

Meetings and Minutes

Regular, Special and Recess Meetings of the Board

The statutory requirements for regular meetings in counties having one court district are set forth in Miss. Code Ann. §19-3-11 (Supp. 1980), and for counties having two court districts, Miss. Code Ann. §19-3-13 (1972).

The statutory procedure for special and adjourned meetings is described in Miss. Code Ann. §19-3-19 (1972). At a regular meeting, the Board may adjourn to meet at any time it may determine upon by an Order on its minutes, which should set forth the purpose or agenda for the adjourned or recessed meeting. For special meetings, notice is required to be given for at least five (5) days by advertisement posted at the courthouse door or published in a newspaper of the county, which notice must be entered in full on the minutes of the special meeting.

In *Tally v. Board of Supervisors of Smith County*, 323 So. 2d 547, 548 (Miss. 1975), the Mississippi Supreme Court held that §19-3-11

furnishes constructive notice to the general public as to all regular meetings of Boards of Supervisors and no other notice is required, except where specifically required by statute or in unusual circumstances, in order for the Boards to conduct their business.

The Mississippi Supreme Court recently emphasized in *Burleson v. Hancock County*, 2003 WL22708159(Miss. App. Nov. 18, 2003) that it has required only a “substantial compliance,”and not a nullification of the action taken that was alleged to violate the Open Meeting Act.

Tally was followed in *Coast Materials Co. v. Harrison County Development Comm’n*, 730 So. 2d 1128, 1134 (Miss. 1998), where the Court held that the due process clause was not violated by providing a concrete manufacturer only ten days in which to appeal a county board of supervisors’ decision to sell land in an industrial district to a competitor. The Court found that since the board was a public body whose meetings were open to the public, the challenger “was on constructive notice of public board meetings [and] the lower court correctly found no due process violation stemming from lack of notice.”

In this regard, it should be pointed out that a section of the Mississippi Open Meetings Law was amended effective July 1, 1990, to provide the following requirements with reference to notice of recess, adjourned or special meetings, that provision being Miss. Code Ann. §25-41-13(1) (Supp. 1990):

Any public body which holds its meetings at such times and places and by such procedures as are specifically prescribed by statute shall continue to and no additional notice of such meetings shall be required except that a notice of the place, date, hour and subject matter of any recess meeting, adjourned meeting, interim meeting or any called special meeting shall be posted within one hour after such meeting is called in a prominent place available to examination and inspection by the general public in the building in which the public body normally meets. A

copy of the notice shall be made a part of the minutes or other permanent official records of the public body.

In *Shipman v. North Panola Consolidated School District*, 641 So. 2d 1106 (Miss. 1994), the Mississippi Supreme Court held that a school board's failure to record any notice of a special meeting, while a violation of the Open Meeting Act, did not void the actions of the school board taken at that special meeting. The Court stated:

While non-compliance may subject a Board to an injunction or a writ of mandamus, nowhere is it written that the lack of recorded notice of a special meeting nullifies all the actions taken.

The rationale for this holding was that it would be overly harsh to allow a technical shortcoming of the Board minutes to invalidate all of the Board's actions at that special meeting. In doing so, it emphasized that while the statutory rules governing Board minutes "are certainly not to be ignored, they do not require perfection." *Shipman* was recently followed in *Citizens For Equal Property Rights v. Board of Sup'rs of Lowndes County*, 730 So. 2d 1141, 1144 (Miss. 1999) ("CEPR argues that strict compliance is required as to notice and hearings for adoption of ordinances. However, in *Shipman v. North Panola Consolidated School District*, ... this Court stated that failure to comply with the Open Meetings Act did not make actions taken at the meeting in question a nullity. There was some mention at one of the meetings that CEPR had attempted to obtain relief in the chancery court concerning these violations, as provided in the Open Meetings Act, but no orders from any chancery court were made a part of this record. Under these circumstances we find no reversible error on this issue.")

Quorum and Fine for Non-Attendance

Three members of the Board constitute a quorum, and if that number does not attend on the first day of any regular, adjourned or special meeting, the Sheriff may adjourn the meeting from day to day until a quorum is present. Any member who fails to attend any meeting, having notice of it and without a sufficient excuse, is required to be fined \$5.00 for each day he is absent. Miss. Code Ann. §19-3-23 (Supp. 1990).

The Attorney General's office has previously issued opinions that official acts of a Board can only be taken at an official meeting with a majority of the members present, and that in the absence of a statute providing otherwise, a quorum is a majority of the authorized membership of the body and that a quorum cannot be present by way of a proxy. See opinions to Skelton, September 26, 1990; Seals, August 22, 1990; Abide, May 14, 1987; O'Reilly-Evans, October 7, 1992; and Griffith, August 31, 1995.

Board Minutes

Under Mississippi law, the minutes of the board of supervisors are the "sole and exclusive evidence of what the board did," and its acts must be evidenced by an entry in its minutes. The board of supervisors speaks and can act only by and through its official minutes. The reasoning behind this rule is to protect the board from being bound by the unauthorized acts of individual members of the board or an agent thereof. *Butler v. Board*

of Supervisors for Hinds County, 659 So. 2d 578, 579 (Miss. 1995). As the Mississippi Supreme Court held in *Smith v. State*, 223 So. 2d 657, 659 (Miss. 1969), cert. denied, 397 U.S. 1030 (1970):

[w]hen these minutes are signed by the President of the Board at the end of the monthly meeting, they become the action of the whole Board and not of the individual members.

Our highest court has consistently emphasized that “in order to be valid, official acts of Boards of Supervisors must be evidenced by orders or resolutions entered upon their minutes and duly signed as required by law.” *Butler v. State*, 241 So. 2d 832, 835 (Miss. 1970).

This solemn language was parsed quite effectively in *Community Extended Care Centers, Inc. v. Board of Supervisors of Humphreys County*, 756 So. 2d 798 (Miss. App. 1999), wherein the Mississippi Court of Appeals invoked equitable estoppel to hold that a technical omission by the Board of Supervisors and CECC in having a lease contract simultaneously spread across the minute book and filed in the land records would not invalidate the lease contract, especially where the execution of the lease contract was not an unauthorized act of the Board president. In this case, the minutes of the Board throughout the thirteen year period the lease contract has been in effect revealed sufficient evidence of the Board’s intent to be bound by the lease contract. Those facts evidenced by the minutes included the following: (1) a resolution had been unanimously passed in 1983 authorizing the Board president to execute in duplicate the original of the lease, (2) the lease contract had been filed in the land records of the chancery clerk’s office, (3) the Board had subsequently approved an amendment to the lease contract in 1990, (4) the amendment had been filed in the land records of the chancery clerk’s office and (5) the amendment had been entered in the Board minutes. These acts, according to the Court of Appeals, were sufficient “to ensure that no individual member of the Board had bound the Board without the benefit of the consent of the Board as a whole by executing the lease contract between CECC and the Board of Supervisors of Humphreys County.” *Id.* at *6. Moreover, the Court held that

the Board, after reaping the benefits of the lease for more than thirteen years, is not excused from its obligations under the lease contract because of CECC’s failure to have the lease contract filed simultaneously in the minute book and in the land records of the chancery clerk, and, applying the doctrine of equitable estoppel, the Board is barred from denying the validity and enforceability of the lease. *Id.*

The Court in *Community Extended Care Centers* distinguished *Butler v. Board of Supervisors for Hinds County*, *supra*, *Thompson v. Jones County Community Hosp.*, 352 So. 2d 795, 797 (Miss. 1977), *Warren County Port Comm’n v. Farrell Constr. Co.*, 395 F.2d 901 (5th Cir. 1968) (involving contractor who performed additional work orally ordered by engineer seeking payment from the board of supervisors), *Colle Towing Co. v. Harrison County*, 213 Miss. 442, 57 So. 2d 171 (1952) (involving payment sought for two barges rented under oral contract), *Burt v. Calhoun*, 231 So. 2d 496 (Miss. 1970) (involving county engineer seeking payment for services performed after contract had expired), and *Martin v. Newell*, 198 Miss. 809, 23 So. 2d 796 (1945) (involving purchaser of county-owned property seeking refund of purchase price when unrecorded deed created cloud on title), all of which dealt with a situation in which a contracting party was seeking payment from the board of supervisors under an oral contract or a tentative

contract in which the terms and conditions had not been fully set out and agreed to by the parties at the time of adoption by the board or an expired written contract. The Court pointed out that there was in this case a substantial entry on the minutes in the form of a resolution authorizing the board president to execute the original lease with CECC “that inferentially was physically presented to the Board and was recorded less than two weeks later,” and CECC was not attempting to force the Board to expend money based on an expired written contract or an oral contract whose express terms had not been recorded in the records of the chancery clerk. On the contrary, there was no dispute “that the Board, through its attorney, had actual notice that the lease contract was filed in the records of the chancery clerk. After reaping the benefits under the lease contract, the Board challenges its validity on a technical omission.” In concluding that equitable estoppel applied, the Court of Appeals held that:

the Board, after reaping the benefits of the lease for more than thirteen years, is not excused from its obligations under the lease contract because of CECC's failure to have the lease contract filed simultaneously in the minute book and in the land records of the chancery clerk, and, applying the doctrine of equitable estoppel, the Board is barred from denying the validity and enforceability of the lease.

Community Extended Care Centers indicated a willingness on the part of our appellate courts to recognize the need for pragmatic fairness in applying the minute book order rule and perhaps a relaxation of the absolute requirement that the principal rights and obligations of the parties be ascertainable by reading the Board's minutes. Indeed, the general law of Mississippi up until 1999 had been that a board of supervisors could act only through orders placed upon its minutes, and this requirement. The minute book order rule up until that time had been characterized as “so stringent that an order actually entered upon the minutes is nevertheless void if the minutes are not signed by the president of the board, or, in his ability, by the vice president for the board, within the time prescribed by law.” *Warren County Port Commission v. Farrell Const. Co.*, 395 F.2d 901 (5th Cir. 1968). Times change, and the common law changes with the times, as demonstrated by the following case decided by the Mississippi Supreme Court just a few months after *Community Extended Care Centers*.

Emergency Exception to Minute Book Order Rule

The Mississippi Supreme Court carved out an emergency exception to the requirement that all valid official acts of a board of supervisors be evidenced by an order, resolution, ordinance or other entry on the board's minutes. In *Bolivar County v. Wal-Mart Stores, Inc.*, 797 So. 2d 790 (Miss. 1999), the Court held that a county could be held monetarily liable for a town's purchase of emergency supplies during the 1994 ice storm that paralyzed the Mississippi Delta, even though the county board of supervisors had never authorized or approved the purchase, either before or after the town purchased the supplies allegedly with written authorization from an assistant director of the Civil Defense. Faced with two separate statutes dealing with the subject matter of emergency purchases, one contained in the Public Purchase Law, §31-7-13(k), and the other in the Mississippi Emergency Management Law, §33-15-17, the Court held that only the latter applied, and that under that statute there was no requirement for emergency purchases to be evidenced or authorized by a board order or other entry on the board minutes, whether before or after the purchase. In the lower court proceedings, the County Court had ruled in favor of the county, but the Circuit Court had reversed, and the

Supreme Court affirmed the Circuit Court, reasoning that the two emergency purchase statutes would not be read in *pari materia*:

It is obvious from the language of the Emergency Management Law found at Miss. Code Ann. § 33-15-17, that it is the controlling statute in times of emergency. The specific language of the Law states that counties “shall have the power to enter into contracts and incur obligations necessary to combat such disaster, protecting the health and safety of persons and property and providing emergency assistance to the victims of such disaster.” The statute states that these obligations may be incurred absent the formalities mandated elsewhere. Therefore, to require the Act to be read in *pari materia* with Miss. Code Ann. §31-7-13(k), which is found in Chapter 7 of the Mississippi Code entitled “Public Purchases,” would be to defeat the purpose of the Act. Miss. Code Ann. §31-7-13(k) deals with emergency purchases and allows some leeway for those making the purchases when circumvention of the statutory procedures would be beneficial to the governing authority. That section requires that the statutorily mandated procedures be delayed instead of being forgiven as the Law allows. The Law recognizes that in emergency situations the statutorily mandated procedures need not be complied with because of the urgency of the situation. The “Public Purchases” section, Miss. Code Ann. §31-7-13(k), has been discussed by this Court in terms of purchases of commodities and repair contracts once the emergency situation threatening harm to persons and property has passed. For example, *in State ex rel. Pittman v. Ladner*, 512 So.2d 1271 (Miss.1987), a tornado struck a Hancock County elementary school. The Hancock County School Board met and declared an emergency. This Court discussed Miss. Code Ann. §31-7-13(k) in a footnote as the “emergency procedures provision.” 512 So.2d at 1274-75 n.l. However, in *Pittman*, the elementary school building had been destroyed and the emergency was getting the children back into school so that their education would not be delayed. Whereas in the case sub judice, the emergency was getting food, water, blankets, electricity and other necessities to the citizens of Bolivar County--those in Winstonville, as well as those in surrounding areas. Although this Court has referred to the “Public Purchases” section of the Mississippi Code as the emergency purchases section, the Emergency Management Law deals specifically with emergency situations and it cannot be read in *pari materia* with other statutes, especially where it specifically disregards the governance of other statutes. See Miss. Code Ann. §33-15-17(b).

Publication of Proceedings

The Board is required to either publish its proceedings each month in a newspaper published in the county under Miss. Code Ann. §19-3-33 (1972), or a synopsis of the proceedings in the form of an abstract or summary of the minutes, under the cumulative method authorized by Miss. Code Ann. §19-3-35 (Supp. 1980).

Signing of Minutes

Miss. Code Ann. §19-3-27 (Supp. 1989) and Miss. Code Ann. §25-41-11 (Supp. 1981), both quoted below, should be read together. Cf. *Shipman v. North Panola Consolidated School District*, *supra* (While late signing of school board minutes was a violation of the statute, it was not such an error as to

invalidate actions of the school board taken at that meeting. “Strictness of action, like strictness of verbiage, should also not be required.”).

Section 19-3-27 prescribes the duties of the Clerk of the Board of Supervisors and provides for the signing of the minutes, as follows:

It shall be the duty of the Clerk of the Board of Supervisors to keep and preserve a complete and correct record of all the proceedings and orders of the Board. He shall enter on the minutes the names of the members who attend at each meeting, and the names of those who fail to attend. He shall safely keep and preserve all records, books and papers pertaining to his office, and deliver them to his successor when required. The minutes of each day’s proceedings shall either (a) be read and signed by the President or Vice President, if the President is absent or disabled so as to prevent his signing of the minutes, on before the first Monday of the first Monday of the month following the day of adjournment of any term of the Board of Supervisors; or, (b) be adopted and approved by the Board of Supervisors as the first order of business on the first day of the next monthly meeting of the Board.

Section 25-41-11 is a section of the Open Meetings Law which makes the following provision with regard to minutes of meetings of a public body:

Minutes shall be kept of all meetings of a public body, whether in open or executive session, showing the members present and absent; the date, time and place of the meeting; an accurate recording of any final actions taken at such meeting; and a record, by individual member, of any votes taken; and any other information that the public body requests be included or reflected in the minutes. The minutes shall be recorded within a reasonable time not to exceed thirty (30) days after recess or adjournment and shall be open to public inspection during regular business hours.

The signing of the board minutes was a central issue in *House v. Honea*, 799 So.2d 882 (Miss.2001), where the Board of Supervisors granted a private right of way across servient land to a landlocked land owner, from which the owner of the servient land appealed by bill of exceptions which were not timely filed with the Circuit Court. While the owner of the servient land challenged the board’s determination that the land was locked and that the landlocked land owner was unable to obtain a reasonable right of way of all surrounding parties, and was thus entitled to a private right of way, the records show that the minutes approving the granting of the private right of way were signed December 14, 1999, the minutes adjourning that meeting were dated December 30, 1999, after which the defendants did not file their Notice of Appeal and bill of exceptions until January 14, 2000, more than ten (10) days after adjournment. The Defendants, owners of the servient land, proffered testimony of the County Administrator that the minutes were not actually signed until January 4, 2000, and argued that filing of the Bill of Exceptions on January 14, 2000 would thus be timely. The Mississippi Supreme Court rejected this argument, noting that the record before it showed the minutes were approved by the Board’s action on December 14, 1999 and the meeting was finally adjourned on December 30, 1999, stating:

we are hard pressed to accept the testimony of the County Administrator which is in direct conflict with the official documents, and which is offered by a witness who was not a signatory to the documents. There is no conflict between when the minutes were signed and when the meeting was adjourned.

The issue in *House v. Honea* was whether the notice of appeal and the bill of exceptions were timely filed. In *Bowen v. DeSoto County Board of Supervisors*, 852 So.2d 21 (Miss. 2003), the Mississippi Supreme Court distinguished House on this basis, noting that the Court in that case did not separately address the bill of exceptions issue, that is, whether jurisdiction to hear an appeal from a board of supervisors would lie in an appellant timely filed a notice of appeal without also filing within ten days a document technically labeled “bill of exceptions.” In *Bowen*, the appellant challenging the action of the board of supervisors “properly and timely filed a notice of appeal.” The Court held that action was sufficient to vest jurisdiction in the circuit court even in the absence of a separate “bill of exceptions,” and the circuit court should have permitted the appellant “a reasonable time within which to file the bill of exceptions.”

Content of Minutes

Oktibbeha County Board Attorney William H. Ward made the following helpful comments and observations regarding preparation of board minutes in a seminar presentation almost 15 years ago:

The Board Attorney has a professional responsibility for the content of the board minutes. While the statute provides that the clerk of the Board will prepare and handle the minutes of the Board, the content of the actual orders and resolutions constitute the only legal and audit protection that our five Board members have.

To some extent there is a difference in philosophy as to how full the minutes should properly be, both as to the detail contained in the orders and resolutions and as to what items that should go into the minutes. These questions are primarily legal and audit questions and are proper questions for the Board Attorney, subject to, of course, the direct instructions of the Board itself.

My personal view is that the Board Attorney should either draft the orders and resolutions or review them carefully before they go into the minutes. Since the auditors review the minutes at the beginning of each audit, it is not a bad idea to detail the statutory authority for what is being done by Code section number.

Reviewability of Factual Findings

The importance of the above observations cannot be over-emphasized. The factual findings and determinations of a Board of Supervisors are subject to limited judicial review and scrutiny under the same standard that applies in the case of other inferior tribunals whose actions have been appealed. That standard was described by the Mississippi Supreme Court in *Cook v. Board of Supervisors of Lowndes County*, 571 So. 2d 932, 936 (Miss. 1990):

Courts may interfere only where the action of the board is arbitrary or capricious and is without support in the substantial credible evidence.

Cook was construed in *Newell v. Jones County*, 731 So. 2d 580 (Miss. 1999), a challenge by county residents to the board's decision to enter into garbage collection contract. The Court also was provided the opportunity to clarify just what is and is not "arbitrary" and "capricious," as set forth in *Miss. Department of Health v. Southwest Mississippi Regional Medical Center*, *infra*. Concluding that the statutory provision for appeal of decision by a county board of supervisors was both mandatory and jurisdictional, and there was no appellate jurisdiction since the challenge was untimely, the Court affirmed the lower court's dismissal of the complaint. In their appeal, the Plaintiffs argued that where a complaint alleged that the actions of the Board failed to comport with law, a different standard of review applied and the challenging party is thus entitled to a de novo proceeding. The Court rejected this argument:

In support of this argument the Plaintiffs cite *Cook v. Board of Supervisors of Lowndes County*, 571 So.2d 932 (Miss.1990). In *Cook*, this Court held that where a circuit court acts in its appellate capacity in reviewing the decisions of municipal authorities it is contemplated that the municipal authority conducted a hearing. Where municipal authorities fail to hold any kind of hearing, a party with standing is entitled to proceed de novo. *Cook*, 571 So.2d at 934. Allowing the parties to proceed de novo does not, however, mean that they are relieved from complying with the procedural prerequisites to appeal under the statute (emphasis added).

The party challenging the Board action in *Cook* filed a petition for writ of prohibition within the ten (10) days prescribed by the Statute. *Cook*, 571 So.2d at 934. This Court stated, "[i]n any event, Cook filed in Circuit Court within ten days and, if it were necessary, we could simply treat Cook's petition ... as an appeal." *Id.* Substance should prevail over form regardless of the label placed on the documents filed with the circuit court. *Id.* The holding in *Cook* turned, not on the nature of the violation the Board is alleged to have committed, but rather on the fact that a timely challenge to the Board's action had been filed. As discussed *supra*, Plaintiffs here failed to file any challenge to the Jones County Board's action within the ten (10) days prescribed by Miss. Code Ann. §11-51-75. Therefore, the action was properly dismissed as untimely.

The terms "arbitrary" and "capricious." while not susceptible of a precise definition or mechanical application, were defined this way...:

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,--absolute in power, tyrannical, despotic, non-rational,--implying either a lack of understanding of or a disregard for the fundamental nature of things.

"Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of

understanding of or a disregard for the surrounding facts and settled controlling principles....

Accord, *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 322 (Miss. 1992), quoting *Miss. State Dep't of Health v. Southwest Miss. Reg'l Med. Ctr.*, 580 So. 2d 1238 (Miss.1991).

The Court has repeatedly emphasized that the standard of review of an order of a Board of Supervisor is the same standard which applies in appeals from decisions of administrative agencies. *Ladner v. Harrison County Board of Supervisors*, 793 So.2d 637(Miss. 2001). See *Malone v. Leake County Board of Supervisors*, 843 So.2d 141 (Miss. 2003) (recognizing that where a County fails to hold any kind of hearing, a party with standing is entitled to de novo review). See *Brandon v. Clairborne County*, 828 So.2d 202 (Miss. App. 2001)(“It is the same standard that is applied in appeals from decisions by administrative agencies and requires a finding by the reviewing Court that the Board’s decision was unsupported by substantial evidence, was arbitrary or capricious, was beyond the agency’s scope of powers, or violated the constitutional or statutory rights of the aggrieved party before it may be altered on appeal”).

The action of a board of supervisors in setting a standard 25% assessment for an attorney’s fee to be paid by a delinquent taxpayer in the amount of \$79,912, where the taxpayer did not pay its 1997 personal property ad valorem taxes in the amount of \$322,580.97 by the statutory February 1 deadline, was held to be arbitrary and capricious in *Harrison County Board of Supervisors v. Carlo Corp.*; No. 2000-CA-02050-SCT (Miss. 2002). The fee was assessed against the taxpayer without the intervention of a collection agency and was payable to the county pursuant to Miss. Code Ann. § 19-3-41(2). It did not exceed the technical parameters of the statute, which authorized the county to assess a fee up to 25%. The Mississippi Supreme Court nonetheless held that the Legislature in enacting this 25% statutory assessment provision “could not have intended to throw reasonableness out the window by setting a maximum allowable fee rate,” and that this was a case where “no guidelines exist, and the result is ad hoc decisionmaking at its worst.”

The particular facts of a case involving allegations of arbitrary and capricious conduct will often demonstrate whether and to what extent a county board of supervisors has taken action and made a decision that (1) rests on a substantial factual basis and (2) is supported by a firm legal foundation. The following case provides an excellent example of how a board’s decision made in the context of public controversy and countervailing economic demands can withstand a challenge of arbitrariness and capriciousness. The actions of a board of supervisors were held lawful and statutorily authorized in an appeal by bill of exceptions in *Mississippi Waste of Hancock County v. Board of Supervisors of Hancock County*, 818 So.2d 326 (Miss. 2001). The Board suspended contract negotiations between Mississippi Waste and the Hancock County Solid Waste Authority amidst vocal opposition by a group of county citizens calling itself “Citizens for Responsible Dumping.” The citizens group opposed the location of a privately owned waste facility and presented to the Board a petition for a special election under Miss. Code Ann. § 19-3-55 (Supp. 2000), but the Board declined to take unilateral action on the issue. It called instead for a county-wide special election. Mississippi Waste challenged the Board’s authority to call such an election by filing a bill of exceptions under Miss. Code Ann. § 11-51- 75 (1972).

The Court rejected Mississippi Waste's argument that § 19-3-55, as applied and written, was unconstitutional, holding as follows:

1. The circuit court's disposition of the matter was not contrary to precedent established under *Board of Supervisors, Harrison County v. Waste Management of Miss.*, 759 So. 2d at 397-99, an earlier case in which Harrison County had proposed an ordinance which would restrict the use of land owned by the holder of a landfill permit such that landfill use would not be permitted. In that case, the Court had held that the county's enactment of the ordinance, without any evidentiary basis and without notice or hearing, was arbitrary and capricious and beyond the county's lawful authority. In the instant case, however, the ordinance was not enacted without notice or evidentiary basis, nor did the Board act unilaterally, but pursuant to the will of the electorate. Moreover, the Board could not ignore a petition signed by the citizens of the county, and if it had refused to act on the petition, it could have been compelled by the circuit court to act under a writ of mandamus. Finally, the action of the Hancock County Board, unlike the Board's action in the Harrison County case, was not an improper attempt at land use regulation, nor had the Hancock County Board failed to follow the relevant zoning statutes, action which in the Harrison County case resulted in the proposed ordinance being found invalid.

2. Mississippi Waste was not denied equal protection under the Fourteenth Amendment of the United States Constitution, since it lacked a contract to operate a landfill, it was still in the negotiating stages with the Hancock County Solid Waste Authority, no formal contract had been entered into by the parties, and thus in the absence of a liberty interest, there was no basis for its claim that it was denied equal protection.

3. The stated goal of the petition, to disallow the acceptance of out-of-state waste, was lawful, since the county, "being composed of its citizens, is free to set restrictions on whose waste they will accept."

4. The Board acted with proper jurisdiction in calling an election under Miss. Code Ann. § 19-3-55 (Supp. 2000). In rejecting Mississippi Waste's contention that the Board did not have jurisdiction to call an election, the Court noted preliminarily that in determining jurisdiction, a board of supervisors must simply enter an order in its minutes which indicates that it has jurisdiction of the matter, and an order of a board of supervisors which does not affirmatively show the facts necessary to give jurisdiction to the board is *void*. While Mississippi Waste argued that the Board had not entered such an order, the Court found that the Board's minutes did contain an opinion of the Attorney General that the Board did in fact have jurisdiction to call an election under these circumstances, that the process of developing, constructing and operating a regional solid waste landfill begins on the local level, and that plan approval requires the adoption of the plan by resolution of the Board of Supervisors. According to the AG Opinion, based largely on *Golden Triangle Regional Solid Waste Management Authority v. Concerned Citizens Against the Location of the Landfill*, 722 So. 2d 648, any resolution of the Board approving a new or amended plan would be subject to the provisions of § 19-3-55.

5. The Board acted as required by § 19-3-55, and nothing in the record supported the allegation that its actions were arbitrary and capricious, leading the Court to conclude:

As mentioned earlier, once a petition is presented to the Board following an affirmative determination of jurisdiction, the Board has no choice but to proceed as § 19-3-55 directs. *Gill*, 226 So. 2d at 918. Had the Board refused to act on the petition, we would be justified in concluding that their inaction amounted to an arbitrary and capricious decision, and thus a denial of due process of law. *Id.* at 920. Here, however, the Board acted as required by statute. Nothing about their actions can be considered arbitrary or capricious.

§11-51-75 as Exclusive Remedy

Malone v. Leake County Board of Supervisors, 841 So.2d 141 (Miss. 2003) was an appeal by bill of exceptions in which Malone, the unsuccessful bidder for a county ambulance contract, challenged the board of supervisors' decision and findings regarding the adequacy of ambulance service through privately owned companies, and specifically its decision to award the contract to another company, Carthage Ambulance Service, under Miss. Code Ann. § 41-55-7(1). In affirming, the Court rejected Malone's argument that because the Board had made no finding that Malone was not an adequately run private ambulance service, it acted erroneously in inviting bids and subsequently entering into a contract with another ambulance service provider. The Court reasoned that statute clearly mandates that a county show a preference to a private provider of ambulance service over a public provider of ambulance service, but "the statute does not prohibit the Board from awarding the contract to another private entity because there is an existing adequate privately run ambulance service that has previously been awarded the contract." In this case, the Board showed a preference to a private provider of ambulance service by awarding the contract to Carthage Ambulance Service, and in making its decision it acted in compliance with the statute. The Court also rejected Malone's contention that § 11-51-75 was not her exclusive remedy and that a de novo tort action was the appropriate remedy, holding that Malone's exclusive remedy under the statute was to appeal the decision of the Board to the circuit court. Finally, the Court rejected Malones' argument that she was entitled to damages in a tort action based upon the ultra vires acts of the Board by unlawfully approving a contract outside the scope of its authority, stating:

An ultra vires act is one which is beyond the powers conferred upon a county by law. See *Biloxi Firefighters Ass'n v. City of Biloxi*, 810 So.2d 589, 593 (Miss. 2002). The statute accords the Board the right to contract for ambulance service with an adequate privately run ambulance company. Miss. Code Ann. § 41-55-7 (Rev. 2001). Because the Board was acting within the confines of its authority under the statute, we find that this issue lacks merit.

Sliding Scale Appellate Review

The courts have long recognized that the board of supervisors is a body which exercises judicial, legislative and executive powers, and that "an appellate court's level of review of an action of a board of supervisors will differ depending upon the category of the power exercised in that action." *Wilkinson County Board of Supervisors v. Quality Farms, Inc.*, 1999 WL 540894 (Miss. App.1999). In *Wilkinson County*, the Mississippi Court of Appeals put it this way:

It is clear that when a board of supervisors exercises a legislative power that is reviewed on appeal, the court to which the appeal is taken shall only inquire into whether or not the action is reasonable and proper according to the facts disclosed, that is, whether the decision is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the board to make, or whether it violates any constitutional right of the complaining party. *Ridgewood Land Company v. Simmons*, 243 Miss. 236, 247, 137 So.2d 532, 536 (1962). *Miller v. Board of Supervisors of Forrest County*, 230 Miss. 849, 855, 94 So.2d 604, 606 (1957). The level of review swings to the other end of the spectrum for matters such as tax appeals, which are tried by the circuit court “de novo,” *Lenoir v. Madison County*, 641 So.2d 1124, 1128 (Miss.1994). For cases adjudicative in nature, as is the case sub judice, the level of review is proof by a preponderance of the evidence. *Barnes v. Board of Supervisors, De Soto County*, 553 So.2d 508, 510-11 (1989). See *Bowen v. De Soto County Board of Supervisors*, 852 So.2d 21(Miss. 2003), for a good discussion of the Standard of Review on a Bill of Exceptions, the Court noting that a bill of exceptions is merely the appellate record and is not necessary to commence an appeal, and, further, the actual filing of the Bill of Exception with the Circuit Court within ten (10) days is not an absolute pre-requisite to vest the Circuit Court with Jurisdiction as long as some formal pleading indicating an intention to appeal is filed within ten (10) days.

Zoning and Land Use Challenges

During the past few years the Mississippi Supreme Court has had a number of occasions to address a variety of zoning law issues and challenges to local government decision making as it relates to land use, solid waste and economic development. *Board of Supervisors of Harrison County v. Waste Management of Mississippi, Inc.*, discussed above, provides a good example of such a challenge and the ever-present NIMBY factor, particularly as it relates to landfill siting. *Citizens Association for Responsible Development, Inc. v. Conrad Yelvington Distributors, Inc.*, No. 2002-CC-00623-SCT (Miss. 2003), provides another. Here a group called Citizens Association for Responsible Development, Inc., voicing concerns over noise impacts, silica dust and adverse impacts on property values attributable to vibrations, challenged the actions of the Harrison County Board of Supervisors and the Harrison County Development Commission authorizing the sale and conveyance of county property in Long Beach Industrial Park, to Yelvington for use as an outdoor aggregate distribution plant. The citizens group challenged the action as arbitrary and capricious, bringing its appeal to the circuit court by bill of exceptions. The Court first addressed what it characterized as the citizens group’s attempt to impose a zoning regulation upon the County by citing the resolutions that authorized the creation of the industrial part. It rejected the claim of the citizens group that the decision by the County to allow Yelvington's outdoor aggregate distribution terminal into a light industrial park violated the land use provisions of the ordinance creating the Long Beach Industrial Park, holding that mere recitals contained in the resolution regarding the feasibility of the acquisition and creation of the Long Beach Industrial Park did not rise to the level of a “policy statement, ordinance, or regulation that is officially adopted and promulgated by the County's lawmaking officials,” and that the County never adopted a resolution, covenant or other regulation specifically implementing land use restrictions. The Court then addressed the issue whether the county had provided a sufficient explanation for the decision to approve the Yelvington transaction. In concluding that the findings of the county were not arbitrary or capricious and were

supported by substantial evidence, the Court relied on a rebuttable presumption in favor of an agency's decision, and placed the burden of proving to the contrary on the challenging party, holding in this case that the record showed (1) the county board of supervisors adequately considered complaints and concerns of the citizens group as well as other members of the community, (2) allowed them to express their concerns and objections as three meetings, and (3) after a full year of meetings, investigations by experts and a personal visit to the Yelvington plant, decided that the sale of the property to Yelvington would be in the County's best interest. Finally, the Court concluded that the issue of whether there were sufficient findings in the record that noise impacts were minimal or were adequately mitigated was fairly debatable and, moreover, the citizens group had presented no evidence to refute the findings of the County's expert who had concluded with respect to claims of health risks associated with silica dust that "in terms of health risks, ... the area proximate to the Yelvington facility is more or less equivalent to walking on the beach or living near a road covered with stone aggregate."

The county's directive to remove a riding arena and attendant facilities from the plaintiff's property was reversed and vacated by the circuit court in *Hinds County Board of Supervisors v. Leggette*, 833 So.2d 586 (Miss. App. 2002). The circuit court found that the county's action, on the recommendation of its Planning Commission Board, was arbitrary and capricious, when the county directed the destruction of the arena. The county's action, according to the circuit court, amounted to "nothing more than selective enforcement of the zoning regulations" and was arbitrary and capricious. The Mississippi Court of Appeals affirmed, concluding that a private, non-profit horse arena in an agricultural district is a permitted agricultural use under Miss. Code Ann. § 17-1-3, and that the county's resolution and decision seeking to remove the riding arena and attendant facilities from the subject property was beyond the power of the Board to make and violated plaintiff's statutory right to erect without a permit a private non-profit horse arena for agricultural use on his unincorporated property as provided in Miss. Code Ann. § 17-1-3. The Court reasoned that the plaintiff's horse arena was a private non-profit recreational facility which was permitted under the zoning ordinance, there was no evidence that it was being operated for-profit in violation of the ordinance, and the plaintiff had a statutory right to erect such a structure in an agricultural district and to operate his private arena as a non-profit arena only in conformance with the regulations of the county's zoning ordinance.

See generally *Citizens for Equal Property Rights v. Board of Supervisors of Lowndes County*, 1998 Miss. App. LEXIS 172 (Miss. App. 1998)(In affirming the circuit court's finding that an airport zoning ordinance was validly enacted, the Mississippi Court of Appeals also concluded that the Open Meetings Act is applicable to a County Zoning Commission, which in this case substantially complied with Section 25-41-11 by publishing the time and place of all Zoning Commission meetings in the local paper. The intent of Section 61-7-13, while unclear regarding the form of preliminary and final reports, was satisfied by a public hearing held prior to the Zoning Commission's recommendation to the Board of Supervisors and a public hearing prior to the Board of Supervisors' action on the Zoning Commission's recommendation).

Nunc Pro Tunc Orders

The purpose of a nunc pro tunc order is to correct evidence a previous action by the Board which,

either through mistake or neglect, was not accurately recorded in the minutes.¹ *See Oliphant v. Carthage Bank*, 80 So. 2d 63 (Miss. 1955); *Board of Supervisors of Lafayette County v. Parks*, 96 So. 466 (Miss. 1923). In these cases the Mississippi Supreme Court held that the Board of Supervisors has no authority to enter an Order Nunc Pro Tunc which attempts to give an order effect retroactively to a former term. *In the Matter of Adoption of A.N.T.*, 843 So.2d 690(Miss. 2003), while not involving local government per se, provides a good general discussion of nunc pro tunc Orders. The Court in that case noted that the term simply means “now for then”, and merely describes the inherent power of a Court or Judicial body to make its records speak the truth, ie, to record what is actually done but has not been recorded. Nunc Pro Tunc signifies now for then, or in other words a thing is done now, which has the same legal force and defect as it did at the time when it ought to have been done.

In *Huey Stockstill, Inc. v. Hales*, 730 So. 2d 539 (Miss. 1999), an unsuccessful bidder on bridge reconstruction project sued the County Board of supervisors and successful bidder, contending that the Board had failed to comply with requirements of bid purchase statutes and that the bid-letting process was so defective as to render resulting contract void. The facts are somewhat involved, but reveal a proper application of the nunc pro tunc concept in the context of a hotly contested bidding war. The Board had advertised for bids to be submitted on a project to reconstruct a bridge, and eight bids were submitted. At the time the bids were submitted, a former County supervisor was employed by one of the bidders, Stockstill, as a bid estimator, and had assisted in preparing Stockstill’s bridge bid. The supervisor’s term as supervisor had expired just two months earlier, and thus he had been out of office for less than a year when the bid was prepared and submitted. To address possible conflicts of interest, the Board sought and obtained an advisory opinion from the Mississippi Ethics Commission addressing the propriety of the Board accepting Stockstill’s bid in the event that Stockstill was the lowest bidder. The advisory opinion concluded that under Miss. Const. §109 and Miss. Code Ann. §25-4-105(2) (1991), a former County supervisor, as an employee of a corporation, had a prohibited interest in all contracts with the corporation authorized by the County during his term and for one year thereafter.

As fate would have it, when the bids were received, the lowest bid was that of Stockstill. Two days after submitting its lowest bid, Stockstill shifted the supervisor’s employment to a separate company and informed the County Board attorney that the supervisor was no longer employed by Stockstill. The Board took all bids under advisement pending the result of a second advisory opinion request to the Ethics Commission. The second lowest bidder, moreover, informed the Board that “any award of the contract to Stockstill would violate the constitutional and statutory conflict of interest provisions, and that any contract made in violation of these provisions would be null and void.” *Id.* at 541. The second opinion was received from the Ethics Commission, stating that whether or not the relation between the two companies was sufficient to cause the former supervisor to have a direct or indirect conflict of interest would require judicial review, but that “the former supervisor being employed by the company that has the same owners and the same physical and mailing addresses as [Stockstill] has the potential of creating suspicion among the public and reflecting unfavorably upon the County,” *Id.* at 541, especially since the bid was submitted while the former supervisor

¹*Chaffin v. Chaffin*, 437 So. 2d 384 (Miss. 1983), citing *Green v. Myrick*, 177 Miss. 778, 171 So. 774 (1937)(“Courts may by *nunc pro tunc* orders supply omissions in the record of what had previously been done, and by mistake or neglect not entered.”).

was still employed by Stockstill. According to the Court,

At a meeting on May 10, 1996, the Board voted to award the contract to Columbia, the second lowest bidder. After the meeting, the clerk of the Board drafted minutes explaining that “[t]he lowest bid submitted for said project was Huey Stockstill, Inc., Picayune, Mississippi, but was rejected by this Board because of a problem with the Ethics Commission.” On May 14, 1996, Stockstill filed suit to enjoin the letting of the bridge contract to Columbia as the second lowest bidder. Stockstill sought a declaration by the court that the Board had violated Mississippi law by its “wilful refusal to award the subject contract to Plaintiff, Huey Stockstill, Inc.” On June 6, 1996, the Board filed its Answer as well as a motion to dismiss. The Board alleged that because the action was an appeal of a decision by a Board of supervisors, Miss.Code Ann. §11-51-75 (1972) required the plaintiff to file a bill of exceptions in order to vest the circuit court with subject matter jurisdiction. The Board also argued that Stockstill had failed to join Columbia as a necessary party under Miss. R. Civ. P. 19. On the same day, the Board also filed a separate motion for summary judgment, arguing that it was clearly barred by state ethics laws from awarding the contract to Stockstill. A hearing was held on the joinder issue on June 7, 1996, and Columbia was subsequently joined as a party.

On June 21, 1996, Stockstill moved to amend the complaint to include its Statement of Facts in Lieu of Bill of Exceptions. On July 30, 1996, the court entered an order granting leave to amend, and denying the Board’s motion to dismiss and motion for summary judgment. In denying summary judgment, the court heeded Stockstill’s contention that the Board had not complied with a provision in the state’s public purchases law which requires the Board, when accepting a bid other than the lowest bid actually submitted, to “place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best *bid*.” Miss. Code Ann. § 31-7- 13(d)(i) (Supp.1996). The court remarked that “this requirement is no mere formality that can be ignored by the Court,” and thus considered the issue one of disputed material fact precluding summary judgment. In response to the court’s statement, the Board, on August 21, 1996, entered a nunc pro tunc order amending its minutes to reflect the complete proceedings of its meeting on May 10, 1996 and to comply with §31-7-13.

The Board’s nunc pro tunc amendment of the meeting minutes in Stockstill was held by the trial court to be proper and related back to the date of the Board’s original meeting. Moreover, the lower court properly found that the actions of the Board granting the project to second lowest bidder based on ethical concerns were not arbitrary and capricious. The supervisors followed at least spirit of bid process requirements and adhered in most respects to the letter of the law. The Mississippi Supreme Court affirmed, reasoning that the Board’s amended minutes reflected the actual occurrences at the earlier meeting on May 10, 1996 in which it voted to award the contract to the second lowest bidder, as well as the Board’s original rationale for making that award. Both the trial court and the Mississippi Supreme Court not only concluded that actions of the County Board of supervisors were not arbitrary and capricious, but that the Board had “correctly balanced its responsibilities under the bid law and those under the law regarding ethics and conflicts of interest.” *Id.* at 541. The Court had this to say about the nunc pro tunc order:

Boards of supervisors have the general power to alter or amend their orders. See Miss. Code Ann. §19-3-40 (1995). In *Walters v. Validation* of \$3,750,000.00 School Bonds, 364 So.2d 274, 276 (Miss.1978), this Court implicitly recognized that a governing body may, at a subsequent meeting, amend the minutes of the prior meeting to reflect what actually occurred on the first occasion. *Id.* at 544.

[T]he rule that a governing body may amend its minutes to speak the truth is in accord with other jurisdictions. The general rule as to the amendments of the minutes of council meetings is stated in *City of Guntersville v. Walls*, 252 Ala. 66, 39 So.2d 567 (1949):

A municipal council may, at a subsequent meeting, if no intervening rights of third persons have arisen, order the minutes or record of its own proceedings at a previous meeting to be corrected according to the facts, so as to make them speak the truth, although the record has once been approved. On the other hand, an erroneous record of the proceeding of a municipal council cannot be corrected or amended to the destruction of rights acquired under it in good faith, without notice of the error....

Id. 39 So.2d at 569. See also *Estes v. City of Gadsden*, 266 Ala. 166, 94 So.2d 744, 747 (1957) (ordinance that is invalid because of noncompliance with statutory requirements when first enacted may be validated by subsequent amendments of the minutes). Thus, a governing body such as a Board of supervisors or city council, with proper notice to any party who acquires rights under the original minutes, can amend those minutes to ensure that they speak original truth or further explain the original rationale of the action. Such amendments may not be used to invent new reasons for the governing body's action or collaterally attack a particular vote.

In the present case, there is ample evidence that the amended minutes reflect the actual occurrences at the meeting on May 10, 1996 as well as the Board's original rationale for awarding the bridge contract to Columbia. The Board's request for two separate opinions from the Commission makes it clear that ethical concerns were paramount in the Board's decision-making process. The original minutes, while admittedly sparse, did recite the ethical "problem" as the reason for rejecting Stockstill's *Id.* Finally, the only witness at trial--an employee of Stockstill who was present at the original meeting of the Board on May 10--admitted that "there was a great deal of discussion about this bridge project and about the ethic [sic] opinion."

We conclude, therefore, that the circuit court properly found that the nunc pro tunc amendment of August 21, 1996 was proper and that it related back to the date of the Board's original meeting on May 10, 1996. *Id.* at 544.

The Attorney General's office has also issued a number of opinions on the subject of nunc pro tunc orders:

•AG Op No. 2003-0096 to Young, March 7, 2003, addressed the question whether a Board of Supervisors could hire election commissioners on a part-time basis with a nunc pro tunc order, where the election commissioners had performed work outside the parameters of the County Election Commission, upon request of the Circuit Clerk, and the election commissioners then submitted a bill to the board of supervisors for payment, requesting that the Board of Supervisors hire them through the use of a nunc pro tunc order, to retroactively approve the election commissioners' redistricting work. This Opinion stated that in the absence of a finding, consistent with fact, that a board of supervisors previously and lawfully employed one or more election commissioners on a part-time basis to perform certain redistricting tasks that are over and above their regular duties in revising and maintaining the county voter rolls, a nunc pro tunc order would not be authorized.

•AG Op. No. 87-176 to Austin, April 30, 1987, stated that a County Board of Supervisors did not have authority to give the County Prosecutor back salary from the date of effectiveness of the statutory amendment which increased the salary, since this would constitute a nunc pro tunc order giving effect retroactively to actions which had not previously been authorized or taken. By contrast, an appropriate nunc pro tunc order would be one which states correctly the previous action taken by the Board which was not recorded accurately in the minutes, due to oversight or neglect.

•AG Opinion No. 95-0070 to Blackwell, March 2, 1995, stated that a Board of Supervisors may not retroactively approve actions through the use of an Order Nunc Pro Tunc, in this case formal approval of a claim for payment for road repairs performed by an independent contractor, where the employment and hourly compensation arrangement have been duly authorized in the Board's minutes, but upon completion of the repair project a claim for payment for the work was submitted to the Board but not entered upon the docket.

•AG Opinion No. 92-0301 to Cauthen, May 7, 1992, stated that a Board of Supervisors cannot ratify actions of the Election Commission and authorize payment for legal services to the Election Commission after the fact, where the minutes of the Board of Supervisors do not reflect the prior authority given to the Election Commission to employ such attorney.