
 COUNTY OF AUTAUGA

Commence at the Northwest corner of the NW 1/4 of the NE 1/4, Section 36, Township 17N, Range 15E, Autauga County, Alabama; thence South and along the East right-of-way of Wadsworth Loop Road aka County Road #29 695.39'; thence leave said right-of-way S77°37'33"E 546.77' to an iron pin at the edge of a gravel drive and the point of beginning; thence S77°37'33"E 78.44' to an iron pin; thence S0°10'33"E 195.80'; thence N61°01'18"W 147.21'; thence N20°02'55"E 150.40' to the point of beginning.

All being one parcel lying in the NE 1/4, Section 36, Township 17N, Range 15E, Autauga County, Alabama and being a part of Wadge G. Benefield property according to an unrecorded warranty deed dated October, 2005 and containing 42 acres, more or less.

This Survey is made subject to any and all easements, restrictions and reservations of covering the above described property. Every document of record reviewed and considered as a part of this survey is noted hereon. Only the documents noted hereon were supplied the surveyor. No abstract of title, nor title commitment, nor results of title searches were finished the surveyor. There may exist other documents of record which would affect this parcel.

Legend	
POB	Point of Beginning
IPS	Iron Pin Set w/cap, (stamp P.L.S. 14721)
IPF	Iron Pin Found
Δ	Calculated Point Only
-p-	Overhead Utility Lines
-x-	Fence
( )	Recorded Distance/ Bearing
AL	Not to Scale
-C-	Centerline
POC	Point of Commencement

Flood Note:  
 Property lying in  
 Zone C

I hereby certify that all parts of this survey and drawing have been completed in accordance with the current requirements of the Standards of Practice for Surveying in the State of Alabama to the best of my knowledge, information, and brief. Copyrighted by David C. McLair, no part of this drawing may be copied, added to, altered or reproduced by any means with out written permission from David C. McLair AL Reg. No. 14721. According to my survey this is the 19th day of June, 2008.

AL Reg. No. 14721  
 NOT VALID UNLESS SIGNED,  
 DATED, AND STAMPED WITH  
 EMBOSSED SEAL

Boundary Survey  
 By  
 Prattville Land Surveying  
 616 Washington Ferry Rd  
 Prattville, AL 36067  
 334-365-1122

File No. S-3334A

EXB C

081113-03

PRATTVILLE BOARD OF ZONING ADJUSTMENT

PETITIONER: MICHAEL & TONYA GILLYARD  
229 COUNTY ROAD 29  
PRATTVILLE, AL 36067

REQUEST: VARIANCE TO ALLOW A MANUFACTURED HOME TO  
ENCROACH INTO THE 10' SIDE YARD LINE.  
229 COUNT ROAD 29  
FAR ZONING DISTRICT (FOREST, AGRICULTURAL, RECREATION)

ORDER

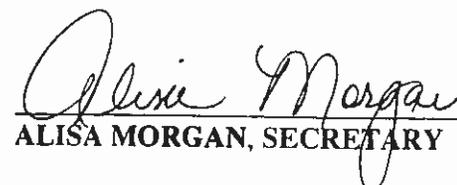
The above petition having been duly considered at a public hearing meeting before the Board of Zoning Adjustment of the City of Prattville, having been advertised in *The Prattville Progress*, a newspaper of general circulation in the city limits of Prattville, Alabama, and setting forth notice of the request for a variance to the Zoning Laws of Prattville, Alabama, as set out in the aforesaid petition and giving notice that a public hearing would be held on November 13, 2008 at the City Hall in Prattville, Alabama, and after due consideration of the party in interest, the Board of Zoning Adjustment of the City of Prattville voted to approve the variance to allow a manufactured home to encroach into the 10' side yard line at property requested.

IT IS THEREFORE ORDERED the petition of Michael & Tonya Gillyard, 229 County Road 29, Prattville, AL is hereby approved.

DONE THIS THE 9th DAY OF December 2008.

BOARD OF ZONING ADJUSTMENT

  
LEO JAMIESON, CHAIRMAN

  
ALISA MORGAN, SECRETARY

The item was tabled 11/13/08.

**Section 68. Definitions.**

For the purpose of this ordinance, words used in the present tense include the future, the singular number includes the plural, and the plural the singular. Words and terms are defined as follows:

*Accessory structure.* Any detached minor building in the rear of the main building consisting of masonry or frame walls and roof, one (1) or two (2) stories in height, necessary as an adjunct to the use or occupancy of a principal or main structure.

*Alteration or altered.* The word "alteration" shall include any of the following:

- a. Any addition to the height or depth of a building or structure.
- b. Any change in the location of any of the exterior walls of a building or structure.
- c. Any increase in the interior accommodations of a building or structure.

In addition to the foregoing, a building or structure shall be classified as altered when it is repaired, renovated, remodeled, or rebuilt at a cost in excess of fifty (50) percent of its value prior to the commencement of such repairs, renovation, remodeling or rebuilding.

*Boardinghouse.* A building other than a hotel, cafe, or restaurant where, for compensation, meals are provided for three (3) or more persons.

*Building area.* The portion of the lot occupied by the main building, including porches, carports, accessory buildings, and other structures.

*Business recycling facility.* A facility engaged in the processing, storage, or transportation of recyclable material created by an otherwise conforming business upon its own premises for the purpose of reuse, sale, or energy extraction. This definition shall include items generated as a by-product of normal business operations and shall not include items purchased, delivered, traded or exchanged in a used or inoperable state.

[*Camping and recreational equipment.*] As used in this ordinance, "camping and recreational equipment" is defined and shall include the following:

*Recreational vehicle.* A recreational vehicle is a vehicular-type structure, not exceeding seven and one-half (7½) feet in width and forty (40) feet in length, primarily designed as temporary living quarters for recreation, camping or travel use, which either has its own motive power or is mounted on or drawn by another vehicle which is self-powered. With allowances for engineering variations, the basic entities are:

- (a) A "travel trailer" is a vehicular portable structure, mounted on wheels, of such a size or weight as not to require special highway movement permits when drawn by a stock passenger automobile, primarily designed and constructed to provide temporary living quarters for recreation, camping and travel use.
- (b) A "camping trailer" is a vehicular portable structure, mounted on wheels, constructed with collapsible partial side walls of fabric, plastic, or other pliable material for folding compactly while being drawn by another vehicle, and, when unfolded at

the site or location, providing temporary living quarters, and whose primary design is for recreation, camping or travel use.

- (c) A "truck camper" is a portable structure, designed to be loaded onto, or affixed to, the bed or chassis of a truck, constructed to provide temporary living quarters for recreation, camping, or travel use.
- (d) A "motor home" is a structure built on and made an integral part of a self-propelled motor vehicle chassis other than a passenger car chassis, primarily designed to provide temporary living quarters for recreation, camping, and travel use.

**Community recycling facility.** A facility engaged in the collection and transportation of externally generated recyclable materials. Such operations may be either stationary or mobile. Said operations may include packing, bailing, storage, crushing or compaction or other operations necessary to preparing the material for delivery or sale to a facility which will actually reuse or remanufacture said products; but may not include the processing of materials for direct reuse or sale.

**Community recycling receptical.** A completely enclosed bin or container made of metal or other impervious material into which recyclable materials may be placed. All such receptacles shall display the name of the owner or sponsor, their address, telephone number, and contact person. Cleanliness and pickup of matter in and around said receptacle shall be the responsibility of the sponsor.

**Drive-in restaurant.** A restaurant or public eating business so conducted that food, meals or refreshments are brought to the motor vehicles for consumption by the customer or patron.

**Drive-in theater.** A theater so arranged and conducted that the customer or patron may view the performance while being seated in a motor vehicle.

**Dwelling.** A house or other building used primarily as an abode for one (1) family except that the word "dwelling" shall not include boarding or rooming houses, tents, tourist camps, hotels, trailers, trailer camps, or other structures designed or used primarily for transient residents.

**(Dwelling unit.** Any portion of a building used, intended or designed as a separate abode for a family.)

**Home occupation.** Any use customarily conducted entirely within a dwelling and carried on solely by the inhabitant thereof, and which use is clearly incidental and secondary to the use of the dwelling for dwelling purposes, and does not change the character thereof, and in which not more than twenty-five (25) percent of the dwelling is used for said home occupation, and in which any signs advertising said home occupation are limited to one (1) unlightened sign, not over two (2) square feet in area attached to the dwelling, and also in which there is no public display of goods. Examples of home occupations are telephone service, typing or word processing, dressmaking, the taking of not more than two (2) boarders and the renting or leasing of not more than two (2) rooms, each of which shall have not more than one (1)

occupant; tutoring and teaching the fine arts; but shall not include beauty parlors, barber-shops, furniture upholstering, baking, and offices for any professional or business use.

*Hotel.* Any building or portion thereof which contains at least ten (10) guest rooms intended for occupancy by individuals for compensation whether paid directly or indirectly.

*House trailer.* The term "house trailer" shall be construed to mean and include any structure intended for, or capable of, human habitation, mounted upon wheels and capable of being driven, propelled, or towed from place to place without change in structure or design, by whatsoever name or title it is colloquially or commercially known. Removal of wheels and placing such a structure on the ground, piers, or other foundation, shall not remove such a vehicle from this definition; provided, that this definition shall not include transport trucks or vans equipped with sleeping space for a driver or drivers.

*Junkyard.* Junkyard shall include any lot or parcel of land on which is kept, stored, bought or sold, articles commonly known as junk, including scrap paper, scrap metal, and used automobile bodies and parts.

*Lot.* A piece, parcel, or plot of land occupied or intended to be occupied by one (1) main building, accessory buildings, uses customarily incidental to such main building and such open spaces as are provided in this ordinance, or as are intended to be used with such piece, parcel or plot of land.

*Motor court.* A building or group of buildings containing one (1) or more guest rooms having separate outside entrances for each such room or suite of rooms and for each of which rooms or suites of rooms automobile parking space is provided.

*Nonconforming use.* A use of any structure or land which, though originally lawful, does not conform with the provisions of this ordinance or any subsequent amendments thereto for the district in which it is located.

*Offices.* Space or rooms used for professional, administrative, clerical and similar uses.

*Public land uses.* Any land use operated by or through a unit or level of government, either through lease or ownership, such as municipal administration and operation, county buildings and activities, state highway offices and similar land uses; and federal uses such as post offices, bureau of public roads and internal revenue offices, military installations, etc.

*Recyclable material.* Reusable material including but not limited to, metal cans, glass, plastic, and paper which are intended for reuse, remanufacture, or reconstitution for the purpose of using the altered form. Recyclable material does not include: inoperative trucks, automobiles or other vehicles, and chassis or parts of the same; household appliances, white metals, used heating or refrigerating equipment, farm implements, machinery, scrap metal, etc.

*Rooming house.* Any building or portion thereof which contains not less than three (3) or more than nine (9) guest rooms which are designed or intended to be used, let, or hired out for occupancy by individuals for compensation whether paid directly or indirectly.

**Satellite dish or disc.** As used in this ordinance, satellite dish or disc is defined and shall mean the following: A structure designed for residential or commercial use to obtain and receive television and/or radio transmissions, not over fifteen (15) feet above existing grade, permanently ground-mounted, and not over twelve (12) feet in diameter, placed in the rear yard as defined by Article 6, section 68.262 and the requirements of this ordinance as to accessory structures, after having acquired a building permit from the City of Prattville.

**Semipublic land uses.** Philanthropic and charitable land uses including: Y.M.C.A.'s, Y.W.C.A.'s, Salvation Army, churches and church related institutions, orphanages, humane societies, private welfare organizations, nonprofit lodges and fraternal orders, hospitals, Red Cross, and other general charitable institutions.

**Shelter, fallout.** A structure or portion of a structure intended to provide protection to human life during periods of danger to human life from nuclear fallout, air raids, storms, or other emergencies.

**Street.** Any public or private way set aside for common travel more than twenty-one (21) feet in width if such existed at the time of enactment of this ordinance, or such right-of-way forty (40) feet or more in width if established thereafter.

**Structure.** Any combination of materials, including buildings, constructed or erected, the use of which requires location on the ground or attachment to anything having location on the ground, including among other things, signs, billboards, but not including utility poles and overhead wires.

**Temporary structure.** A business structure, not used as a residence or habitation, of one (1) or more of the following types: portable or preassembled metal buildings or storage structures, tents, freestanding awnings, sun screens, sunshades, shelters and other structures composed of flexible materials, and all structures of a temporary character or intended for short-term occupancy. This term shall not include construction trailers, not used for sales or habitation, at the site properly permitted construction during such construction. This term shall not include portable or preassembled metal buildings used as accessory structures to primary, permanent business structures.

**Trailer camp.** Any site, lot, field, or tract of land privately or publicly owned or operated, upon which two (2) or more house trailers used for living, eating or sleeping quarters, are, or are intended to be, located; such establishments being open and designated to the public as places where temporary residential accommodations are available whether operated for or without compensation, by whatsoever name or title they are colloquially or commercially termed.

**Use.** The purpose for which land or a building or other structure is designed, arranged, or intended, or for which it is or may be occupied or maintained.

**Yard.** An open space, on the lot with the main building, left open, unoccupied and unobstructed by buildings from the ground to the sky except as otherwise provided in this ordinance.

*Yard, front.* The yard extending across the entire width of the lot between the main building including covered porches, and the front lot line, or if an official future street right-of-way line has been established, between the main building, including covered porches and the right-of-way line. No fallout shelter, even though it does not exceed thirty (30) inches in height, shall be permitted in any front yard.

*Yard, rear.* The yard extending across the entire width of the lot between the main building, including covered porches, and the rear lot line.

*Yard, side.* The yard extending along a side lot line, from the front yard to the rear yard, between the main building, including covered porches and carports, and such lot line.  
(Ord. of 7-2-68; Ord. of 5-23-85; Ord. of 3-1-88; Ord. of 10-15-91)

**656 So.2d 845 (Ala.Civ.App. 1995)**  
**Charles McKAY and Brenda McKay**  
**v.**  
**Cecil H. STRAWBRIDGE, et al.**  
**AV93000708.**  
**Court of Civil Appeals of Alabama.**  
**February 17, 1995**

Jesse W. Shotts, Birmingham, for appellants.

Jack E. Propst, Kennedy, for appellees.

YATES, Judge.

On September 15, 1992, Charles and Brenda McKay purchased a parcel of land in Vernon, Alabama, on which they planned to relocate their truck repair shop and to build a grocery store. At the time of the purchase, the property was zoned for residential use. The McKays petitioned the Board of Adjustment of the City of Vernon for a variance in the zoning of the property from residential use (R-1) to general commercial use (B-2). On August 19, 1993, after a hearing, the Board granted the variance.

On August 26, 1993, Cecil H. Strawbridge, Autense R. Strawbridge, Ronald H. Strawbridge, and Pearl J. Strawbridge (hereinafter "the Strawbridges") appealed the Board's decision to the circuit court for a trial de novo. The McKays moved to dismiss the appeal, stating that the Strawbridges "did not have sufficient interest" to file the appeal. The Strawbridges responded, arguing that they were aggrieved parties and had standing to challenge the Board's decision.

On November 5, 1993, the Strawbridges moved to dismiss the McKays' application to the Board for a variance, claiming that the McKays were actually attempting to rezone rather than to obtain a variance and that the McKays had not alleged an "unnecessary hardship," which is required to obtain a variance. On that same day, the Strawbridges sought an order reversing the Board's order granting the variance, and dismissing the McKays' application. On April 30, 1994, the trial court vacated the order of the Board and dismissed the case.

The McKays appeal, contending that the trial court dismissed their case because of a defect in their petition. They argue that instead of dismissing their case because of a defect, the circuit court should have allowed them to amend so as to cure any defect. However, the trial court did not dismiss the case because of a defect in the petition, but rather for other reasons. We agree with the trial court that any argument concerning a defect in the petition is premature and moot.

In reaching its conclusion, the trial court made the following findings of fact:

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**Page 846**

"1. On March 11, 1993, the Mayor of Vernon wrote ... Charles McKay a letter stating that [someone had] brought to the attention of the Planning Board [that the McKays might be planning to develop] a commercial site in an R-1 Zone, and stated that, if so, 'it would be a good idea for you [Charles McKay] to make contact with the Planning Board.'

"2. On June 28, 1993, the Hon. Jesse W. Shotts, attorney for [the McKays], wrote the mayor of Vernon and enclosed an application on behalf of the [McKays] to 'rezone' the tract of land.

"3. The application included with the letter of June 28, 1993, was directed to the Zoning Advisory Committee and requested a favorable recommendation to the Vernon City Council to 'change zoning district boundaries, from R-1 Zone to Commercial.' There is no record or evidence of any administrative board and/or officer.

"4. There is an undated 'Application to the Board of Adjustment' (Application for Variance in R-1 Zone to Allow B-2 Zone). The language of this application is exactly the same as the application to the Zoning Advisory Committee requesting a favorable recommendation by the Board of Adjustment to the City Council for a 'zoning change,' not a variance."

The Board of Adjustment is limited to the authority set out in § 11-52-80(d), Ala.Code 1975. Specifically, those powers are:

"(1) To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this article or of any ordinance adopted pursuant thereto;

"(2) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance; and

"(3) To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done."

Section 11-52-80 does not allow the Board the power or jurisdiction to rezone property. See also, *Beaird v. City of Hokes Bluff*, 595 So.2d 903 (Ala.Civ.App.1992).

We agree with the trial court that the McKays had no decision from which to appeal to the Board and that the Board was without authority to consider or to grant a variance.

AFFIRMED.

ROBERTSON, P.J., and THIGPEN, MONROE and CRAWLEY, JJ., concur.

**814 So.2d 851 (Ala. 2001)  
Board of Zoning Adjustment for the City of Fultondale  
v.  
Robert B. Summers  
1992284  
Alabama Supreme Court  
September 7, 2001**

Appeal from Jefferson Circuit Court (CV-98-7360)

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**Page 852**

[Copyrighted Material Omitted]

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**Page 853**

BROWN, Justice.

This case concerns the propriety of the circuit court's grant of a variance in a zoning matter. We reverse the judgment of the trial court and render a judgment for the Board of Zoning Adjustment for the City of Fultondale ("the Board").

**Facts and Procedural History**

Robert B. Summers ("Summers") is the owner of a 2.08-acre parcel of land in the City of Fultondale. Summers purchased the property approximately 18 years before the present litigation. For approximately 15 years, the property contained a single-family dwelling that Summers leased as rental property to various occupants. In late summer 1998, Summers decided to construct a mini-storage facility on the property. In preparation for constructing the mini-storage facility, Summers allowed the City of Fultondale to burn the house that was on the property and to use the burning as a training exercise for city firefighters. <sup>[1]</sup>

In August 1998, Summers contacted the City of Fultondale regarding his desire to construct a mini-storage facility on the property. Pursuant to the City's comprehensive zoning ordinance, a mini-storage facility fell within the "special exceptions" category to the "B-2 general business classifications."

The zoning ordinance for the City of Fultondale permits the following uses in the B-2 general business district:

"A. Commercial Uses

"1. Bakeries (Minor)

"2. Business or Professional Offices

"3. Banks or Financial Services

"4. Business Support Service

"5. Clinics

"6. Commercial Parking

- "7. Commercial Schools
- "8. Convenience Stores
- "9. Day Care Centers
- "10. Entertainment (Indoor)
- "11. General Retail Businesses (Enclosed)
- "12. General Retail Businesses (Unenclosed)
- "13. Home Improvement Centers
- "14. Medical Support Services
- "15. Personal Services
- "16. Printing Establishment (Minor)
- "17. Restaurants (Minor)
- "18. Studios
- "19. Vehicle Repair (Minor, See Definition Section)
- "20. Vehicle Sales or Rentals

"B. Institutional Uses

- "1. Clubs
- "2. Community Centers or Civic Centers
- "3. Community Service Clubs
- "4. Public Utility Services"

The zoning ordinance further classifies the following as "special exception uses" permitted under the ordinance, subject to the approval of the Board and the issuance of appropriate permits by the City:

"A. Commercial Uses

- "1. Campgrounds
- "2. Car Washes
- "3. Funeral Homes

- "4. Garden Centers or Nurseries
- "5. Gasoline Service Stations, Subject to Article VIII, Section 4.0
- "6. Hotels and Motels
- "7. Liquor Lounges
- "8. Major Vehicle Repair Services as defined in Article IV, Definitions.
- "9. Mini-warehouses, Subject to Article VIII, Section 10.0
- "10. Restaurants (Fast Food, Subject to Article VIII, Section 5.0)
- "11. Shopping Centers, Subject to Article VIII, Section 3.0
- "12. Truck Stops
- "B. Institutional Uses
  - "1. Country Clubs
  - "2. Hospitals
  - "3. Parks
  - "4. Places of Worship
  - "5. Public Assembly Centers
  - "6. Public Buildings, Subject to Article VI, Section 2.0, Subsection 2.5
  - "7. Public Utility Facilities
  - "8. Schools
  - "9. Nursing Care Facility, See Section VIII, Section 7.0
  - "10. Domiciliary Care Facility"

As is evidenced by the foregoing ordinance, to be classified as a "special exception" use, the construction of Summers's proposed mini-storage facility was subject to the approval of the Board. The ordinance further required that construction of a mini-storage facility was subject to the requirements enumerated in Article VIII, Section 10.0, of the Fultondale zoning ordinance. Article VIII, Section 10-A-4, required, among other things, that "a minimum lot size of three (3) acres" was necessary before the construction of a "mini-warehouse development" would be permitted.

Summers subsequently provided the City with a survey of his property, which revealed that his parcel consisted of only 2.08 acres. Once the City discovered that his property did not meet the minimum size requirement for construction of a mini-warehouse, it informed Summers that he would be required to obtain a variance from the Board before a permit could be issued. Summers requested an "area variance," which the Board unanimously denied. In requesting the area variance, Summers asserted that the moneys he had expended in purchasing equipment for construction of the mini-storage facility constituted a "hardship" entitling him to the variance.

Summers appealed the denial of the variance to the Jefferson Circuit Court and demanded a trial by jury. Following the close of all the evidence, the Board moved for a judgment as a matter of law ("JML"), asserting that Summers had failed to present evidence indicating any "unnecessary hardship" that would entitle him to a variance from the lot-size requirement. The trial court denied the Board's motion and submitted the case to the jury. The jury returned a verdict in favor of Summers; however, it made the grant of the area variance subject to three conditions:

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**Page 855**

(1) that Summers obtain the approval of adjoining property owners for the construction of the mini-warehouses; (2) that he comply with all restrictions and sections of the zoning ordinance regarding B-2 mini-warehouses contained in the Fultondale zoning book with the exception of Article VIII, Section 10-A-4; and (3) that he have all planning and engineering feasibility reports completed by a licensed planner or engineer. The Board moved for a judgment notwithstanding the verdict and/or for a new trial, asserting the same grounds it presented in its JML. The trial court denied the motion. The Board appeals.

**Analysis**

Because this is an appeal from the trial court's denial of a motion for JML, we apply the same standard the trial court used initially in granting or denying the motion. *Employees' Benefit Assoc. v. Grissett*, 732 So. 2d 968, 974 (Ala. 1998). "In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling." *Id.* at 975 (citation omitted).

"In situations where a variance is at issue, the primary question is whether due to special conditions, a literal enforcement of a zoning ordinance will result in [an] unnecessary hardship[]." *Sanders v. Board of Adjustment of the City of Chickasaw*, 445 So. 2d 909, 912 (Ala. Civ. App. 1983). Although we recognize that whether an "unnecessary hardship" exists is generally a question of fact, we have recognized that the resolution of this issue requires an application of the law to the facts. *Ex parte Board of Zoning Adjustment of the City of Mobile*, 636 So. 2d 415, 417 (Ala. 1994). However, "[w]hen a trial court improperly applies the law to the facts, the presumption of correctness otherwise applicable to the trial court's judgment has no effect." *Id.* at 418.

We have repeatedly recognized that variances should be granted sparingly, and only under unusual and exceptional circumstances where the literal enforcement of the ordinance would result in unnecessary hardship. *Ex parte Chapman*, 485 So. 2d 1161, 1162 (Ala. 1986); see also *Ex parte Board of Zoning Adjustment of the City of Mobile*, 636 So. 2d 415, 417 (Ala. 1994); *Board of Zoning Adjustment of the City of Mobile v. Dauphin Upham Joint Venture*, 688 So. 2d 823, 825 (Ala. Civ. App. 1996); *Board of Adjustment of the City of Gadsden v. VFW Post 8600*, 511 So. 2d 216, 217 (Ala. Civ. App. 1987); and *F.H. Sanders v. Board of Adjustment of the City of Chickasaw*, 445 So. 2d 909, 912 (Ala. Civ. App. 1983). Exactly what constitutes an "unnecessary hardship" must be determined from the facts of the particular case. *City of Mobile v. Sorrell*, 271 Ala. 468, 470, 124 So. 2d 463, 465 (1960).

""No one factor determines the question of what is practical difficulty or unnecessary hardship, but all relevant factors, when taken together, must indicate that the plight of the premises in question is unique in that they cannot be put reasonably to a conforming use because of the limitations imposed upon them by reason of their classification in a specified zone.""

*Ex parte Chapman*, 485 So. 2d at 1162 (quoting *City of Mobile v. Sorrell*, 271 Ala. at 471 (quoting in turn *Brackett v. Board of Appeal*, 311 Mass. 52, 39 N.E. 2d 956 (1942))).

Summers first argues that the hardship entitling him to a variance was the significant amount of money he says he

expended in purchasing equipment to construct the mini-warehouses on his property. However, "the unnecessary hardship which will suffice for the granting of a variance must relate to the land rather than to the owner himself. Mere personal hardship does not constitute sufficient ground for the granting of a variance." Ex parte Chapman, 485 So. 2d at 1164 (quoting 82 Am. Jur. 2d Zoning and Planning § 275 (1976)). Further, a "self-inflicted or self-created hardship may not be the basis for a variance or for a claim thereof." Ex parte Chapman, 485 So. 2d at 1163 (quoting Thompson, Weinman & Co. v. Board of Adjustments, 275 Ala. 278, 281, 154 So. 2d 36, 39 (1963)). When the owner, by his own conduct, creates the exact hardship he alleges exists, he will not be permitted to take advantage of it. Id. Therefore, the fact that Summers had expended a significant amount of money to purchase equipment in anticipation of the construction of the mini-warehouse facility was an insufficient basis on which to grant an area variance.

Summers also argues that the existence of a junkyard adjacent to his property created an unnecessary hardship that warranted issuance of the variance. This Court has stated that "[a]n unnecessary hardship' sufficient to support a variance exists where a zoning ordinance, when applied to the property in the setting of its environment, is 'so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property.'" Ex parte Chapman, 485 So. 2d at 1162. Summers testified that he did not know of any reason his property could not be used for one of the approximately 20 permitted uses under the B-2 zoning classification. Although Summers argues that one of the City officials testifying at trial stated that the property would probably not be suited for several of the permitted uses because the property was adjacent to a junkyard, it is undisputed that Summers's property had been used as rental property, a permitted use, for 15 years before the time he sought the variance. Based upon the record before us, we cannot say that the Board's refusal to grant a variance was either arbitrary or capricious. Therefore, the trial court erred in submitting to the jury the issue whether a variance should be granted.

Finally, Summers argues that the topography of his property renders the cost of developing the property for any of the conforming uses unfeasible, unreasonable, and uneconomical; thus, he argues, the topography creates an unnecessary hardship that would justify the issuance of the variance. Although Summers's counsel suggested at trial that Summers's property is 30 feet above the level of the road upon which it is situated and that the geological formation is solid rock, the record does not contain substantial evidence that either of these factors renders the property unfit for one of the permitted uses. To the contrary, as we have noted, Summers himself testified that he knew of no reason the property could not be used for several of the approximately 20 permitted uses.

"[T]he reasons for granting a variance must be 'substantial, serious, and compelling.'" Ex parte Chapman, 485 So. 2d at 1163 (quoting McQuillin, Municipal Corporations, § 25.167 (3d ed. 1983)). Because the reasons for granting a variance in this case do not meet this standard, we reverse the trial court's judgment and render a judgment in favor of the Board.

REVERSED AND JUDGMENT RENDERED.

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Page 857

Houston, See, Lyons, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

Notes:

[1] Summers does not claim that when he allowed the rental house to be destroyed he was relying on assurances from the City that he would be allowed to construct the mini-storage facility.

842 So.2d 627 (Ala. 2002)  
CITY OF RUSSELLVILLE ZONING BOARD OF ADJUSTMENT  
v.  
Raymond VERNON.  
1010331.  
Supreme Court of Alabama.  
May 24, 2002.

Rehearing Denied Aug. 16, 2002.

Eddie Beason, Russellville, for appellant.

James P. Atkinson, Florence, for appellee.

WOODALL, Justice.

The Zoning Board of Adjustment ("the Board") of the City of Russellville ("the City") appeals a judgment granting Raymond Vernon's request for a variance from zoning restrictions set forth in the City's zoning ordinance. We reverse and remand.

Raymond Vernon owns property in the City, comprising one city block. In 1997, his daughter purchased a mobile home and installed it on his property to serve as her residence. At that time, his property was subject to the "Zoning Ordinance of Russellville, Alabama" ("the Ordinance"), and was in an area zoned as an "R-3 Residential District." The Ordinance prohibited,

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Page 628

among other things, the use of "mobile homes [and] mobile home parks." Bois Porter, the City Building Inspector, advised Vernon and his daughter that if they removed the "tongue" and "underpinned" the mobile home, the Board would grant a variance from the prohibited uses. After they made the suggested modifications, the variance was granted.

In March 2000, Vernon purchased a mobile home and moved it onto his property. Intending to lease this home for residential purposes, he removed the tongue and underpinned the unit on the site. However, before utilities were provided to this mobile home, Porter visited the site and told Vernon that he could not proceed with the installation unless he obtained a second variance from the Board.

Vernon appealed to the Board for a variance. When the Board denied Vernon's second variance request, Vernon appealed to the Franklin Circuit Court. Following a bench trial, the court entered a judgment in favor of Vernon. It found that the Board's action was "an 'arbitrary and capricious interference with the basic right' of [Vernon] to utilize his property in an appropriate manner." From the denial of its motion to alter, amend, or vacate the judgment, the Board appealed.

This case is controlled by the following well-established principles:

"The board of adjustment derives its power to grant variances from Code 1975, § 11-52-80(d)(3), which vests the Board with the following power:

" 'To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in *unnecessary hardship* and so that the spirit of the ordinance shall be observed and substantial justice done.'

"Variances were allowed by the legislature 'to permit amelioration of the strict letter of the law in individual cases.' *McQuillin, Municipal Corporations* § 25.160 (3d ed.1983). However, variances should be sparingly granted, and only under 'peculiar and exceptional circumstances' of unnecessary hardship. *Priest v. Griffin*, 284 Ala. 97, 101, 222 So.2d 353, 357 (1969); *Martin v. Board of Adjustment*, 464 So.2d 123, 125 (Ala.Civ.App.1985). The pivotal question is whether, due to special conditions, a literal enforcement of a zoning ordinance will result in 'unnecessary hardship.' *Priest v. Griffin*, supra; *Alabama Farm Bureau Mutual Cas. Ins. Co. v. Board of Adjustment*, 470 So.2d 1234, 1237 (Ala.Civ.App.1985); *Pipes v. Adams*, 381 So.2d 86, 87 (Ala.Civ.App.1980).

"An 'unnecessary hardship' sufficient to support a variance exists where a zoning ordinance, when applied to the property in the setting of its environment, is 'so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property.' *McQuillin*, supra, at § 25.167. This Court has approved the following definition of 'unnecessary hardship':

" 'No one factor determines the question of what is practical difficulty or unnecessary hardship, but all relevant factors, when taken together, must indicate that the plight of the premises in question is unique in that they cannot be put reasonably to a conforming use because of the limitations imposed upon them by reason of their classification in a specified zone.'

"*City of Mobile v. Sorrell*, 271 Ala. 468, 471, 124 So.2d 463, 465 (1960), quoting

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**Page 629**

*Brackett v. Board of Appeal*, 311 Mass. 52, 39 N.E.2d 956 (1942). A mere hardship or inconvenience is not enough to justify a variance. *McQuillin*, supra, at § 25.168; *Martin*, 464 So.2d at 125. Moreover, the reasons for granting a variance must be 'substantial, serious, and compelling.' *McQuillin*, supra, at § 25.167.

"Also, a 'self-inflicted or self-created hardship may not be the basis for a variance or for a claim thereof.' *Thompson, Weinman & Co. v. Board of Adjustments*, 275 Ala. 278, 281, 154 So.2d 36, 39 (1963); *Martin*, supra. 'When the owner himself by his own conduct creates the exact hardship which he alleges to exist, he certainly should not be permitted to take advantage of it.' *Josephson v. Autrey*, 96 So.2d 784, 789 (Fla.1957), cited with approval in *Thompson, Weinman & Co.*, supra."

*Ex parte Chapman*, 485 So.2d 1161, 1162-63 (Ala.1986) (emphasis added) (footnote omitted). "Hardship alone is not sufficient. The statute says 'unnecessary hardship,' and mere financial loss of a kind which might be *common to all of the property owners in a use district* is not an 'unnecessary hardship.' " *Nelson v. Donaldson*, 255 Ala. 76, 84, 50 So.2d 244, 251 (1951) (emphasis added). The proliferation of variances "tend[s] to destroy or greatly impair the whole system of zoning." *Priest v. Griffin*, 284 Ala. 97, 102, 222 So.2d 353, 357 (1969).

The trial court made findings of fact based on evidence presented *ore tenus*. Nevertheless, we review its judgment *de novo*, because the dispositive issue is a *legal* one. The *ore tenus* presumption of correctness applies to findings of fact, not to conclusions of law. See *Ex parte Cater*, 772 So.2d 1117, 1119 (Ala.2000); *Eubanks v. Hale*, 752 So.2d 1113, 1144-45 (Ala.1999); *McCluney v. Zap Prof'l Photography, Inc.*, 663 So.2d 922, 924 (Ala.1995) ("The *ore tenus* rule applies only to the trial judge's factual findings on disputed evidence."). We assume the trial court's factual findings are correct, but we conclude that it misapplied the well-established legal principles set out above. More specifically, a property owner is not entitled to a variance where the hardship suffered because of the zoning restriction is "self-inflicted or self-created." It is undisputed that Vernon knew of the zoning restriction against mobile homes before he purchased his mobile home. Nevertheless, he purchased the mobile home without first seeking and securing a variance. Clearly, Vernon's hardship is self-created.

Vernon, however, cites two cases, which, he argues, recognize an exception to the self-created-hardship rule, namely, *Board of Zoning Adjustment of Huntsville v. Mill Bakery & Eatery, Inc.*, 587 So.2d 390 (Ala.Civ.App.1991); and *Board of Zoning Adjustment of Muscle Shoals v. LaGrange Church of the Nazarene, Inc.*, 507 So.2d 538 (Ala.Civ.App.1987). Those cases, however, are distinguishable.

*LaGrange* involved the following facts: The LaGrange Church of the Nazarene, Inc. ("the Church"), purchased property in an area not zoned for churches and subsequently obtained a variance to construct a church building on a five-acre tract of that property. *LaGrange*, 507 So.2d at 539. In an attempt to raise money for the proposed

construction, the Church sold two of the five acres. After it sold the property, it was informed that a second variance would be necessary in order to construct the building on the *remaining three acres*. *Id.* The second variance, however, was denied. *Id.*

The Church appealed the denial, and a jury returned a verdict for the Church. The Court of Civil Appeals affirmed the

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**Page 630**

judgment entered on that verdict. It noted that a variance should "not be granted where the property owner merely suffers a financial loss of a kind that is common to all of the property owners of the use district." 507 So.2d at 539. It concluded, however, that, because the Church had relied on the first variance, it had suffered a *unique* hardship. Specifically, it explained: "The Church's unique financial loss was incurred due to its reliance on the 1979 variance, not because it had purchased property not zoned for churches." *Id.* at 540.

Relying on *LaGrange*, the Court of Civil Appeals in *Mill Bakery* held that the Mill Bakery and Eatery, Inc. ("The Mill"), was entitled to a second variance to sell liquor on its premises, where it had formerly sold liquor under a license that had expired. Additionally, The Mill had renovated its property under the assumption that it could renew its expired liquor license. 587 So.2d at 391. The Court of Civil Appeals stated that "if the [second] variance was not granted ..., The Mill would suffer a financial loss *not common to that of the other property owners* in the district, in light of the cost of renovations The Mill undertook *based on its reliance on the previous variance*." *Id.* at 392 (emphasis added). The court further stated: "The Mill's unique financial loss would result from its reliance on the [first] variance and [consequent] liquor license, not because it had purchased property on which restaurants and liquor sales were prohibited." *Id.*

Vernon argues that he is similarly situated to the Church and The Mill. Like the Church and The Mill, he is entitled to rely, he contends, on the variance, by which he installed his daughter's mobile home, for the right to install his mobile home. We disagree with this contention.

*LaGrange* and *Mill Bakery* were decided based on a quasi-estoppel theory. Assuming--without deciding--that the two cases were correctly decided, Vernon's reliance on them is misplaced. In each of those cases, successive variances were sought from zoning restrictions for the *identical use*. In *LaGrange*, the first variance was granted, and the second one denied, for the construction of the same church building on the same property. In *Mill Bakery*, the first variance was granted, and the second one denied, for the sale of liquor on the same premises. This case, by contrast, involves variances for *two distinct uses*, namely, two mobile homes. The first variance allowed Vernon to install a mobile home as a residence for his daughter. The second variance was sought three years later, not with regard to his daughter's mobile home, but to allow Vernon to install a second mobile home for a purpose *wholly unrelated* to the installation of the first mobile home.

These are not technical distinctions. Vernon was not entitled to rely on one variance as a basis on which to install an *indeterminate number* of mobile homes--or even a second mobile home--in the zoning district. Were we to adopt Vernon's proposed rule, zoning boards of adjustment would be reluctant to grant a single variance out of concern that one such variance could precipitate the evisceration of their power to enforce use restrictions. Such a rule "would tend to destroy or greatly impair the whole system of zoning." *Priest v. Griffin*, 284 Ala. at 102, 222 So.2d at 357.

In short, Vernon's self-created financial hardship is not of a nature uncommon to property owners in the district. For that reason, the trial court erred in granting the variance. The judgment is, therefore, reversed, and the cause is remanded for

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**Page 631**

further proceedings consistent with this opinion.

REVERSED AND REMANDED.

MOORE, C.J., and HOUSTON, LYONS, and JOHNSTONE, JJ., concur.

485 So.2d 1161 (Ala. 1986)

Ex parte Mary CHAPMAN.

(Re Mary CHAPMAN

v.

BOARD OF ADJUSTMENT OF CITY OF MOBILE).

85-58.

Supreme Court of Alabama.

February 7, 1986

Linda S. Perry for Perry & Rivers, Mobile, for petitioner.

John L. Lawler, Mobile, for respondent.

TORBERT, Chief Justice.

This case involves an appeal by Mary Chapman from the circuit court's judgment allowing Henry Hallet a "variance" from a local zoning ordinance. The Court of Civil Appeals affirmed the judgment, and we

Page 1162

granted certiorari. We now reverse and remand.

The relevant facts of this case show that in October of 1983, Henry Hallet began construction of a utility building at his residence. The building was of wood and was prefabricated. Its size was ten feet by twelve feet with a peak height of approximately ten feet. The building was to rest on boards, and was not to be set in concrete. Mary Chapman, who was Hallet's next-door neighbor, complained to the Inspection Service Department of the City of Mobile. The basis of her complaint was that the utility building obstructed her view of her own backyard and its greenery, "crowded" her backyard area, and thwarted her use and enjoyment of her own property.

After her complaint to the city authorities, it was found that Hallet did not have the required building permit, and, furthermore, could not obtain a permit because the utility building was being built much closer than eight feet from the line separating his property from that of Mrs. Chapman. This was in violation of a city zoning ordinance imposed on the Mobile historical district requiring a building set-back of eight feet from property lines.

Consequently, Hallet applied for a variance from the Board of Adjustment of the City of Mobile. After a hearing, the variance was granted on January 9, 1984. The utility building had been substantially completed before the variance was granted, and it was fully completed soon thereafter. However, Mrs. Chapman appealed to the circuit court for a de novo hearing pursuant to Code 1975, § 11-52-81. The circuit court also granted a variance to Mr. Hallet, based upon the finding of an "unnecessary hardship," and the Court of Civil Appeals affirmed this finding, 485 So.2d 1158.

The board of adjustment derives its power to grant variances from Code 1975, § 11-52-80(d)(3), which vests the Board with the following power:

"To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done."

Variances were allowed by the legislature "to permit amelioration of the strict letter of the law in individual cases." *McQuillin*, Municipal Corporations § 25.160 (3d ed. 1983). However, variances should be sparingly granted, and only under "peculiar and exceptional circumstances" of unnecessary hardship. *Priest v. Griffin*, 284 Ala. 97, 101, 222 So.2d 353, 357 (1969); *Martin v. Board of Adjustment*, 464 So.2d 123, 125 (Ala.Civ.App.1985). The pivotal question is whether, due to special conditions, a literal enforcement of a zoning ordinance will result in "unnecessary hardship." *Priest v. Griffin*, *supra*; *Alabama Farm Bureau Mutual Cas. Ins. Co. v. Board of Adjustment*, 470 So.2d 1234, 1237 (Ala.Civ.App.1985); *Pipes v. Adams*, 381 So.2d 86, 87 (Ala.Civ.App.1980).

An "unnecessary hardship" sufficient to support a variance exists where a zoning ordinance, when applied to the property in the setting of its environment, is "so unreasonable as to constitute an arbitrary and capricious interference

with the basic right of private property." McQuillin, *supra*, at § 25.167. This Court has approved the following definition of "unnecessary hardship":

"No one factor determines the question of what is practical difficulty or unnecessary hardship, but all relevant factors, when taken together, must indicate that the plight of the premises in question is unique in that they cannot be put reasonably to a conforming use because of the limitations imposed upon them by reason of their classification in a specified zone."

*City of Mobile v. Sorrell*, 271 Ala. 468, 471, 124 So.2d 463, 465 (1960), quoting *Brackett v. Board of Appeal*, 311 Mass. 52, 39 N.E.2d 956 (1942). A mere hardship or

#### Page 1163

inconvenience<sup>[1]</sup> is not enough to justify a variance. McQuillin, *supra*, at § 25.168; Martin, 464 So.2d at 125. Moreover, the reasons for granting a variance must be "substantial, serious, and compelling." McQuillin, *supra*, at § 25.167.

Also, a "self-inflicted or self-created hardship may not be the basis for a variance or for a claim thereof." *Thompson, Weinman & Co. v. Board of Adjustments*, 275 Ala. 278, 281, 154 So.2d 36, 39 (1963); Martin, *supra*. "When the owner himself by his own conduct creates the exact hardship which he alleges to exist, he certainly should not be permitted to take advantage of it." *Josephson v. Autrey*, 96 So.2d 784, 789 (Fla.1957), cited with approval in *Thompson, Weinman & Co.*, *supra*.

The testimony of Mr. Hallet shows that he had lived on this property for over twenty years when he decided to build this utility building for extra storage space. He began construction of the building, and substantially completed the project, before obtaining a building permit, and did so in violation of the zoning ordinance. "Clearly, the hardship is self-created where it stems from an improvement made without a building permit and in violation of law." 82 Am.Jur.2d, Zoning and Planning § 276 (1976). We conclude that by building this structure in contravention of the zoning ordinance, any hardship now imposed on Mr. Hallet was self-created.

The board relies on its interpretation of *Board of Zoning Adjustment v. Boykin*, 265 Ala. 504, 92 So.2d 906 (1957), for the holding that an innocent self-created hardship may support a variance. In *Boykin*, the claimant applied for a building permit before he began a construction project, and was given permission to proceed by the proper authorities. In reliance thereon and in good faith, he began work and spent much money on the project. However, six years later, when the work was nearly complete, he was ordered to desist when the city determined that it had been error to allow the construction.

The Court in *Boykin* affirmed the grant of a variance for the claimant because an unnecessary hardship existed in that the construction had improved the appearance of the property and increased its value, and the building could not be used for any other purpose. *Boykin*, 265 Ala. at 510, 92 So.2d at 910. We believe that the case at hand is clearly distinguishable, because Mr. Hallet did not rely on a building permit when he began construction, his work did nothing to improve the appearance of the property, and the utility building could readily be moved to another location on the property that would comply with the law.

The board's argument that such innocent reliance was present in this case because of Mr. Hallet's finishing the construction after he was granted a variance is also misplaced. The board argues that Hallet relied on the variance to complete the project and did not know that an appeal to the circuit court was being filed, and that this innocent reliance supports a variance. However, the fact that Mr. Hallet went ahead and completed construction after the variance was granted should not have even been a factor in the circuit court's decision. On appeal to the circuit court from a decision of the board of adjustment, the circuit court sits as a "glorified board of adjustment," *City of Homewood v. Caffee*, 400 So.2d 375, 377 (Ala.1981), and is limited to considering only that which the board itself could have considered. *Board of Zoning Adjustment v. Warren*, 366 So.2d 1125, 1128 (Ala.), on remand, 383 So.2d 179, 182 (Ala.Civ.App.1979), cert. denied, 383 So.2d 183 (Ala.1980); *Alabama Power Co. v. Brewton Board of Zoning Adjustment*, 339 So.2d 1025 (Ala.1976). Obviously, the board of adjustment could not have considered events that happened after its own hearing and final decision. Therefore, any reliance by Mr. Hallet on the board's decision

#### Page 1164

should not have been a factor in the circuit court's decision.

Another factor which should not have been considered by the circuit court in reaching its decision was Mr. Hallet's age and health. An "unnecessary hardship" is related only to the parcel of land, without regard to ownership. This is better explained as follows:

"The grant of a variance runs with the land and is not a personal license given to the landowner. Accordingly, the

unnecessary hardship which will suffice for the granting of a variance must relate to the land rather than to the owner himself. Mere personal hardship does not constitute sufficient ground for the granting of a variance."

82 Am.Jur.2d, Zoning and Planning § 275.

Zoning statutes and ordinances which impose restrictions on private property should be strictly construed, *Smith v. City of Mobile*, 374 So.2d 305, 307 (Ala.1979), and the "board of adjustment does not have the right to act arbitrarily or to amend or depart from the terms of the ordinance at its uncontrolled will and pleasure." *Nelson v. Donaldson*, 255 Ala. 76, 84, 50 So.2d 244, 251 (1951).

Being mindful of the presumption of correctness indulged in favor of the trial court's decision, we nevertheless must overturn the decision as palpably wrong when, as in this case, that presumption is overcome by both the law and the evidence. *Dickey v. McClammy*, 452 So.2d 1315, 1320 (Ala.1984). Therefore, the judgment of the Court of Civil Appeals affirming the trial court's ruling must be reversed, and this cause is remanded with instructions for the Court of Civil Appeals to remand it to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

MADDOX, FAULKNER, JONES, SHORES, BEATTY and HOUSTON, JJ., concur.

Adams, J., not sitting.

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Notes:

[1] During the circuit court's hearing of this case, Mr. Hallet was asked if the utility building could be moved to a place in his yard which conforms to the ordinance. He replied, "It could be, but it's more convenient for me for it to be here...." (Emphasis added.)  
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EXBI

50 So.2d 244 (Ala. 1951)  
255 Ala. 76  
NELSON et al.  
v.  
DONALDSON.  
3 Div. 576.  
Supreme Court of Alabama.  
January 25, 1951

Page 245

Page 246

[255 Ala. 78] Jack Crenshaw, of Montgomery, for appellants.

Hill, Hill, Stovall & Carter and Rives & Godbold, all of Montgomery, for appellee.

LAWSON, Justice.

This is an appeal from a judgment of the circuit court of Montgomery County upholding [255 Ala. 79] an order of the Board of Adjustment of the City of Montgomery whereby that board ordered the City Building Inspector to issue a building permit to C. T. Donaldson, the appellee here.

In 1948 the City of Montgomery enacted a zoning ordinance, which became effective on November 19, 1948. This ordinance was enacted and adopted in conformity with Title 37, Chapter 16, §§ 774-785, inclusive, of the 1940 Code of Alabama. Under this ordinance the City of Montgomery is divided into a number of districts and the use of property located in the various districts is prescribed. As to residence A-1 districts, the use is limited to single family dwellings, with some few additional uses, such as churches, public libraries, public parks, accessory structures, etc. Neither dwellings for two families nor apartment houses are permitted in residence A-1 districts. An apartment house is defined as a building containing three or more family dwelling units.

The ordinance provides that 'except as otherwise provided, no structure or land shall be used hereafter and no structure or part thereof shall be erected, altered or moved unless in conformity with the regulations herein specified for the district in which it is located.' However, with exceptions not here pertinent, any structure or use existing or under construction at the time the ordinance was enacted, or at the time it is changed by amendment, is permitted to continue, even though such structure or use is not in conformity with the provisions of the ordinance. But no nonconforming use or structure can be extended unless such extension conforms with the provisions of the ordinance as to the district in which it is located.

The ordinance provides that its terms are to be enforced by the building inspector of the city and it is made unlawful for anyone to commence the excavation for or the construction of any building or other structure until the building inspector of the city has issued for such work a building permit,

Page 247

including a statement that the plans, specifications and intended use of such structure in all respects conform with the provisions of the ordinance.

The ordinance further provides for the establishment of a board of adjustment. It does not purport to set out the powers of the board of adjustment, but provides that the appointment, procedure, powers and actions of the board of adjustment are governed and controlled by the provisions of § 781, Title 37, Code 1940, as it may be amended. Since the board of adjustment is provided for in the ordinance, its powers stem directly from the statute

and may not be circumscribed, altered or extended by the municipal governing body. Under these circumstances, the inclusion in the zoning ordinance of a word-for-word recital of the statutory powers of the board would be superfluous. *Duffcon Concrete Products, Inc., v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347, 9 A.L.R.2d 678.

The powers of the board of adjustment, as enumerated in § 781, Title 37, supra, are in pertinent part as follows: '\* \* \* To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this article or of any ordinance adopted pursuant thereto. To hear and decide special exceptions to the terms of the terms (sic) of the ordinance upon which such board is required to pass under such ordinance. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done. \* \* \*' (Emphasis supplied.)

In exercising such powers, the board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision, or determination as ought to be made, and to that end has all the powers of the officer from whom the appeal is taken. § 781, Title 37, Code 1940.

By § 783, Title 37, Code 1940, it is provided: 'Any party aggrieved by any final [255 Ala. 80] judgment or decision of such board of zoning adjustment, may within fifteen days thereafter appeal therefrom to the circuit court or court of like jurisdiction, by filing with such board a written notice of appeal specifying the judgment or decision from which appeal is taken. In case of such appeal such board shall cause a transcript of the proceedings in the cause to be certified to the court to which the appeal is taken and the cause in such court be tried de novo.' (Emphasis supplied.)

Shortly prior to February 11, 1950, the appellee, Donaldson, made application to the city building inspector for a permit to build an apartment house on the front of a lot owned by him at 709 Federal Drive, which is in a residence A-1 district, wherein the construction of an apartment house is prohibited. The permit was not issued. On February 11, 1950, Donaldson took an appeal to the board of adjustment. On February 25th the board of adjustment entered an order granting a variance to Donaldson and ordered that a permit be issued to him to construct the apartment house.

Certain persons owning property in the vicinity of 709 Federal Drive appealed to the circuit court of Montgomery County. The cause was tried de novo in the circuit court on or about March 21, 1950, and a judgment was entered by that court affirming the order of the board of adjustment and ordering that a permit be issued to Donaldson to construct the apartment house, on the ground that under the evidence he was entitled to a variance from the terms of the ordinance. From the judgment of the circuit court the objecting property owners have appealed to this court.

Our zoning statutes seem to be generally in harmony with the Standard State Zoning Enabling Act prepared under the auspices of the Federal Department of Commerce, which act has been adopted in many of the states. See McQuillan, *Municipal Corporations*, 3d Ed., Vol. 8, § 25.219. The

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**Page 248**

board of adjustment in some of the states is called a board of appeals. In other states, it is called by the same name as is designated in our statute. In most of the states, the proceeding for a judicial review of the decision or order of the board of adjustment is by certiorari, but in some of the states the proceeding for such review is by appeal, the same method as is provided in our statute.

The inquiry in the circuit court is neither enlarged nor diminished by appeal. The scope of inquiry on appeal is the same as before the board of adjustment, though the circuit court is a court of general jurisdiction. In other words, under our statute the authority of the circuit court on appeal to permit a variance from the terms of the ordinance is the same as that conferred on the board of adjustment by § 781, Title 37, Code 1940. *Vogel v. Board of Adjustment for City of Manchester*, 92 N.H. 195, 27 A.2d 105; *Oklahoma City et al. v. Harris et al.*, 191 Okl. 125, 126 P.2d 988; *In re McInerney*, 47 Wyo. 258, 34 P.2d 35. In *Oklahoma City et al. v. Harris*, supra, it was pointed out that

under the Oklahoma law, review of the order or decision of the board of adjustment is by appeal and it was held that on appeal the district court 'sits as a glorified board of adjustment.'

The dominant question raised by appellants is whether or not the power given by § 781, Title 37, Code 1940, to vary the effect of the zoning ordinance in specific cases includes the power to authorize a nonconforming use, that is, a use which is prohibited by the ordinance. Appellants insist that such authority is not conferred by § 781, Title 37 supra; that the privilege to erect a nonconforming building or a building for a nonconforming use cannot be granted under the guise of a variance permit; that the authority to permit variances from the terms of the zoning ordinance conferred by § 781, Title 37, supra, is restricted to slight modifications as to height, area, distance from boundaries, etc.

In support of their contention, appellants argue that to construe the language of § 781, Title 37, supra, relating to the powers of the board of adjustment to authorize a variance from the terms of an ordinance as giving the board power to authorize a nonconforming use, would result in its unconstitutionality, in that it would be an unconstitutional[255 Ala. 81] delegation of legislative power to an administrative agency, there being no sufficient standards, rules, restrictions or limitations under which the board should act in reaching its conclusions.

The specific question has not been decided by this court. In *Leary v. Adams et al.*, 226 Ala. 472, 477, 147 So. 391, 396, we pretermitted as unnecessary to the decision in that case the assertion that the power of the board of adjustment to authorize a variance was limited to minor details, saying: 'The city contends that the board of adjustment was limited in its functions to hear appeals concerning minute details and principally as to height and area only, and was without authority to modify the zoning ordinance as here sought. This may present a debatable question (*In re Rose Builders' Supply Co.*, 202 N.C. 496, 163 S.E. 462; *Falvo v. Kerner*, 222 App.Div. 289, 225 N.Y.S. 747; *People ex rel. Sheldon v. Board of Appeals*, 234 N.Y. 484, 138 N.E. 416), the consideration of which may well await the necessity for its determination.'

While it is true that no body in which is vested the legislative power may abdicate its legislative function by delegating power to another body to make the law, it is equally well established that the legislative body may delegate to a subordinate body the power to execute and administer its laws, where the legislative body has formulated a standard reasonably clear to govern the action of such subordinate body. While these general rules are well settled, their applicability probably never will be. The ever-recurring problem is whether any statute constitutes an unlawful delegation of legislative power or merely a power to administer and execute the declared policy of the legislative body within reasonably clear standards fixed by the statute.

The courts in other jurisdictions have been called upon on numerous occasions to consider the effect of the provisions in zoning laws and ordinances permitting variances, in identical or substantially the same language as contained in § 781, Title

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Page 249

37, Code 1940. The decisions of such courts are in decided conflict.

In *Welton v. Hamilton*, 344 Ill. 82, 176 N.E. 333, 337, the Supreme Court of Illinois held that a statute of that state, in so far as it attempted to confer authority on the board of appeals to grant variances from the terms of the zoning ordinance where there are practical difficulties or unnecessary hardships in carrying out the letter of the ordinance, was unconstitutional on the ground that: 'The statute gives no direction, furnishes no rule, and provides no standard for determining what are practical difficulties or unnecessary hardships which justify setting aside the provisions of the ordinance and varying or modifying their application, but leaves those questions to be determined by the unguided and unlimited discretion of the board.' The effect of this decision, as we understand it, was to deprive the board of appeals of authority even to grant variances as to minor details. See *Speroni v. Board of Appeals of City of Sterling et al.*, 368 Ill. 568, 15 N.E. 2d 302; *People ex rel. Danielson v. City of Rockford et al.*, 338 Ill.App. 347, 87 N.E.2d 660.

In several other states it has been held, in effect, that under the provisions of ordinances and statutes similar to those of our state here under consideration, the board of adjustment or board of appeals could grant variances as to

minor details of construction, etc., but that they could not authorize nonconforming uses, for to do so would be to exercise a legislative function. *Nicolai et al. v. Board of Adjustment of City of Tucson*, 55 Ariz. 283, 101 P.2d 199; *Bray et al. v. Beyer et al.*, 292 Ky. 162, 166 S.W. 2d 290; *Sims et al. v. Bradley et al.*, 309 Ky. 626, 218 S.W.2d 641; *Jack Lewis, Inc., v. Mayor and City Council of Baltimore*, 164 Md. 146, 164 A. 220; *Sugar v. North Baltimore Methodist Protestant Church*, 164 Md. 487, 165 A. 703, Cf. *Heath et al. v. Mayor and City Council of Baltimore et al.*, 187 Md. 296, 49 A.2d 799, and *Heath v. Mayor and City Council of Baltimore et al.*, 190 Md. 478, 58 A.2d 896; *Lee et al. v. Board of Adjustment of City of Rocky Mount*, 226 N.C. 107, 37 S.E.2d 128, 168 A.L.R. 1; *James v. Sutton, Chief Building Inspector, et al.*, 229 N.C. 515, 50 S.E.2d 300; *Livingston v. Peterson*, 59 N.D. [255 Ala. 82] 104, 228 N.W. 816; *Harrington v. Board of Adjustment of City of Alamo Heights, Bexar County, et al., Tex.Civ.App.*, 124 S.W.2d 401; *Texas Consolidated Theatres v. Pittillo, Tex.Civ.App.*, 204 S.W.2d 396; *Board of Adjustment et al. v. Stovall et al., Tex.Civ.App.*, 218 S.W.2d 286; *Walton v. Tracy Loan & Trust Co. et al.*, 97 Utah 249, 92 P.2d 724.

In the recent case of *Flynn v. Zoning Board of Review of City of Pawtucket, R. I.*, 73 A.2d 808, the Supreme Court of Rhode Island held, in substance, that the subsection of a zoning ordinance authorizing the board of review to grant exceptions to the terms of the ordinance so as to permit a nonconforming use was invalid as an attempt to re-delegate legislative power delegated to the city by the state legislature. As to whether the power to authorize variances as to nonconforming uses is affected by that decision is not clear.

Counsel for appellants cite the case of *Civil City of Indianapolis et al. v. Ostrom Realty & Construction Co.*, 95 Ind.App. 376, 176 N.E. 246, as holding that in Indiana the board of zoning appeals was without power to authorize a nonconforming use under any circumstances. We do not think that case so holds. In *O'Connor et al. v. Overall Laundry, Inc., et al.*, 98 Ind.App. 29, 183 N.E. 134, 137, it was held that the board of zoning appeals 'has power to permit and authorize exceptions and variations from the district regulations in the class of cases or the particular situation specified in the ordinance. In the instances set out in the ordinance and in absolutely no other instance has the board any power to 'vary.'" We think the following Indiana cases show that the board of zoning appeals in that state do have the power to authorize nonconforming uses in certain instances. *Board of Zoning Appeals v. Waintrup*, 99 Ind.App. 576, 193 N.E. 701; *Board of Zoning Appeals v. Moyer*, 108 Ind.App. 198, 27 N.E.2d 905; *Keeling et al. v. Board of Zoning Appeals of City of Indianapolis et al.*, 117 Ind.App. 314, 69 N.E.2d 613.

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Page 250

In *Anderson et al. v. Jester et al.*, 206 Iowa 452, 221 N.W. 354, 358, it was held that the delegation of power to the board of adjustment to authorize variances was not unconstitutional. As to the power conferred to authorize a variance it was said: 'The power of the board of adjustment is to vary, to make special exceptions to the application of the zoning and use regulations, not to vary, further than as the incidental effect in the specific case, boundaries or the provisions of the ordinance. \* \* \* The variance must be reasonable, not arbitrary. It may not under the same circumstances be granted to one and withheld from another. The power is to be used in subordination to the general welfare, and not for the benefit of one who does not bring himself within the terms of the statute \* \* \* The power may not be arbitrarily exercised and its exercise must be confined strictly within the limitations of the statute. \* \* \*'

Without any treatment of the constitutional question, the Supreme Court of Missouri in *State ex rel. Nigro v. Kansas City et al.*, 325 Mo. 95, 27 S.W.2d 1030, held, in effect, that the board of zoning appeals was not empowered to authorize a nonconforming use. To like effect is *In re Botz*, 236 Mo.App. 566, 159 S.W.2d 367.

In *Thalhofer v. Patri*, 240 Wis. 404, 3 N.W.2d 761, 763, it was said: 'Provisions in statutes and ordinances authorizing slight variations in the application of zoning laws are common and have generally been upheld as against the contention that such a provision is an unlawful delegation of legislative power.' But in *State ex rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317, 319, the Wisconsin court said: 'However, if it be assumed that by this provision it was intended to confer upon the board of appeals power to waive exact compliance with some detail of the ordinance, it would hardly go to the extent of authorizing the board to work substantial amendments to the ordinance, or to ignore it altogether, or to accomplish its repeal.'

The cases heretofore considered tend to support the contention of appellants that the provisions of § 781, Title 37, Code 1940, do not authorize a variance as to a nonconforming use.

[255 Ala. 83] We come now to consider the cases from other jurisdictions which do not support that view.

In several states the constitutionality of statutes and ordinances authorizing variances in practically the same language as our statute has been upheld as against the contention that they were unconstitutional as containing an unlawful delegation of legislative power to an administrative agency, without any specific reference being made to the question as to whether the power to authorize variances included the power to permit a nonconforming use. *McCord et al. v. Ed Bond & Condon et al.*, 175 Ga. 667, 165 S.E. 590, 86 A.L.R. 703; *L. & M. Investment Co. v. Cutler et al.*, 125 Ohio St. 12, 180 N.E. 379, 86 A.L.R. 707; *Momeier v. John McAlister, Inc.*, 203 S.C. 353, 27 S.E.2d 504; *Spencer-Sturla Co. v. City of Memphis*, 155 Tenn. 70, 290 S.W. 608. To like effect is *Johnston v. Board of Supervisors of Marin County*, 31 Cal.2d 66, 187 P.2d 686.

The courts of other states have held in effect that to construe the power to authorize variances to include the power to permit nonconforming uses does not result in the unconstitutionality of the 'variance' provisions of the statute and ordinance, there being sufficient standards or rules set up to guide the board of adjustment or board of appeals in the exercise of its authority. *Appeal of Blackstone*, 8 W.W.Harr., Del., 230, 190 A. 597; *Tau Alpha Holding Corp. et al. v. Board of Adjustments of City of Gainesville et al.*, 126 Fla. 858, 171 So. 819; *Thomas et al. v. Board of Standards and Appeals of City of New York et al.*, 263 App.Div. 352, 33 N.Y.S.2d 219, reversed on other grounds, 290 N.Y. 109, 48 N.E.2d 284; *Roosevelt Field, Inc., et al. v. Town of North Hempstead et al.*, 277 App.Div. 889, 98 N.Y.S.2d 350; *State v. Gunderson*, 198 Minn. 51, 268 N.W. 850; *Freeman v. Board of Adjustment*, 97 Mont. 342, 34 P.2d 534; *Fortuna v. Zoning Board of Adjustment*, 95 N.H. 211, 60 A.2d 133, 135, wherein is approved the holding in *Vogel v. Board of Adjustment of Manchester*, 92 N.H.

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Page 251

195, 27 A.2d 105; *In re Dawson et al.*, 136 Okl. 113, 277 P. 226; *Oklahoma City v. Harris et al.*, 191 Okl. 125, 126 P.2d 988; *Huebner et ux. v. Philadelphia Sav. Fund Soc. et al.*, 127 Pa.Super. 28, 192 A. 139; *Berman et al. v. Exley et al.*, 355 Pa. 415, 50 A.2d 199; *Application of Devereaux Foundation, Inc.*, 351 Pa. 478, 41 A.2d 744.

In the following cases the power of boards of adjustment or boards of appeal to authorize nonconforming uses was upheld without treatment of the constitutional question. *Board of Adjustment of City and County of Denver v. Handley et al.*, 105 Colo. 180, 95 P.2d 823; *Board of Zoning Appeals v. Moyer*, 108 Ind.App. 198, 27 N.E.2d 905; *State ex rel. Kreher v. Quinlan, City Engineer, et al.*, 182 La. 721, 162 So. 577; *People ex rel. St. Basil's Church of City of Utica v. Kerner, et al.*, 125 Misc. 526, 211 N.Y.S. 470; *Lattsco, Inc., v. Mutual Mort. & Invest. Co.*, Ohio Com.Pl., 6 Ohio Supp. 102, 168 A.L.R. 64, note; *Bubis v. City of Nashville*, 174 Tenn. 134, 124 S.W.2d 238.

Perhaps the review of the authorities from other states serves no purpose other than to answer the contention asserted by counsel for appellants to the effect that the courts of other states are in accord on the question, and to show the lack of uniformity in the holdings of the courts of other states on this aspect of the so-called Standard State Zoning Enabling Act.

We are of the opinion that § 781, Title 37, Code 1940, properly empowers the boards of adjustment to determine that in a particular situation the zoning ordinance should not be applied literally, and to that end the board should make proper adjustment to prevent unnecessary hardship, even to the extent of authorizing nonconforming uses. In order to prevent injustice, oppression, arbitrary application, and to promote 'the public interest,' the board of adjustment has the power to find, under a certain set of facts, that the literal application of the ordinance would not be within the spirit of the ordinance. In other words, having in mind the public interest, and the interest of the people in a given use district, the legislature intended that so long as no oppression or unnecessarily great burden exists and, therefore, no great individual injustice done, the ordinance should be applied strictly; [255 Ala. 84] but, on the other hand, if the situation is such as to indicate oppression and unnecessary individual burden, then the spirit of the zoning ordinance would not be in accordance with the spirit of the law, that it should not be applied strictly and literally.

The power and authority to determine the existence of such a state of facts is not a delegation of legislative authority. The board of adjustment does not have the right to act arbitrarily or to amend or depart from the terms of the ordinance at its uncontrolled will and pleasure. Section 781, Title 37, supra, in so far as it relates to the power of

the board to permit variances from the terms of the zoning ordinance merely delegates the power and authority, coupled with the duty to perform the function of hearing testimony, to determine if the facts are such as was intended by the legislature to entitle the property owner to a variance from the terms of the zoning ordinance. This is a quasi judicial function by an administrative board.

Variances from the terms of the zoning ordinance should be permitted only under peculiar and exceptional circumstances. Hardship alone is not sufficient. The statute says 'unnecessary hardship,' and mere financial loss of a kind which might be common to all of the property owners in a use district is not an 'unnecessary hardship.'

We come now to consider the evidence presented before the trial court upon which it was held that appellee was entitled to a variance from the terms of the zoning ordinance.

The testimony was taken orally before the trial judge and his findings on the facts had the effect of a verdict of a jury and, hence, the judgment will not be disturbed unless plainly erroneous. *Hampton v. Stewart*, 240 Ala. 2, 194 So. 509.

In 1938 or 1939, Donaldson, the appellee, bought a house and lot now known as 707 Federal Drive. Donaldson and his family lived in the house until 1941, when it was remodeled so as to convert it into a two-story

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**Page 252**

brick veneer apartment house, containing three family dwelling units. One of the dwelling units is occupied by the Donaldson family. In 1942 or 1943 Donaldson erected garage apartments on the rear portion of this property known as 707 Federal Drive.

In 1947 Donaldson purchased, from the Montgomery Heights Company, the land, the use of which is the subject of this proceeding, and which is known as 709 Federal Drive. It is immediately north of Donaldson's property at 707 Federal Drive. It fronts 112 feet on the west side of Federal Drive and has a depth of 185 feet. Donaldson's sister and brother-in-law own the property immediately north of 709 Federal Drive. Donaldson owns property across the street.

Donaldson purchased 709 Federal Drive for the purpose of constructing thereon an apartment development. On the date of purchase there was no constitutional ordinance prohibiting the construction of an apartment, garage or otherwise, on 709 Federal Drive. But Donaldson, acting on the assumption that there was a valid ordinance of the city of Montgomery requiring the consent of the property owners for a distance of 300 feet before a garage apartment could be erected on the property, sought and obtained the consent of such owners to construct a garage apartment on the rear of his lot, 709 Federal Drive. Such an ordinance had been adopted, but it was declared unconstitutional by this court in *Pentecostal Holiness Church of Montgomery v. Dunn*, 248 Ala. 314, 27 So.2d 561. Shortly after the purchase of the property and after obtaining such consent, Donaldson proceeded to construct upon the rear of the lot in question a structure with six automobile garages or 'stalls' on the ground level, and two family dwelling units above the two garages in the center of the structure. The four extra garages were constructed so that there would be a garage for each family occupying the four-unit apartment which he contemplated building on the front of the lot. At the time of the building of this so-called garage apartment, Donaldson installed a paved driveway from the street and a concrete apron 32 feet wide and 80 feet long in front of the garages, at an expense of approximately [255 Ala. 85] \$2,000. A gas line was installed sufficient to accommodate two dwelling units on the rear of the lot and four on the front. A water line for the garage apartment units was installed and connected, and two water lines were connected to the water main and 'stubbed' off at the front of the lot to accommodate the contemplated four-unit apartment building. Telephone cable was laid of sufficient size to accommodate not only the garage apartments, but the proposed four-unit apartment as well. A sewer line was laid with connections for the proposed four-unit apartment building. All of the above work was done prior to the effective date of the comprehensive zoning ordinance here involved.

After completing the building on the rear of the lot, Donaldson was unsuccessful in obtaining financing of the apartment which he contemplated building on the front. In the spring of 1948, the city planning commission of the city of Montgomery held public hearings as to the proposed comprehensive zoning ordinance. At one of the meetings

Donaldson appeared and offered to present his proposed plans for the construction of the apartment on the front of his lot at 709 Federal Drive. He had obtained plans for an apartment building from a local contractor, but the bid was more than he could pay.

On April 19, 1948, Donaldson wrote the city planning commission that he was ready to build the four-unit apartment on the front of the lot and accompanied his letter with a plat of the lot and plans for the building. The planning commission of the city considered the matter and reported to the city commission that 'in view of the fact that the party had started his development before the new zoning plan was developed, it is the recommendation of the planning commission that this request be granted.' Donaldson continued to encounter difficulty in obtaining financial assistance and no further steps were taken toward the actual construction of the four-unit apartment building prior to November 19, 1948, when the comprehensive zoning ordinance became effective. By virtue of

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**Page 253**

the said comprehensive zoning ordinance, 709 Federal Drive was placed in a residence A-1 district, wherein, as before pointed out, the construction of an apartment house is prohibited.

We are clear to the conclusion that under the evidence the trial court was fully justified in finding that appellee had suffered an unnecessary hardship sufficient to warrant the granting of a variance from the terms of the zoning ordinance. Unless appellee is permitted to construct the apartment house, he will suffer considerable financial loss, a financial loss of a kind entirely different from that of any other property owner within the same district, in that he had already incurred considerable expenditure of money in connection with the construction of the apartment house, entirely aside from any investment which he had in the lot itself. The evidence supports a finding that his property could not be advantageously used for any other purpose than the construction of the apartment house, in view of the presence on the rear of the lot of the garage apartments which, as before pointed out, were constructed before the zoning ordinance went into effect.

The evidence fully supports a finding that the spirit of the ordinance will not be violated by permitting appellee to construct the apartment house. There were in the use district multiple dwelling houses other than the garage apartment on the rear of Lot 709, Federal Drive, and the other multiple dwelling units owned by appellee on the adjoining lot. The mere fact that other multiple dwelling units are in existence in the use district would not in and of itself warrant the granting of a permit of the kind requested by appellee. But it is a factor to be considered where the evidence shows, as it does in this case, unnecessary hardship.

The evidence supports the further finding that the construction of the apartment house will not depreciate the value of other property in the use district, but in fact will add to the value of such property, in view of the fact that at the present time the garage apartments on the rear of Lot 709, Federal Drive, with their [255 Ala. 86] open garages, detract from the appearance of the entire neighborhood.

The facts in this case fully justify the action of the board of adjustment and the circuit court of Montgomery County in granting a variance from the terms of the zoning ordinance under § 781, Title 37, Code 1940.

The judgment is affirmed.

Affirmed.

BROWN, FOSTER, LIVINGSTON, SIMPSON, and STAKELY, JJ., concur.

EXBJ

**Town of Orrville v. S & H Mobile Homes, Inc., 872 So.2d 856 (Ala.Civ.App. 2003)**

Page 856

**872 So.2d 856 (Ala.Civ.App. 2003)**

**TOWN OF ORRVILLE**

**v.**

**S & H MOBILE HOMES, INC., and Lula Powell.**

**2020406.**

**Court of Civil Appeals of Alabama.**

**August 8, 2003.**

**Page 857**

John E. Pilcher and E. Elliott Barker of Pilcher & Pilcher, P.C., Selma, for appellant.  
Collins Pettaway, Jr., of Chestnut, Sanders, Sanders, Pettaway & Campbell, L.L.C., Selma, for appellees.  
THOMPSON, Judge.

The Town of Orrville ("the Town") filed a complaint on May 10, 1999, against S & H Mobile Homes, Inc., and Lula Powell (hereinafter collectively referred to as "the defendants") seeking to enforce the Town's zoning ordinance prohibiting the placement of mobile homes on property within the municipal limits of the Town that is not specifically zoned for mobile-home use. On or about June 1, 1999, Powell requested a variance from the Town's zoning ordinance after the Town filed its complaint to enjoin the defendants from placing a mobile home on property within the Town's municipal limits that was not zoned for mobile home use; on June 19, 1999, the Town's Board of Adjustments ("the Board") voted unanimously to deny the variance. On July 7, 1999, the defendants answered the Town's complaint and counterclaimed, alleging, among other things, that the Town engaged in an intentional discriminatory practice by selectively enforcing the zoning ordinance. The defendants subsequently amended the counterclaim to appeal the decision of the Board pursuant to § 11-52-81, Ala.Code 1975.

On October 6, 1999, the parties filed a joint stipulation in which they agreed, in pertinent part, that all claims asserted by the defendants against the Town were dismissed

**Page 858**

except the defendants' statutory appeal of the denial of the variance. The parties further stipulated that the issues before the trial court were whether Powell violated the Town's zoning ordinance and whether the Board's denial of Powell's application for a variance was proper. The joint stipulation also listed as the defenses of the defendants the selective enforcement and the unconstitutional application of the Town's zoning ordinance.

The trial court held a hearing on September 25, 2001, and received ore tenus evidence. <sup>[1]</sup> On December 2, 2002, the trial court entered a final judgment in favor of the defendants, in which the trial court denied the Town's request to enjoin the defendants from placing a mobile home on Powell's property. In its judgment, the trial court determined that the Town had selectively enforced its zoning ordinance, and, therefore, had unconstitutionally applied the zoning ordinance. The Town filed a postjudgment motion that was subsequently denied by the trial court. The Town appealed to the supreme court, which transferred the case to this court, pursuant to § 12-2-7(6), Ala.Code 1975.

Generally, where the trial court receives ore tenus evidence, the trial court's judgment based on that evidence is entitled to a presumption of correctness and will not be reversed on appeal absent a showing that it is plainly and

palpably wrong. *Alverson v. Trans-Cycle Indus., Inc.*, 726 So.2d 670 (Ala.Civ.App.1998). However, that presumption of correctness applies to the trial court's findings of fact, not to its conclusions of law. *City of Russellville Zoning Bd. of Adjustment v. Vernon*, 842 So.2d 627 (Ala.2002). Further, the presumption favoring the judgment of the trial court has no application when the trial court is shown to have improperly applied the law to the facts. *Ex parte Board of Zoning Adjustment of Mobile*, 636 So.2d 415 (Ala.1994).

On appeal, the Town contends that the trial court erred by misapplying the law to the facts in the instant case. More specifically, the Town avers that the trial court exceeded its authority by granting a variance to the defendants even though the defendants failed to show that the enforcement of the variance would result in an unnecessary hardship.

Alabama law is clear and our courts have repeatedly recognized that variances should be granted sparingly and only under unusual and exceptional circumstances where the literal enforcement of the ordinance would result in unnecessary hardship. *Ex parte Chapman*, 485 So.2d 1161 (Ala.1986); *see also Board of Zoning Adjustment of Fultondale v. Summers*, 814 So.2d 851 (Ala.2001); *Ex parte Board of Zoning Adjustment of Mobile*, 636 So.2d 415 (Ala.1994); *Board of Zoning Adjustment of Mobile v. Dauphin Upham Joint Venture*, 688 So.2d 823 (Ala.Civ.App.1996); *Board of Adjustment of Gadsden v. VFW Post 8600*, 511 So.2d 216 (Ala.Civ.App.1987). "An 'unnecessary hardship' sufficient to support a variance exists where a zoning ordinance, when applied to the property in the setting of its environment, is 'so unreasonable as to constitute an arbitrary and capricious interference with the basic right to private property.'" *Ex parte Chapman*, 485 So.2d at 1162 (quoting McQuillin, *Municipal Corporations-*

#### Page 859

§ 25.167 (3d. ed.1983)). The determination of what constitutes an "unnecessary hardship" must be determined from the facts of the particular case. *City of Mobile v. Sorrell*, 271 Ala. 468, 124 So.2d 463 (1960).

The record reveals that, in 1974, the Town adopted a zoning ordinance; that ordinance limited the placement of mobile homes within the municipal limits to mobile-home parks, stating:

"Trailers, buses, mobile homes, or any other structure so built to be, or give the reasonable appearance to be, mobile in the character of its construction will not be permitted in any district for any use other than for the purposes of transportation and transportation enterprises except that mobile homes may be located within mobile home parks and subdivisions where same are permitted under this ordinance."

The zoning ordinance defined a mobile home as "[a]ny structure intended for, or capable of, human habitation, mounted upon wheels and capable of being driven, propelled, or towed from place to place without change in structure or design, by whatsoever name or title it is colloquially or commercially known. Removal of wheels and placing the structure on the ground, piers, or other foundation shall not remove such a vehicle from this definition; provided that this definition shall not include transport trucks or vans for sleeping of a driver or drivers. To be termed a mobile home, such structure shall not have less than 250 square feet of floor area."

In early 1999, Powell purchased property within the Town's municipal limits; the property was located behind a house owned by Powell's brother. The property was zoned as a combination of two districts--R-1 for residential district, and A-O for agricultural-open district. The zoning ordinance permits the following uses in an R-1 residential district:

"Single family dwellings; accessory structures (carports and utility rooms and structures used for residential storage); gardens; playgrounds; parks; public buildings, including public schools and libraries."

The following uses are permitted by the zoning ordinance for an agricultural-open district: "Single family dwellings, accessory structures, playgrounds, parks, tree farms, crop farming, grazing of livestock, temporary or seasonal roadside product stands, commercial greenhouses, and nurseries and farms, provided that the Building Inspector determines that such use of land would not have an adverse effect upon land use and property values in any zoning district within the Town."

At or about the time Powell purchased the property, Powell informed Gene McHugh, the Town's mayor and building inspector, of her intent to purchase a mobile home and to place it on the property. McHugh told Powell that the property she had purchased was not zoned for mobile-home use; Powell testified that she understood the limitation on the property provided for in the zoning ordinance.

Shortly thereafter, Powell purchased a double-wide mobile home, and, in April 1999, she attempted to move the mobile home onto her property. McHugh testified that he went to the property and informed the defendants that they could not place the mobile home on the property; at that time, the defendants did not set up the mobile home. Approximately one week later, the defendants placed the mobile home on the property. The Town sued the defendants seeking to enforce the zoning ordinance. Powell subsequently applied to the Board for a variance.

In support of her application for a variance, Powell stated that her mother was dying and that she needed a larger house in which she could care for her mother; according to Powell, her brother's house was inadequate. At the time of the hearing before the Board, Powell's mother had died and Powell asserted that her brother and children now needed a home. According to Powell and her brother, the neighbors did not object to her placing the mobile home on the property and the mobile home would not be visible from the street.

Following a hearing, the Board unanimously voted to deny Powell's request for a variance. Frank Williamson, the chairman of the Board, testified that Powell had failed to present evidence that demonstrated an unnecessary hardship if the zoning ordinance was applied to the property. According to McHugh, 14 people had applied for a similar variance from the zoning ordinance, and all 14 requests had been denied. Since the enactment of the zoning ordinance, the Town has granted a variance only to June Moore, a member of the Town Planning Commission. According to McHugh, Moore had a modular home and not a mobile home.

McHugh testified that, contrary to the defendants' assertion, the zoning ordinance had not been selectively enforced. Louvenia Lumpkin placed a mobile home on the Town boundary line. According to McHugh, Lumpkin was allowed to live in the mobile home until she built her house; Lumpkin lived in the mobile home for approximately 8 years. Steve Ery had a mobile home on his property that, according to Inez Anderson, Ery's sister, was placed on the property in approximately 1976. McHugh testified that Ery's mobile home was on the property prior to the enactment of the zoning ordinance, and, therefore, it was precluded from the application of the zoning ordinance.

Relying on evidence presented at trial that indicated that others were allowed to place mobile homes on property within the Town's municipal limits that was not zoned for mobile-home use, the trial court entered a judgment in favor of the defendants in which it determined that the Town had engaged in unlawful selectivity by granting only June Moore a variance and by excluding mobile homes merely because they were incompatible with housing in the affected area. Alabama courts have recognized that " 'a municipality may establish a comprehensive land-use plan and effectuate that plan through a scheme of comprehensive zoning regulations.' " *Ex parte City of Orange Beach Bd. of Adjustment*, 833 So.2d 51, 53 (Ala.2001), citing *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So.2d 154, 158 (Ala.2000). Therefore, when reviewing a zoning ordinance, this court is limited to determining whether the ordinance in question is arbitrary or capricious. *Id.*

In the instant case, the trial court based its judgment on what it perceived to be the selective application of the Town's zoning ordinance. Generally, a trial court's review of a decision of a board of adjustment is limited to only those issues that could be properly presented to the board. *See Bedgood v. United Methodist Children's Home*, 598 So.2d 988 (Ala.Civ.App.1992)(circuit court's review limited to issues presented to the board of adjustment). However, it does not appear from the record before us that Powell presented the issue of selective application to the Board or that the Board addressed the issue at the variance hearing. Moreover, the parties stipulated before trial that the issues before the trial court for review were limited to whether a violation of a zoning ordinance had occurred and whether the denial of the requested variance was proper.

Therefore, the dispositive issue on appeal is whether the enforcement of the zoning ordinance and the subsequent denial of a variance resulted in an unnecessary hardship to the defendants. " '[T]he unnecessary hardship which will suffice for the granting of a variance must relate to the land rather than to the owner [herself]. Mere personal hardship does not constitute sufficient ground for the granting of a variance.' " *Ex parte Chapman*, 485 So.2d at 1164 (quoting 82 Am.Jur.2d *Zoning and Planning* § 275 (1976)). Further, a " 'self-inflicted or self-created hardship may not be the basis for a variance or for a claim thereof.' " *Ex parte Chapman*, 485 So.2d at 1163 (quoting *Thompson, Weinman & Co. v. Board of Adjustments*, 275 Ala. 278, 281, 154 So.2d 36, 39 (1963)).

It is undisputed that Powell knew of the zoning restriction before she purchased the mobile home. Nevertheless, Powell purchased the mobile home without first seeking and securing a variance. In her brief on appeal, Powell asserts that it would have been futile to apply for a variance in light of McHugh's statement that the zoning ordinance prohibited the placement of the mobile home on the property. Regardless of the alleged futility in applying for a variance, Powell was aware of the zoning restriction but proceeded to place a mobile home on the property. Clearly, Powell created the hardship that she alleged existed, and, therefore, she may not be permitted to take advantage of it. *See Ex parte Chapman, supra; see also City of Russellville Zoning Board of Adjustment v. Vernon*, 842 So.2d 627 (Ala.2002)(holding trial court erred by granting variance from zoning restriction where appellee created hardship).

Moreover, the alleged hardship upon which Powell based her variance request did not relate to the property but, instead, related to her personal need for a larger house in order to care for her family. *See Ex parte Chapman, supra*

(hardship must relate to land and not to person). We find this to be an insufficient basis on which to grant a variance. We must conclude that, given the defendants' failure to demonstrate how the enforcement of the zoning ordinance would result in an unnecessary hardship, the trial court erred in granting the variance. The judgment of the trial court is, therefore, reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

YATES, P.J., and PITTMAN, J., concur.

CRAWLEY and MURDOCK, JJ., concur in the result.

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Notes:

[1] This is the second time the trial court tried the instant case. The case was initially tried, and a judgment was rendered, on February 25, 2000. The Town appealed that judgment to the supreme court. Following a failed attempt to procure the first trial transcript, the parties filed a joint motion with the supreme court seeking to vacate the February 25, 2000, judgment and to remand the case for a new trial; on February 9, 2001, that motion was granted.

Rec'd 8/6/11  
after mtg. adjourned  
JMK

PETITION TO CITY OF PRATTVILLE ZONING BOARD OF  
ADJUSTMENT

I (We) petition the zoning board to comply with the Prattville  
Zoning Ordinance in regards to the mobile home at 231 County Rd  
29, Prattville, Al 36067 on the .43-acre parcel 1.003. in a FAR  
zoning district.

Donna Salle'  
Donna Salle'

Carl R. Salle'  
Carl R. Salle'