No. 23-____

IN THE

Supreme Court of the United States

BALDWIN COUNTY, *et al.*,

Petitioners,

v.

MIKE BORDELON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 21, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, the Court held that the Fifth Amendment requires "just compensation" for temporary regulatory takings, i.e., "those regulatory takings which are ultimately invalidated by the courts." 482 U.S. 304, 310 (1987). The appropriate compensation for a temporary regulatory taking is described as "fair value for the use of the property during this period of time." *Id.* at 322. All claims for temporary regulatory takings must be analyzed using the ad-hoc, fact-based analysis set out in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328 (2002). The takings analysis must "focus on 'the parcel as a whole," including a temporal element, in determining the impact of the challenged regulation. *Id.*, 535 U.S. at 331 (quoting *Mahon*, 438 U.S. at 130-131.

Judgment was entered in this case finding that the denial of a permit for a specific project – a three-story beachfront duplex – during administrative appeal proceedings was a temporary regulatory taking, even though other economically beneficial uses remained available, and there was no evidence of any effect that this denial may have had on the fair market value of the land. Compensation was awarded for the total value of claimed lost profits, plus additional estimated costs, as if the denial of the permit had completely stripped the property of all value during the litigation.

The questions presented are:

1) Does the temporary prohibition of a specific project or use constitute a compensable regulatory taking, regardless of the availability of other economically beneficial uses of the property?

2) Alternatively, whether it is "just" pursuant to the Fifth Amendment to award compensation for a temporary regulatory taking based solely on the lost profits and other costs of the prohibited project or use, without regard for any remaining value.

PARTIES TO THE PROCEEDING

The Petitioners are Baldwin County, Alabama, and Baldwin County Planning and Zoning Director Jay Dickson, in his official capacity. Baldwin County, Alabama, was an Appellant below. Director Dickson is substituted for former Director Matthew Brown, who was one of the Appellants below. The Respondents are Mike Bordelon and Breezy Shores, LLC. Respondents were also the Appellees and Plaintiffs below.

Additional defendants in the district court were the now-defunct "Baldwin County Commission District 4 Planning and Zoning Board of Adjustment" and former Planning and Zoning Director Vince Jackson, in his individual capacity.

CORPORATE DISCLOSURE STATEMENT

Petitioners are governmental entities that are not subject to R. 29.6.

RELATED PROCEEDINGS

The proceedings in state and federal trial and appellate courts identified below are directly related to the above-captioned case in this Court:

Breezy Shores, LLC v. Board of Adjustment for Baldwin County Commission, District 4, et al.. Filed in the Circuit Court for Baldwin County, Alabama, Case No. 05-CV-2019-901746.00.

Case removed to the United States District Court for the Southern District of Alabama: *Bordelon et al. v. Baldwin County, et al.*, Civil Docket No. 1:20-cv-00057-C. Final judgment entered October 28, 2022.

In the 11th Circuit Court of Appeals: *Bordelon, et al. v. Baldwin County, et al.*, No. 22-13958. Judgment entered January 26, 2024. Petition for Rehearing denied March 25, 2024.

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OPINIONS BELOW

The Eleventh Circuit's opinion is not reported but is available at 2024 WL 302382 and is reprinted in the Appendix at 1a-2a.

The district court's opinion is also not reported but is available at 2022 WL 16543269 and is reprinted in the Appendix at 3a-93a. An earlier opinion by the district court denying Bordelon/Breezy Shores's Partial Motion for Summary Judgment and partially granting Baldwin County, et al.'s Motion for Summary Judgment, is not reported, nor is the Order denying Bordelon/ Breezy Shores's Motion for Partial Reconsideration.

STATEMENT OF JURISDICTION

Judgment was entered by the United States Court of Appeals for the Eleventh Circuit on January 26, 2024. The Petition for Rehearing En Banc was denied on March 25, 2024. This Petition for a Writ of Certiorari is timely filed on June 21, 2024. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part, "nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V.

Other provisions of law involved in the case include Ala. Code (1975) § 45-2-261.04 and §§ 45-2-261.11 – 45-2-261.13. (App. 130a-134a) The relevant portions of the Baldwin County Zoning Ordinance are set forth at App. 95a-126a, including: §§ 2.3.25.1 – 2.3.25.3(c) and (3) (Local Provisions applicable to Planning District 25); §§ 15.1 – 15.3 (Parking and Loading Requirements);

Articles 18 (Administration) and 21 (Enforcement); and the definition of "Parking Space, off-street."

INTRODUCTION

Modern regulatory takings jurisprudence is commonly regarded as having started with the declaration in *Pennsylvania Coal Co. v. Mahon* that a regulation that goes "too far [] will be recognized as a taking." 260 U.S. at 415. "Since *Mahon*, [the Court has] given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). There is even less guidance concerning the relatively recent recognition of temporary regulatory takings.

An examination of the outcome of the cases shows that, when the Court decides whether a particular action constitutes a regulatory taking, it hews fairly closely to a limited application of the doctrine, in line with the text of the Fifth Amendment. But, respectfully, the somewhat vague nature of the stated guidance, combined with the "ad hoc" nature of the analysis, has resulted in confusion and conflict surrounding almost every aspect of regulatory takings jurisprudence.

This Petition does not seek the overruling or abrogation of any specific decision issued by the Court. Instead, much like in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), it seeks clarity, and to stem the tide of contradictory lower court decisions that purport to be based on the same general principles laid out in the same authority. The judgment in this case is an example of the outcome-driven judicial overreach that can all too easily occur in the absence of definitive standards.

This case, with its fully developed record, is an excellent vehicle to provide much-needed specific

guidance on the increasingly urgent problem of regulatory takings and the analytical distinction between permanent and temporary regulatory takings.

STATEMENT OF THE CASE

A. Development in Baldwin County Planning District 25 has been subject to County regulation since 1993.

Alabama Code §§ 45-2-261 *et seq*. provides for the institution of planning and zoning authority in unincorporated areas of Baldwin County, Alabama. The County is divided into Planning Districts. Citizens in a planning district may petition for an election to institute zoning in their district, Ala. Code § 45-2-261.05 (1975); if the measure passes, the district becomes subject to Baldwin County's zoning authority, as set forth in the Zoning Ordinance adopted by the Baldwin County Commission. Ala. Code § 45-2-261.04 (1975). (App. 130a-131a) The Ordinance contains both generally applicable provisions and provisions that are specific to each planning district. The Commission has delegated the administration and enforcement within the terms of the Zoning Ordinance to the Planning and Zoning Administrator. (App. 102a)

A property owner who wants to build in a zoned area must first obtain a land use certificate and then a building permit. (App. 103a). The building permit warns, in all capitals, that "THE GRANTING OF A PERMIT DOES NOT PRESUME TO GIVE AUTHORITY TO VIOLATE OR CANCEL THE PROVISIONS OF ANY FEDERAL STATE OR LOCAL LAW REGULATING CONSTRUCTION OF THE PERFORMANCE OF CONSTRUCTION" and specifically disclaims that it vests rights in the permittee. (Doc. 84-1, pg. 1.)

A property owner that is denied a certificate or permit for any reason may appeal that decision to the Board of Adjustments and then to the Circuit Court. Ala. Code § 42-2-261.13 (1975). (App. 105a, 134a)

The property at issue is located in Planning District 25, which encompasses the Fort Morgan area of Baldwin County, including extensive areas of shoreline. After a successful zoning election on June 19, 1992, the Planning District Zoning Map and local provisions were first adopted on November 16, 1993. (App. 95a-96a)

B. Concerns regarding the negative health, safety, and environmental effects of increasing population density prompt amendments to the local provisions for Planning District 25 in 2017.

In September 2017, the local provisions for Planning District 25 ("P.D.25") were amended to increase the minimum off-street parking for residential structures from two spaces per dwelling unit, regardless of size, to a tiered system requiring additional spaces depending on the number of bedrooms. (Doc. 78, pgs. 104-105)

Additional changes were subsequently made to P.D. 25's local provisions in 2019, including removing High Density Residential Districts; lowering the habitable story limitation to two (2) stories; establishing dune walkover requirements; and establishing considerations for Coastal High Hazard Areas and Flood Hazard Area. (Doc. 84-19, pg. 165)

There is an extensive legislative record supporting both the 2017 and 2019 changes, which establishes that 1) the changes were fully advertised and commonly known and 2) that the Baldwin County Commission received and considered comprehensive statements both for and against the proposed ordinance. Those in support

of the amendment expressed numerous concerns regarding health and safety issues as well as environmental concerns and livability issues. (Doc. 84-19.)

Unfortunately, Baldwin County staff did not immediately appreciate the full ramifications of the increased parking requirements. An "off-street parking space" has long been generally defined as an "area adequate for parking an automobile with room for opening doors on both sides, together with properly related access to a public street or alley and maneuvering room…" (App. 125a) Section 15 of the Ordinance further specifies dimensions and requires that each off-street parking space be "connected with a street or alley by a driveway which affords unobstructed ingress and egress to each space." (App. 101a-102a)

In the past, developers provided extra parking spaces by using "stacked parking" configurations, which do not provide direct ingress and egress to each space. As demonstrated by Mike Bordelon's previous development next to the property at issue, "Easy Breezy," these configurations still provided the minimum 2 spaces, as defined in the Ordinance, required in residential construction; therefore, stacked parking was simply not an issue when reviewing residential LUCs. (Doc. 78, pg. 130; Doc. 84-19, pg. 78) But in 2019, Paul Stanton, on behalf of the residents in the district, pointed out that spaces in a stacked parking configuration did not provide the required unobstructed ingress and egress. (Doc. 78, pgs. 40-41) As per their usual procedure pertaining to the various emails and communications received from citizens, Former Planning Director Vince Jackson and his staff, including veteran planner Linda Lee, began considering the issue and ultimately concluded that the plain language of the Ordinance prohibits the use of stacked parking to meet the

minimum parking requirements. (Doc. 78, pgs. 62-63) Because Paul Stanton had communicated about the issue, Jackson sent him a letter on July 3, 2019, with his decision. (Doc. 84-20)

C. Breezy Shores, LLC, applies for a Land Use Certificate without reviewing the law or regulations, relying exclusively on County staff to ensure their compliance.

The land use certificate application for Breezy Shores was originally submitted on March 27, 2019. (Doc. 84-1, pg.2) It was assigned to Linda Lee, who informed Steve Jones, Breezy Shores's contractor, on April 2 that an ADEM permit and parking plan were needed in order for the application to be complete. (Doc. 78, pg. 38.) The time that it would take for an application to be completed varied widely, and there was no way for staff to know when a particular completed application would be submitted. (*Id.*, pgs. 66-67).

Jones, who is licensed home builder, testified that he did not keep up with any regulatory changes. He claimed that there was "just no way of knowing" what was required unless he was told. (Doc. 79, pgs. 110-111) He stated that he submitted permits based on the ones that were previously submitted and approved: "Unless they tell me I need something else, I don't know it." (Doc. 79, pg. 112)

Notably, Jones incorrectly stated that he had not been previously required to obtain a coastal construction permit prior to building Easy Breezy, which was the project on which Breezy Shores was loosely based. (Doc. 79, pg. 110)

Mike Bordelon also testified that the plan for the Breezy Shores property was to build a similar duplex to Easy Breezy. He purposefully avoided reading the

Zoning Ordinance and so was unaware that the parking requirements had changed. (Doc. 80, pgs. 58-59, 70)

The revision to the site plan was done June 12, 2019. (Doc. 84-1, pgs. 4-5.) The ADEM permit was not received until July 17, 2019. (Id., pg. 3.) Unfortunately, Linda Lee was on vacation when the ADEM permit was received, and Jackson had failed to inform Crystal Bates (who ordinarily worked in a different office) about the decision regarding stacked parking. Bates approved the LUC on July 17, 2019. (App. 10a)

D. The Land Use Certificate and Building Permit are quickly revoked as having been issued in error, and the subsequent application for a LUC is denied.

The basic sequence of events occurring next are essentially undisputed: on July 31, 2019, Jackson sent Breezy Shores's agents a letter, on behalf of Baldwin County, ordering that they stop work immediately, and an order was posted on the site. (Doc. 47) Breezy Shores was given multiple options to respond to the Stop Work Order. Bordelon, on behalf of Breezy Shores, decided to move forward with adding additional parking spaces, which required a revised incidental take permit from the United States Fish and Wildlife Service. In the interim, the above-referenced amendments to the Zoning Ordinance pertaining to Planning District 25, including the Height Ordinance, were proposed and passed. Breezy Shores was notified that, because they had not obtained a Building Permit before this change, the original three-story building would not be permitted. Breezy Shores chose to go before the Board of Adjustment to seek a variance,

which was denied, and then appealed this denial. (Doc. 60, pgs. 8-10)

E. Mike Bordelon and Breezy Shores turn the appeal of the denial of their request for a variance into expansive, complicated litigation encompassing at least forty-seven (47) discrete claims for relief, ultimately succeeding only on their takings claim and certain State law claims seeking injunctive and declaratory relief.

Breezy Shores first filed its Notice of Appeal in the Circuit Court of Baldwin County, Alabama, pursuant to Ala. Code § 11-52-81 on December 16, 2019. (Doc. 1-1, PageID.12) Mike Bordelon and Breezy Shores then filed their "First Amended Complaint" in the Circuit Court of Baldwin County, Alabama, on January 8, 2020, adding claims under federal law. (Doc. 1-1, PageID.18-31) Notably, they did not assert a takings claim in the First Amended Complaint. The case was timely removed. (Doc. 1, PageID.1-3)

A Motion to Dismiss, or, in the alternative, Motion for a More Definite Statement was filed and fully briefed. (Docs. 3-4, 9, 16) After a hearing, the district court ordered Bordelon and Breezy Shores to replead their claims. (Doc. 20)

The Second Amended Complaint filed on July 1, 2020, becoming the operative pleading in the case. (Doc. 21) It alleged at least ***forty-seven (47) discrete claims***, divided among Ten Counts brought against a one or more of each of four Defendants, including Baldwin County, the (now defunct) Baldwin County

Board of Adjustment No. 4, and Director Vince Jackson, in his official and individual capacities.[1]

A partial motion to dismiss was filed and fully briefed, but no ruling was ever issued. After the close of discovery, Baldwin County and the other defendants sought summary judgment as to all claims, and Plaintiffs filed a Partial Motion for Summary Judgement. Breezy Shores and Bordelon conceded that their substantive due process claims were due to be dismissed to the extent that they argued that the Story Ordinance and Parking Ordinances are unconstitutionally vague and/or arbitrary and capricious. (Doc. 52, PageID.1756-1757, PageID.1794) They also conceded the Procedural Due Process and Takings claims against Vince Jackson, in his individual capacity, and the Dormant Commerce Clause claims. (Id., Page Id.1794)

The district court denied Breezy Shores and Bordelon's motion and entered summary judgment for Defendants on the Procedural Due Process claims (Count Three); the Substantive Due Process Claims (Count Four); the Equal Protection Claims (Count Five); the First Amendment Retaliation Claims (Count Eight); and the Dormant Commerce Clause Claims (Count Ten), as well as judgment as to all claims brought under State law seeking money damages, attorneys' fees, or relief against Jackson individually. (Counts Seven and Nine). (Doc. 60, PageID.40)

After a bench trial and post-trial briefing, the district court ultimately ruled in favor of Bordelon and Breezy Shores as to their request for a variance (Count One);

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[1] In counting claims, Petitioners have treated the official capacity claims alleged against Jackson as duplicative of the claims alleged against the County in the interest of fairness, since they are substantively identical, even if technically separate.

their temporary takings claim against the County and Jackson in his official capacity (Count Six); and their State law Vested Rights claim (Count Seven). The district court found in favor of Defendants on the negligence/wantonness claim (Count Nine) on account of the doctrine of substantive immunity. (Doc. 96, PageID.4354-4355)

Baldwin County and then-Planning Director Matthew Brown timely appealed to the Eleventh Circuit. Oral argument was held on January 24, 2024. The Panel issued its decision affirming the district court's judgment on January 26, 2024. The decision does not contain any independent analysis, but merely states that there is "no reversible error in the district court's judgment," and that the "district court's reasoned decision in favor of Plaintiffs" is affirmed. (App. 2a)

REASONS FOR GRANTING THE WRIT

I. Confusion amongst the lower courts and litigants about the proper analysis of regulatory takings claims, particularly temporary regulatory takings claims, leads to inconsistent results and provides a unique opportunity for judicial overreach.

A. The Court's regulatory takings jurisprudence establishes that the application of the doctrine must be limited, lest it become unmoored from the Fifth Amendment.

In *Pennsylvania Coal Co. v. Mahon*, the Court stated that the "general rule..is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). Although framed as a rather unremarkable proposition – a mere "general rule," anodyne enough

to not warrant a specific citation of supporting authority – this statement is now widely considered to be a watershed moment: the first articulation of the doctrine that would eventually be known as "regulatory takings." *See*, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition [], it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession." (internal citations and quotation marks omitted)); *see also Murr v. Wisconsin*, 582 U.S. 383, 419 (2017) (Thomas, J. dissenting); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (characterizing *Mahon* as the "leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'").

Mahon's legacy has proven to be far-reaching. But, in addition to its language, the facts of *Mahon* suggest that its revolutionary status has been overstated and/or that the extreme nature of the statute found to go "too far" in the case has been understated. Prior to *Mahon*, the Court had considered the complete obliteration of property rights by regulation only as a hypothetical. 260 U.S. at 415-416; *see, e.g.*, *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) ("For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.") The challenged law in

Mahon completely prohibited a coal company from exercising mineral rights that it had explicitly retained in the sale of the surface property to private citizens who constructed a home on the land. 260 U.S. at 412-413. Although the mineral rights were not technically seized by the government, the statute's practical effect was to "abolish what is recognized in Pennsylvania as an estate in land – a very valuable estate – and what is declared by the [c]ourt below to be a contract hitherto binding the plaintiffs." *Id.* at 414. In other words, the statute destroyed the coal company's interest in its mineral rights as completely as if the government had commandeered its operations.

Some 56 years later, the *Penn Central* Court synthesized prior precedent, consisting of a series of "essentially ad hoc, factual inquiries," into the analysis that is now considered the standard in almost all regulatory takings cases, as follows:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

438 U.S. at 124.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general

law." *Penn Central*, 438 U.S. at 124. Most of the cases preceding *Penn Central* either upheld the challenged regulation and/or found that no compensation was required, with exceptions for situations in which there was a "total destruction…of all value" by regulation, *Armstrong v. United States*, 364 U.S. 40, 48 (1960), or the action could be "characterized as acquisitions of resources to permit or facilitate uniquely public functions," *Penn Central*, 438 U.S. at 128. The cases "uniformly reject the proposition that diminution in value, standing alone, can establish a 'taking.'" *Id.* at 131. *Penn Central* followed these principles, refusing to analyze the owners' interest in the "air rights" above historic landmarks as a separate property interest from the parcel as a whole, *Id.* at 130, and finding that the effect of the landmarks law were not severe enough to constitute a taking.

Of course, the Constitution does not discuss "economic impact" or "interference with distinct investment-backed expectations." The Court has reiterated that the ultimate issue in any regulatory takings case must remain whether the challenged action is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). The Court has also repeated that the takings analysis does not examine alleged damage to individual sticks in the proverbial 'bundle of rights,' but instead "focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id.* at 130-31; *see also Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. 302, 327-28 (2002); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). Establishing a significant negative impact on the parcel as a whole is

meant to be "heavy burden." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 US. 470, 493 (1987).

B. The flexibility inherent in the *Penn Central* analysis has caused lower courts to miss the forest (the limited nature of the doctrine of regulatory takings) for the trees (the jumble of factors that may play a role in the analysis).

Everyone agrees that the *Penn Central* test applies to all permanent regulatory takings, except the rare "categorical takings" case, and also applies to all temporary regulatory takings…but the devil is in the details. The limited nature of this Petition does not permit an extensive survey of the entirety of regulatory takings jurisprudence, but it is clear the "flexibility" in the regulatory takings analysis, *see, e.g., Murr*, 582 U.S. at 394, has resulted in inconsistent analysis and outcomes from circuit to circuit and even from case to case, which problem is only exacerbated by the distinction between permanent and temporary takings.

1. The judgment in this case is a result of the common temptation to use circular logic to define the property in terms of the regulation, instead of examining its effects on the parcel as a whole.

Because the regulatory takings analysis requires a comparison of "the value that has been taken from the property with the value that remains in the property," one of the "critical questions is determining how to define the applicable unit of property." *Murr*, 582 U.S. at 395 (quoting *Keystone Bituminous Coal Assn.*, 480 U.S. at 497). *Murr* extended the same kind of broad, flexible analysis represented by the *Penn Central*

factors to this threshold question, while still affirming several basic precepts. First, the parcel under review cannot be limited "in an artificial manner to the portion of property targeted by the challenged regulation," whether geographically, temporally, or in terms of specific uses. *Id.* at 396. "The second concept about which the Court has expressed caution is the view that property rights under the Takings Clause should be co-extensive with those under state law." *Id.*

Prior to this judgment, and consistent with this Court's jurisprudence and that of other circuits, the Eleventh Circuit had resisted efforts by property owners to limit the takings analysis to the value of the prohibited project. *See, e.g., Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1074-1076 (11th Cir. 1996) ("*Corn IV*"); *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1410 (11th Cir. 1989); *Nasser v. City of Homewood*, 671 F.2d 432, 438 (11th Cir. 1982); *see also Mohit v. West*, No. 21-12483, 2023 WL 239992 (11th Cir. January 18, 2023) ("*Mohit II*"); *Agurcia v. Republica de Honduras*, No. 21-13276, 2022 WL 2526591, at *4 (11th Cir. July 7, 2022); *see also Cienega Gardens v. U.S.*, 503 F.3d 1266, 1280 (Fed. Cir. 2007) (holding that lower court erred in using a "return on equity approach" that considered the income from the project for each year as a separate property interest); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995) (rejecting argument that "complete evisceration of a single stick in the bundle of property rights" can constitute a categorical taking)

But the judgment in this case is the result of an improper focus only on the specific, three-story duplex envisioned as Breezy Shores, without any consideration whatsoever as to the value of the property itself or any economically beneficial uses that would remain

in the property. To the extent that the district court explained this decision, it did so only in a footnote by 1) relying on its finding regarding the substantive defects in the revocation and subsequent denial of the permits for the three-story duplex and 2) characterizing the denial of the permit for the three-story duplex as a "permanent partial taking of Plaintiff's property due to the reduced profitability of their property, which it found "constituted a physical invasion of Plaintiffs' property sufficient to support a temporary takings claim." (App. 71a) It also adopted a portion of Bordelon/Breezy Shores's post-trial reply brief, in which Breezy Shores states that Baldwin County "incorrectly cites *Corn IV* [in its post-trial brief] to conflate the categorical rule regarding the denial of all or substantially all economically viable use of land…with the *Penn Central* three-factor test." (Doc. 92, pg. 14.)

This criticism is an example of the nature of the confusion surrounding regulatory takings analysis, particularly with regards to temporary regulatory takings. Although it was decided without the benefit of *Tahoe-Sierra Preservation Council*, *Corn IV* correctly refused to hold that compensation must be paid whenever a zoning authority is estopped from enforcing a change in zoning as a special instance of a categorical rule, finding instead that the temporary regulatory takings analysis must always be conducted under *Penn Central*, even during a development moratorium. 95 F.3d at 1070-1071. The *Corn IV* court also states that the property owner must "show that the denial of his rights in the Project denied him all or substantially all economically viable use of *the Parcel*, not simply economically viable use of whatever property rights he had in the Project." *Id.* at 1074 (emphasis in original).

There is an evidentiary elephant in the room that must be recognized: namely, the consistent refusal by Bordelon/Breezy Shores to engage with the question of diminution in fair market value until the very end of trial, when its efforts resulted in mass confusion. (Doc. 80, pgs. 4-21) Their expert admitted that valuing a two-story property would require an entirely new appraisal; his attempt to testify about any possible loss in the property value because of the restriction was properly excluded. (App. 48a-50a) In order to reach its preferred result, the district court disregarded the effects of this lack of evidence through the simple expedient of declaring that any lost value was irrelevant in a temporary regulatory takings claim, narrowing its focus to the particular project. *Id.*

"Of course, defining the property interest taken in terms of the very regulation being challenged is circular." *Tahoe-Sierra Preservation Council*, 535 U.S. at 331. The "property" at issue was improperly defined by the district court only as the proposed project due to a conflation of the definition of the property and portions of the various *Penn Central* factors, in conflict with the decisions of this Court, the Eleventh Circuit, and other courts. This error infected the entirety of the analysis.

2. The analysis of a regulation's economic impact varies from court to court, and even case to case.

One of the primary factors in the regulatory takings analysis is the economic impact of the regulation. *See Lingle*, 544 U.S. at 538. Determining the economic impact of a regulation requires a comparison of "the value that has been taken from the property with the value that remains." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497. The first step in deciding "how much

is too much?" is attempting to quantify the economic loss caused by the regulation. Courts have recognized multiple methods and tests for determining the extent of a regulation's economic impact, occasionally resulting in contradictory precedent in a single circuit. *See State ex rel. AWMS Water Solutions, L.L.C v. Mertz*, 162 Ohio St.3d 400, 416-417 (Ohio 2020) (discussing both the "market value" approach and "lost-net-income approach" to determining the loss of value caused by the regulation); *Anaheim Gardens, L.P. v. United States*, 953 F.4d 1344, 1354 (Fed. Cir. 2020) ("Regardless whether a taking is permanent or temporary in nature, there is no one-size-fits-all method for measuring the economic impact of a governmental action.") (holding that lost income could be used as an appropriate measure of economic impact); *compare Rose Acre Farms, Inc. v. U.S.*, 559 F.3d 1260, 1268-69 (Fed. Cir. 2009) (holding that reliance on lost profits as a measure of economic impact was inappropriate) *with City of Grapevine v. Muns*, 651 S.W.3d 317, 340 (Tex. App. 2021) ("Contrary to the City's assertion, lost profits are a relevant factor to consider in assessing the property's value and the severity of the economic impact on a property owner."); *see also* Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 616, 634 (Winter 2014) (discussing the lack of clarity as to what burdens can be considered under the economic impact factor and effect of repudiation by the Federal Circuit of its previous "return on equity" approach).

Once the loss is quantified, its severity must be examined. In general, the Court has explicitly eschewed any bright-line tests or more definitive statements outside of the rare case of a regulation that permanently deprives an owner of all economically beneficial uses of property. *See Lucas v. South Carolina Coastal*

Council, 505 U.S. 1003, 1016-17 (1992). But the principle that a "diminution in property value, standing alone" cannot establish a taking has been repeatedly reiterated. *Penn Cent. Transp. Co.*, 438 U.S. at 131.

Prior to this judgment, the Eleventh Circuit had held that establishing a temporary regulatory takings requires a property owner to show that the regulation deprived them of "all or substantially all economically viable use of his property," based on *First English*. *Corn IV*, 95 F.3d at 1072. Other courts have repeated this formulation, both in general and specifically as to temporary regulatory takings. *See Walcek v. U.S.*, 44 Fed. Cl. 462, 467 (Fed. Cl. 1999) ("In evaluating temporary takings claims, courts generally focus on two elements. First, they look to whether the government's action have temporarily deprived the property owner of all or substantially all economically viable use of their property."); *see also Bettendorf v. St. Croix County*, 631 F.3d 421, 424 (7th Cir. 2011); *In re 106 North Walnut, LLC*, 447 Fed. Appx. 305, 309 (3rd Cir. 2011); *Eberle v. Dane County Bd. of Adjustment*, 227 Wis. 2d 609, 622 (Wis. 1999). Other courts have used slightly different phrasing. *See Moore v. City of Costa Mesa*, 886 F.2d 260, 263 (9th Cir. 1989) ("A regulation that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value.")

Again, the district court ignored this standard, criticizing it as conflating the categorical takings test with the *Penn Central* analysis. This criticism is without merit. While there is a certain amount of similarity in the wording, prohibiting "substantially all economically viable use" is still an obviously lower, and more flexible, standard than being forced to "sacrifice *all* economically beneficial uses in the names

of the common good, that is, to leave [] property economically idle." *Lucas*, 505 U.S. at 1019. The "substantially all" standard more accurately captures the actual holdings of the Court's regulatory takings jurisprudence, from *Mahon* to *Penn Central* to *Murr*.

The district court's criticism is particularly inapt when applied to temporary regulatory takings. It is impossible to conflate the categorical takings test with the *Penn Central* analysis in a temporary regulatory takings case because there is no such thing as a temporary categorical taking. *Tahoe-Sierra Preservation Council*, 535 U.S. at 341. Further, while *First English* recognized the possibility of temporary regulatory takings, it is expressly limited to the facts presented, specifically including the allegation that the ordinance "denied appellant all use of its property." 482 U.S. at 321. It "[did] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Ibid.* After remand, "the California courts concluded that there had not been a taking," and the Court "declined review of that decision, 493 U.S. 1056 [] (1990)." *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 329.

The district court's economic analysis was based solely on projections of the net income of the proposed three-story duplex. The comparison was simple and stark: Breezy Shores projected a net income of $599,666.00; it collected $0 because it chose not to engage in any economically beneficial use of the property during the litigation. Using projected lost profits to quantify an economic impact is a "slender reed upon which to rest a takings claim," both because of the inherent uncertainty in the calculation and

because "the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus*, 444 U.S. at 66. Relying only on projected lost profits in a vacuum, devoid of any consideration or comparison of the remaining value of the parcel, to find a "profound economic impact" (App. 75a-76a) is an unprecedented deviation from regulatory takings jurisprudence.

This analysis also fails to recognize that much of the delay can be directly attributed to the decision by Breezy Shores and Bordelon to needlessly prolong this litigation (conveniently avoiding disruptions caused by the pandemic) by bringing multiple extraneous claims, most of which were eventually adjudged to be without merit. The principles of "fairness and justice" that underlie the takings analysis demand that the duration and severity of the interference with property rights be balanced in each case. *Tahoe-Sierra Preservation Council*, 535 U.S. at 342. Allowing property owners to litigate themselves over the line by dragging out an ordinary appeal of an administrative action until a takings claim can plausibly be added, and then further enhancing their 'damages' by extending the litigation with dozens of ultimately meritless claims, is inherently at odds with the equitable nature of a takings claim and is an unprecedented departure from existing regulatory takings jurisprudence.[2]

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[2] While it is impossible to know exactly how long the appeals process would have been if Breezy Shores had 1) filed under the correct sections in the first place and 2) not added dozens of ultimately unsuccessful claims to their suit, it is worth noting that litigation in *Teachers' Retirement System of Alabama v. Baldwin County Planning and Zoning Dept.*, No. CL-2022-0697, __So.3d__, 2023 WL 5157747 (Ala. Civil App. August 11, 2023), progressed from the initial administrative decision through a

3. The judgment improperly limits the inquiry into the degree of interference with reasonable investment-backed expectations by holding that "real estate development" is not a "highly regulated industry" and failing to consider other evidence of the unreasonableness of Bordelon and Breezy Shores's expectations.

Prior to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), lower courts disagreed about the relative importance of a finding of interference with a property owner's reasonable investment-backed expectations and the factors that should be considered in the analysis. *Palazzolo* established that a regulatory takings claim does not automatically fail just because the owner acquired the property after the regulation was enacted. 533 U.S. at 626-627. "Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title." *Id.* at 627. "Investment-backed expectations, though important, are not talismanic under *Penn Central*." 533 U.S. at 634 (O'Connor, J. concurring). "Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations."

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reported appellate decision in approximately twenty-eight months. Breezy Shores was notified that it would not be allowed to build a three-story duplex on November 5, 2019 (Doc. 84-2). Nine months then elapsed before the Second Amended Complaint, adding, inter alia, the takings claim.

The district court (and, by logical extension, the Eleventh Circuit) adopted the Federal Circuit's three-part test for determining a party's reasonable expectations: "(1) whether the plaintiff operated in a highly regulated industry; (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase." *Appolo Fuels Inc. v. U.S.* 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quotation marks and citations omitted) (App. 76a)

To the extent that this test purports to consider the pre-existing regulatory environment only in "highly regulated industries," it is plainly contrary to the flexible nature of the *Penn Central* analysis. Further, the citation of *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409 (2015) as additional support for a very limited view of "highly regulated industries" proves too much. The Court in *Patel* refused to include hotels in the narrow category of highly regulated industries to which a "more relaxed standard" of probable cause for searches applies under the Fourth Amendment. 576 U.S. at 424. In contrast, the Court's takings jurisprudence does not refer to "highly regulated industries," but to "regulated field[s]," which includes a much broader range of businesses. *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993).

It is important to note that this case does not just involve "real estate development," but the development of coastal property, which is subject to additional regulations. *See Lucas*, 505 U.S. at 1035. For example,

the development of Breezy Shores also required an incidental take permit from the E.P.A.

In addition, the district court's holding that "there was no evidence presented at the time of their purchase of the property that [Bordelon/Breezy Shores] were aware of any issues" of the kind that eventually developed (App. 77a) ignores the reason why Bordelon and the other agents of Breezy Shores were unaware of any potential issues: to wit, their adoption of a strategy of willful ignorance concerning the entire regulatory process. The definition of an "off street parking space" and the increased minimum number of such spaces required in the Fort Morgan area after September 2017 were as available to Mike Bordelon and his agents (and any other member of the public) as they were to Paul Stanton. The difference is that Paul Stanton read and considered the Ordinance and reached out to the planning staff regarding the interplay between these sections, whereas the Breezy Shores group consciously ignored the Ordinance, instead relying on the planning staff to affirmatively inform them of all regulatory requirements. It obviously would have been better if former Director Jackson had immediately recognized the issue, or had at least communicated more effectively with his staff and the public. But it is patently unreasonable to abdicate one's own well-established responsibility to know the law, *see, e.g., Bank of U.S. v. Daniel*, 37 U.S. 32, 41 (1838), while simultaneously demanding perfection from over-worked administrative staff.

4. Many lower courts are still struggling to shake off the pre-*Lingle* formulation of the "character of the regulation" factor.

In *Lingle*, this Court recognized that significant confusion among the lower courts had developed regarding the role that the "character of the regulation" should play in the *Penn Central* analysis, particularly in light of certain language used in *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980), stating that a taking may be found if the challenged regulation does not "substantially advance legitimate state interests." *Lingle* held that the "'substantially advances' formula is not a valid takings test," 544 U.S. at 545, explaining that substantive questions regarding the underlying validity of a particular regulation fall under other constitutional provisions, most notably including the substantive due process clause. *Id.* at 542-543. The plain language of the Fifth Amendment necessarily presupposes a valid public use; the only question in a takings claim is whether the public use infringes so greatly on private property rights as to amount to a taking, and, if so, what compensation is just. *Id.*

The Eleventh Circuit did not acknowledge *Lingle*'s effect on its prior precedent holding that the "rationale behind the regulation" was a proper subject of inquiry in a takings case until *South Grande View Development Company, Inc. v. City of Alabaster, Alabama*, 1 F.4th 1299, 1312 (11th Cir. 2021) – and even then, it still held that admission of evidence regarding the city's alleged motives for rezoning the property was not sufficient grounds to overturn the finding of a taking.

Although the analysis of this factor in this case is nominally framed as arising from the so-called "physical invasion" associated with giving notice of the Stop

Work Order, it is clear that the district court's determination is really based on its finding that Baldwin County planning staff acted improperly in the sense of being substantively incorrect and/or unfair. (App. 78a-80a) Baldwin County vehemently objects to this characterization as a matter of law and fact. But, for the purposes of this Petition, the important point is that there is obviously still confusion among lower courts about this factor. *Compare Oliver v. Etna Township, Ohio*, No. 2:2022cv02029, 2024 WL 1804993 at * 15 (S.D. Ohio April 24, 2024) (finding that the fact that the "Township has legitimate objectives for its zoning actions…weighs against finding a partial taking") and *Pittsfield Development, LLC v. City of Chicago*, 17 C 1951, 2024 WL 579715 at * 14 (N.D. Illinois, Feb. 13, 2024) (stating that, *inter alia*, "evidence that the purpose of enacting the Ordinance was to 'halt' the Hotel Development Project and 'throw [the Building] into non-conformance" is "enough to raise a dispute of material fact as to whether the Ordinance was akin to a 'physical invasion by the government' as opposed to an interference meant to 'promote the common good.'")

This mode of analysis of the "character of the regulation" factor is particularly problematic in a case involving a temporary regulatory taking. *First English* defined a temporary regulatory takings claim as involving an action that is "ultimately invalided by the courts." 482 U.S. at 310. While some actions may expire of their own accord, *see Tahoe-Sierra Preservation Council*, *supra*, most cases will either involve an enactment that is struck down as unconstitutional or otherwise void or, as in this case, a denial of a permit or variance that is reversed through the administrative appeal process.

The Supreme Court of California has held that a delay caused by a regulatory mistake that is eventually corrected through the administrative appeal process is merely a "normal delay in development," not a temporary regulatory taking. *Landgate Inc. v. California Coastal Com'n,* 17 Cal.4th 1006, 1018, 1020 (Cal. 1998), *partially abrogated on other grounds* by *Lingle, supra* (collecting cases and stating that "[v]irtually every court that has examined the issue has concluded" that a regulatory mistake resulting in delay does not amount to a taking). The district court adopted Bordelon/Breezy Shores's argument that the 'regulatory mistake' cases had been abrogated by *Lingle* because "they questioned whether delays were part of the 'normal' regulatory process, or whether they failed to advance a legitimate state governmental interest." (App. 70-71a). There is a certain irony in the attempt to use *Lingle* to avoid established precedent differentiating between a regulatory taking and an ordinary delay in the permitting process caused by a regulatory mistake. It is also without merit, since pre-*Lingle* cases examined both whether the regulation substantially advanced legitimate state interests and, if so, whether it was so burdensome as to constitute a taking. *See Landgate, Inc.*, 17 Cal.4th at 1025-1032.

The judgment in this case that a temporary regulatory taking occurred thus stands in direct conflict with the Court's precedent and that of many, albeit not all, federal courts and state appellate courts on almost every aspect of the analysis. The Petition should be granted to resolve these conflicts and give the lower courts and litigants much needed clarity on the issue.

II. In the alternative, the award of so-called "full compensation" represents an unearned windfall and conflicts with decisions of other courts and prior Eleventh Circuit precedent.

The purpose of the takings clause is to "protect[] individual property owners from bearing public burdens which, in all fairness and justice, should be borne by the public as a whole." *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 332 (internal quotation marks and citations omitted). The concepts of "fairness and justice" must also be considered when determining the amount of compensation that is "just." It is well-established that the concept of "fair market value" plays an important role in ensuring that the property owner is justly compensated, without being awarded a windfall at taxpayer expense based on speculation or idiosyncratic factors that would not play a role in any uncoerced transaction. *See, e.g.*, *U.S. v. Miller*, 317 U.S. 369 (1943).

Before this case, the Eleventh Circuit had adopted the following formula for determining compensation in a temporary regulatory taking:

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. ***Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory***

> ***restriction and its fair market value with the restriction***. Under this approach, the landowner recovers what he lost. To award any affected party additional compensation for lost profits or increased costs of development would be to award double recovery: the relevant fair market values by definition reflect a market estimation of future profits and development costs with respect to the particular property at issue.

Wheeler v. City of Pleasant Grove, 883 F.2d 267, 271 (11th Cir. 1987) ("Wheeler III") (emphasis added). This formula has been widely accepted across the country in similar cases. *See Bridge Aina Le'a LLC v. Land Use Commission*, 950 F.3d 610, 632, n.12 (9th Cir. 2020); *City of Tampa V. Redner*, 852 So.2d 270, 272 (Fla. Dist. Ct. App. 2003); *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 665 N.E.2d 1061 (1996); *PDR Development Corp. v. City of Santa Fe*, 120 N.M. 224, 900 P.2d 973 (1995).

There are other "commonly accepted methods," like the "fair rental value" test used in cases like *Yuba Natural Resources, Inc. v. U.S.*, 904 F.2d 1577 (Fed. Cir. 1990). "Each of the commonly accepted methods…rely on a determination of the fair market value of the property with the invalid regulation in effect and without it." J. Margaret Tretbar, *Calculating Compensation for Temporary Regulatory Takings*, 42 U. KAN. L. REV. 201, 219 (1993).

It is almost never appropriate to accept lost profits as a measure of compensation. *Compare Primetime Hospitality, Inc. v. City of Albuquerque*, 146 N.M. 1, 206 P.3d 112, 120-122 (2009) (affirming an award of lost profits as compensation, but confining its decision to the "unusual case" before it because of the amount of work that had been completed before construction was

stopped) *with City of Austin v. Teague*, 570 S.W.2d 389, 394 (Texas 1978) ("Rental value is that amount which, in the ordinary course of business, the premises would bring or for which they could be rented, or the value, as ascertained by proof of what the premises would rent for, and not the probable profit which might accrue." (internal quotations omitted)).

The Eleventh Circuit's affirmance of the compensation award in this case disregarded its own prior precedent and puts it at odds with the vast majority of other courts. The complete disregard for fair market value in favor of a lost profits + expenses formulation means that Bordelon and Breezy Shores will be compensated as if the entirety of the property interest and all rights therein had been forcibly seized, even though all that Breezy Shores lost was the ability to construct a three-story duplex pending the outcome of its appeal of the denial of the variance, which, as discussed *supra*, was prolonged by the litigation tactics used by Bordelon and Breezy Shores.

III. This case is a good vehicle for presenting these important questions.

The issues raised in this case have broad national importance to the courts, governmental entities, and property owners who are attempting to navigate the minefield of regulatory takings jurisprudence. First, it is important to note that regulatory taking claims appear to be rising. While there has long been scholarly debate and interest in the validity and analysis of regulatory takings claims, *see, e.g., Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 429 (2008), judicial consideration of such issues was often pretermitted by the requirement

established in *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), that a property owner either show a lack of effective state remedies for an alleged taking or exhaust said remedies before attempting to state a federal takings claim. *See, e.g. Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997).

It is logical to assume that the Court's overruling of *Williamson* in *Knick v. Township of Scott, Pennsylvania*, 588 U.S. 180 (2019), would result in an increase in the number of regulatory takings claims filed. And indeed, while admittedly not a precise scientific method, a search for the term "regulatory takings" in the "All State and Federal" database in Westlaw validates this assumption. There were 89 decisions in the time period between June 1, 2018 and May 31, 2019; 96 decisions in the time period between June 1, 2019, and May 31, 2020; 120 decisions in the time period between June 1, 2020 and May 31, 2021; 151 decisions in the time period between June 1, 2021 and May 31, 2022; 157 decisions in the time period between June 1, 2022 and May 31, 2023; and 149 decisions in the last year. Decisions do not precisely track filings, but the year over year increase is still compelling.

The doctrine of regulatory takings is relatively new, considering the entirety of our legal history, and the recognition of temporary regulatory takings is even newer. Without guidance from the Court, these concepts are poised to become unmoored from the text of the Fifth Amendment. This case comes before this Court with the benefit of a fully developed record and litigants who have had the opportunity to refine their respective arguments and positions. *Cf. 74 Pinehurst LLC v. New York*, Nos. 22-1130 and 22-1170, __S.Ct.__, 218 L.Ed.2d 66, 2024 WL 674658 at *1 (2024) (Thomas,

J. concurring) (concurring in denials of certiorari because the record was not developed enough to facilitate a full understanding of the case). It is also worth noting that this case has already been cited by litigants in the Fifth Circuit, *DM Arbor Court, Limited v. The City of Houston*, No. 23-20385, 2024 WL 967014 (Reply Brief, Feb. 26, 2024) and discussed in 18 No. 5 Quinlan, ZONING BULLETIN VOL. 4, suggesting that the unprecedented analysis may have greater reach than would ordinarily be expected from an unpublished district court opinion. Baldwin County and the Baldwin County Planning and Zoning Director, in his official capacity, respectfully submit that it is an excellent vehicle to provide much-needed clarity.

CONCLUSION

The petition for certiorari is due to be granted.

Respectfully submitted,

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June 21, 2024

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13958

MIKE BORDELON, BREEZY SHORES, LLC,
Plaintiffs-Appellees,

versus

BALDWIN COUNTY, AL, BALDWIN COUNTY PLANNING AND ZONING DIRECTOR,
Defendants-Appellants,

BALDWIN COUNTY COMMISSION DISTRICT 4 PLANNING AND ZONING BOARD OF ADJUSTMENT, *et al.*,
Defendants.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:20-cv-00057-C

Before WILSON, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

This case concerns a zoning dispute between Baldwin County's zoning leadership and Mike Bordelon, a property owner within the county. Baldwin County's Zoning Department prohibited Plaintiffs-Appellees Mike Bordelon and Breezy Shores, LLC (collectively, Plaintiffs) from constructing a three-story duplex as originally permitted. After the local Board of Adjustment denied Plaintiffs' request for a variance, Plaintiffs filed a notice of appeal in the Circuit Court of Baldwin

County, which was removed to the Southern District of Alabama, Southern Division. Relevant to this appeal, Plaintiffs challenged the zoning decision pursuant to Alabama's vested rights jurisprudence and the Fifth Amendment of the U.S. Constitution. The district court[1] granted Plaintiffs' request for a variance and concluded that (1) Baldwin County temporarily took Plaintiffs' property without just compensation, (2) Plaintiffs held a vested right to construct their duplex as originally permitted, and (3) as a result, Baldwin County is both enjoined from prohibiting the duplex's originally-permitted construction and ordered to pay $746,289.00 in just compensation.

On appeal, Baldwin County argues that Plaintiffs lack vested rights under Alabama law because, among other things, the district court's interpretations of the zoning ordinance contravene its plain language and deference is due to the County's interpretations. Second, the County maintains that its acts do not amount to a temporary regulatory taking under *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). Third, and in the alternative, Baldwin County contends that the district court erred in its just compensation calculations which resulted in an unjust windfall.

After careful consideration of the record and the parties' briefs, and with the benefit of oral argument, we find no reversible error in the district court's judgment. Accordingly, we affirm the district court's reasoned decision in favor of Plaintiffs.

AFFIRMED.

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[1] U.S. District Judge William H. Steele referred all proceedings to and ordered entry of judgment with U.S. Magistrate Judge William E. Cassady in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73 after all parties consented to Judge Cassady's jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CA 20-0057-C

MIKE BORDELON and BREEZY SHORES, LLC,

Plaintiffs,

vs.

BALDWIN COUNTY, ALABAMA, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter came on for a bench trial before the Court on January 24-26, 2022. Upon consideration of the statement of the case and agreed facts set forth by the parties in their final pretrial document, as amended (Doc. 68, PageID.1942-44 & 1945- 51; *see also* Doc. 71 (joint supplement to joint pretrial document)), the testimony offered by the witnesses during the bench trial, and the exhibits admitted without objection (Doc. 80 (Plaintiffs' notice of filing trial exhibits admitted during the bench trial submission of additional trial exhibits); *see also* Docs. 84-1-84-26)), and all other relevant pleadings, the Court enters this final memorandum opinion and order pursuant to 28 U.S.C. § 636(c), Fed.R.Civ.P. 73, and S.D. Ala. GenLR 73(c) & (d).[1]

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[1] Any appeal taken from this memorandum opinion and order and judgment shall be made to the Eleventh Circuit Court of

FINDINGS OF FACT

A. Land Development in Baldwin County and Issuance of the Land Use Certificate and Building Permit.

On or about February 6, 2018, plaintiff Breezy Shores, LLC,[2] purchased a lot on the Gulf of Mexico in the Fort Morgan area of Gulf Shores, Alabama, with plans to develop a duplex at that location (the "Site").[3] (*See* Doc. 79, PageID.3169).

Development of real property in Fort Morgan is governed by the Baldwin County Commission, and zoning matters are governed by the Baldwin County Zoning Ordinance. (*See* Doc. 84-18). Different areas of Baldwin County fall within different Planning Districts,

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Appeals. (*See* Doc. 31 ("An appeal from a judgment entered by a magistrate judge shall be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of this district court.")).

[2] Bordelon testified that he has incurred personal expenses "to deal with the trial[.]" (Doc. 80, PageID.3280). This testimony is consistent with Bordelon's earlier representations that he is personally responsible for the costs of litigating this action. (*Compare id. with* Doc. 60, PageID.1879, n.2, citing Doc. 51, PageID.1745 & 1747, ¶¶ 2, 9).

[3] Breezy Shores, LLC is partially owned by an investment trust (that is, a self-directed IRA) belonging to Mike Bordelon (Doc. 79, PageID.3167; *see also* Doc. 80, PageID.3280 (Bordelon's testimony that he has no direct ownership in Breezy Shores; 50 percent is owned by his self-directed IRA and 50 percent by DLP1, a company owned by a friend)), who managed the development of the duplex project on the Site (*see* Doc. 79*,* PageID.3167-68). Bordelon explained at trial that the purpose of Breezy Shores was the purchase of property on which to build a short-term vacation rental property, "rent it out for a period of three to four years, and then . . . sell that property and then use the proceeds to try to work on another one." (*Id.,* PageID.3168).

with Fort Morgan and the Site lying within Planning District 25. (*See id.,* PageID.3593). Bordelon relied on his architect, Mark Pavey, to ensure that the site plans and designs conformed to the local ordinances. (Doc. 79, PageID.3173).

A residential development in Baldwin County generally requires at least two permits: first, a land use certificate from the Baldwin County Planning and Zoning Department (the "Zoning Department"), and second, a building permit from the Baldwin County Building Department (the "Building Department").[4] (*See, e.g.,* Doc. 79, PageID.3107 (Plaintiffs' contractor/builder, Steve Jones, testified: "You got to have a building permit and a land use certificate. The land use certificate comes first and then the building permit."); *see id.,* PageID.3174 (Bordelon's testimony that Jones handled the land use certificate application)). In accordance with Section 18.2.1 of the Baldwin County Zoning Ordinance (the "Ordinance"), "[a] land use certificate shall be obtained from the Zoning Administrator prior to the commencement of development and issuance of any building permit including electrical, HVAC and plumbing permits." (Doc. 84-18, PageID.3751). This two-step process gives the Zoning Administrator an opportunity to inspect the property and the application to ensure compliance with the Ordinance prior to allowing the commencement of development of the property and thereby preventing any unnecessary expenses. By the terms of the Ordinance, a land use certificate is valid for issuance of a building permit for up to 180 days after issuance. (*See id.,* PageID.3752, § 18.2.4 ("After that time a new land use certificate must be obtained."); see Doc. 78, PageID.2941-42 (Jackson's

[4] The zoning and planning department has no responsibilities with respect to building permits. (Doc. 78, PageID.2888).

testimony regarding the contents of § 18.2.4, the former Baldwin County planning director testifying that Plaintiffs' 6-month period "kicked off" on March 27, 2019, when the planning and zoning department stamped the application as having been received[5]). A building permit is a mandatory prerequisite to a landowner commencing "the evacuation for or the construction of any building or other structures" in Baldwin County. (*See* Doc. 84-18*,* PageID.3753, § 18.3). A building permit includes "a statement that the plans, specifications and intended use of such structure in all respects conform with the provisions of these zoning ordinances." (*Id.*).

Plaintiffs submitted their original site plan[6] and land use certificate application to the Baldwin County

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[5] However, this testimony by Jackson regarding § 18.2.4 of the Zoning Ordinance is wrong based on the contents of this section. The Court reads this section as "starting" the 180 days to obtain a building permit from the "issuance" of the land use certificate, not from the date of application for the land use certificate. To read this section in the manner suggested by Jackson would be at direct odds with the language in the section. Therefore, as the undersigned reads this section, Plaintiffs' land use certificate, which was approved and issued on July 21, 2019, was valid for issuance of a building permit for 180 days after that July 21, 2019 issuance (or until January 17, 2020).

[6] "Each application for a land use certificate shall be accompanied by an accurate site plan drawn to scale showing: the actual shape, dimensions and size of the lot to be built upon, the size, shape, height, floor area and location of the buildings to be erected; dimensions and locations of existing buildings; width of front, side and rear yards; existing and proposed parking; ingress to and egress from the site; and such other information as may be reasonably requested to determine compliance with these zoning ordinances including but not limited to a landscaping plan, erosion control plan, stormwater management plan, and utilities plan." (Doc. 84-18, PageID.3752, § 18.2.3(b)).

Planning Director, Vince Jackson (Doc. 78, PageID.2890),[7] and the Zoning Department on March 19, 2019 (*see* Doc. 84-1, PageID.3326; *see also* Doc. 79, PageID.3107 (Steve Jones' testimony)); the site plan and application were reviewed and then accepted on March 27, 2019 (Doc. 84-1, PageID.3326*; see also* Doc. 78*,* PageID.2852 (Lee's confirming testimony); *id.,* PageID.2897 (Jackson's testimony); Doc. 79, PageID.3175 (Bordelon's testimony that the land use certificate application was submitted on March 19, 2019 and accepted on March 27, 2019)).[8]

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[7] In his capacity as Planning Director, Jackson was responsible for administration and enforcement of the Baldwin County Zoning Ordinance, including receiving applications for and issuing land use certificates. (*See* Doc. 84-18, PageID.3751, § 18.1.2 ("The Zoning Administrator is authorized and empowered to administer and enforce the provisions of these zoning ordinances to include reviewing applications, inspecting sites, and issuing land use certificates for projects and uses and structures which are in conformance with the provisions of these zoning ordinances.")); *compare id. with* Doc. 78, PageID.2892 ("[P]rimarily, it was the administration and enforcement of the zoning ordinance, the administration and enforcement of the subdivision regulations[,] and the supervision of the planning and zoning staff."). With respect to interpretation of the zoning ordinance, Jackson testified that "if there was ever a situation where there might be a question as to the meaning or the applicability of a particular provision of the zoning ordinance, . . . it was the job of the planning director to make those determinations." (*Id.*).

[8] There is no dispute but that after plaintiffs submitted their application, neighbors on the same street as the Site, including Paul Stanton (who owned property right across the street from the Site), began lobbying the Zoning Department to halt the project. (*See* Doc. 84-15, PageID.3532-33 (Paul Stanton emailed Lee on April 17, 2019, asking for the plans filed with her office with respect to the Site and also seeking "all plans pertaining to our new Parking Amendment for this property[,]" to which Lee responded approximately 5 hours later explaining the brief "history" of the application to date, including that it had yet to be approved because the ADEM permit had net been submitted, and,

In doing so, Plaintiffs adhered to the above-delineated published procedures in the Ordinance. Upon review of Plaintiffs' land use certificate application, Baldwin County Planner Linda Lee[9] notified them that they needed more parking spaces and that they were required to obtain a permit from the Alabama Department of Environmental Management ("ADEM") before the application could be granted. (Doc. 78, PageID.2852-53 (Lee's trial testimony that she told the contractor, Steve Jones, that an ADEM permit was needed for completion of the application and, as well, that the site plan needed to comply with the local provisions for Planning District 25 relative to the number of parking spaces that were required[10]); *see also* Doc. 84-14,

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as well, that she had requested a parking plan that included the size of the parking spaces based on the Zoning Ordinance requirements, which she had not yet received; she attached to her email "copies of the application, the floor plans, the elevations page and the parking plan submitted.")).

[9] Lee has been a planner since September of 2012. (Doc. 78, PageID.2851).

[10] The relevant 2017 amendment to the zoning ordinance directed solely to Planning District 25, contained in Section 2.3.25.3(c), reads as follows:

> (c) Off-street Parking.
>
> As a supplement to Section 15.2, Parking Schedule, the following off-street parking requirements shall be applicable to single family dwellings and two-family dwellings:
>
> 1. Up to Four (4) Bedrooms: Two (2) spaces per dwelling unit.
> 2. Up to Six (6) bedrooms: Three (3) spaces per dwelling unit.
> 3. Seven (7) Bedrooms and more: Four (4) spaces per dwelling unit, plus one (1) additional space per dwelling unit for every bedroom over eight (8).

PageID.3520-21 (Lee's April 2, 2019 email to Steve Jones to which she attached the Local Provisions for Planning District 25, inclusive of the provision addressing off-street parking); *see* Doc. 84-23, PageID.4030- 31 ("The Land Use Certificate was not approved at that time [in late March to early April, 2019] due to the absence of the required ADEM permit. The applicant for the property owner was also informed that required parking spaces should be shown on the submitted site plan.")).[11] Based upon Lee's feedback, plaintiffs revised their site plan to add the requisite parking spaces. (*See, e.g.,* Doc. 78, PageID.2878-80 (Lee's testimony regarding the revised plan being submitted on or about June 12, 2019); Doc. 79, PageID.3177 (Bordelon's testimony that Pavey revised the site plan to add the requisite parking spaces)).[12] After they did so, Baldwin

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(Doc. 84-18, PageID.3591-92*; see also* Doc. 84-25, PageID.4066 ("The amendment which is most pertinent to parking in Planning District 25 was approved on August 15, 2017. This was where the Local Provisions for Planning District 25 were amended to require additional parking spaces based on the number of bedrooms in single family and two-family dwellings. This amendment was applicable to Planning District 25 only.")). It was based on this amendment that Lee instructed Jones to show the parking spaces on the site plan.

[11] It would have been unusual for the Baldwin Counting zoning and planning department to deny a land use certificate outright because it was the department's policy to help landowners meet all prerequisites to issuance of land use certificates. (*See, e.g.,* Doc. 78, PageID.2843 (testimony of Bates)). Indeed, according to Vince Jackson, when Lee told Plaintiffs' contractor, Steve Jones, that an ADEM permit and a more detailed parking plan was needed, there was no expectation in the zoning and planning department that Plaintiffs would have to reapply for a land use certificate and/or pay a new fee on submission of the requested information. (Doc. 78, PageID.2898-99).

[12] According to Steve Jones, this was the first occasion upon which he was required to submit a parking plan (Doc. 79,

County indicated that the ADEM permit was the only remaining impediment to issuance of a land use certificate for the Site. (*See id.*).[13]

On July 17, 2019, Plaintiffs submitted their ADEM permit to the Zoning Department and received a land use certificate for their duplex project on the Site that same day. (*See* Doc. 84-1, PageID.3327; Doc. 78, PageID.2837; Doc. 79, PageID.3112). Less than a week later, on July 23, 2019, the Building Department issued Building Permit #126349 for the Site based upon Plaintiffs' architectural and engineering plans and the existing Land Use Certificate. (*See* Doc. 84-1, PageID.3325; Doc. 79, PageID.3178 (Bordelon's testimony that the building permit was issued on July 23, 2019)).

After receiving the Building Permit, Plaintiffs immediately moved forward with development of the Site per the authorized plans. (Doc. 79, PageID.3112-13 (builder's testimony that construction on the project began shortly after receipt of the building permit on July 23, 2019); *see* Doc. 78, PageID.2902 (Jackson agreed that Plaintiffs did nothing wrong in starting to build their duplex, specifically by putting pilings in the

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PageID.3109-10) and he acknowledged that he did not know how many parking spaces would be required to construct the duplex or that the ordinance had changed to increase the number of parking spaces in 2017 (*id.*, PageID.3130; *see also id.,* PageID.3131 (Jones admitted to being unaware that those changes were publicly advertised for a number of weeks and are available online)). However, he credibly testified that he submits applications/ permits based on those he has submitted in the past that have been approved and then will provide revisions as directed by the planning and zoning department. (*See id.,* PageID.3132).

[13] Jones did not know he needed an ADEM permit until he was told by the planning and zoning department that it was an area that could have artifacts. (*See* Doc. 79, PageID.3129-30).

ground)).[14] Indeed, Breezy Shores, through the builder, expended monies on building materials (principally pilings and windows) and labor, including that Jones' "piling guy got down there and . . . started installing pilings." (Doc. 79, PageID.3114; *but cf. id.,* PageID.3133-34 (Jones' testimony that if none of the costs listed on Trial Exhibit 53 were incurred between July 23, 2019 and July 31, 2019, they were not then incurred); Doc. 79, PageID.3178 (Bordelon's testimony that Plaintiffs spent $68,000 on materials for the project; most of the materials were purchased before the permits were issued but he believed some materials were purchased after Plaintiffs' receipt of the permits)). Jones did testify that $3,000.00 was expended in removing pilings from the Site after the stop-work notice was posted (Doc. 79, PageId.3135) and there were labor costs associated with installing the two pilings on the Site (*see id.*).[15]

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[14] Steve Jones expected the project to take about a year to construct, with completion expected in July of 2020. (Doc. 79, PageID.3118). The builder's total planned expenses were $1.12 million (more specifically, $1,120,906.00); and with square feet of 8,089 total in the duplex (heating and cooling square footage), that would have been a total cost of $138.00 per square foot. (Doc. 79, PageID.3120 (total expenses divided by square footage renders $138.00 per square foot, actually $138.57)).

[15] The expenditures included more than $14,000 for pilings for the foundation, and more than $28,000 for windows for the Site. (Doc. 84-24, PageID.4063 (showing expenses incurred from March 1, 2019 through June 20, 2019)). There was no testimony, however, that those materials could not be used during the ultimate construction of Breezy Shores.

B. The Stop Work Order and the Parking Ordinance.

1. *The City Revokes the Land Use Certificate Citing the Parking Ordinance.*

On July 31, 2019, at 9:15 a.m., a Baldwin County code enforcement officer in the planning and zoning department issued a Stop Work Notice and posted it on the Site, requiring plaintiffs to cease all efforts to improve the Site. (Doc. 84-21, PageID.4024 ("This construction is in violation of the following provisions: Revoked Land Use Certificate by Baldwin County Planning Director[.]")).[16] That same day, then-Baldwin County Planning Director Jackson sent a letter to Plaintiffs' contractor, Steve Jones, revoking the Land Use Certificate for the Site, same providing, in part, as follows:

> The purpose of this letter is to inform you that the approval granted for the above[-]referenced LU-190197 has been revoked, and the Land Use Certificate is hereby denied. The reason for this denial is based on a failure to meet off-street parking requirements as specified in Section 15.3.1 of the *Baldwin County Zoning Ordinance*. Specifically, two of the

[16] The impetus for issuance of the Stop Work Order was that certain "citizens" (most notably, Paul Stanton) had observed the development activities on the Site and contacted county personnel, including Jackson, and that was the point at which the code enforcement officer was instructed to go to the Site to see what was happening and issue a stop work order. (*Compare* Doc. 84-9, PageID.3489 (July 30, 2019 email penned by Stanton and sent to Jackson) *with* Doc. 78, PageID.2903-07 (Jackson's testimony regarding Stanton's July 30, 2019 email and his response to Stanton's email); *see* Doc. 79, PageID.3180 (Bordelon's testimony that "all of this was driven by Paul Stanton and a couple of neighbors across the street from EZ Breezy and Breezy Shores.")).

> required spaces partially extend into the right-of-way of Ponce de Leon Court. In addition, the driveways, as shown on the site plan, do not provide unobstructed ingress and egress to each space.
>
> . . .
>
> Please provide a revised Land Use Certificate application and site plan which addresses the above listed requirements. Furthermore, and in accordance with Section 18.2.6 of the zoning ordinance, you may appeal the denial of the Land Use Certificate to the County Commission District No. 4 Board of Adjustment in writing within twenty (20) calendar days after the date of this notice.

(Doc. 84-4, PageID.3470).

The Zoning Ordinance, specifically § 18.2.5. outlines the following procedure for revocation of a land use certificate: "The Zoning Administrator may revoke a land use certificate issued in a case where there has been a false statement or misrepresentation in the application or on the site plan for which the Certificate was issued or if after a documented warning has been issued the applicant has failed to comply with the requirements of these zoning ordinances. Revocation of a land use certificate shall also cause suspension of the building permit until such time as in the judgment of the Zoning Administrator, the applicant is in compliance with the requirements of these zoning ordinances." (Doc. 84-18, PageID.3752-53). Linda Lee testified that apart from this section of the zoning ordinance, she was not familiar with and did not know of any other authority affording the zoning administrator/planning director the right to revoke a land use certificate. (Doc.

78, PageID.2883). Jackson confirmed that there was no other provision of the zoning ordinance governing revocation of land use certificate applications. (Doc. 78, PageID.3012).

It is undisputed that the Stop Work Order and the July 31 letter was a surprise to plaintiffs. (*See* Doc. 79, PageID.3114-15 (Jones' testimony that he learned of the stop-work notice for the first time when his pilings installer called him and told him about it); *see also id.,* PageID.3179 (Bordelon's testimony that he had no idea, at the time, why Baldwin County decided to issue a stop work notice/order on the project)). At no point prior to those events had Baldwin County, Jackson, or anyone else alerted Plaintiffs that they were in jeopardy of losing their Land Use Certificate or that there were lingering parking issues related to the Site plan. (*See* Doc. 78, PageID.2912 (Jackson's trial testimony); Doc. 79, PageID.3115 (Jones' testimony that the first time he heard that the Site's parking plan was stacked parking that did not allow proper ingress and egress was on or around July 31, 2019); *see id.,* PageID.3179). At no time during the Land Use Certificate application and approval process did Linda Lee inform plaintiffs that their proposed parking configuration would not be permitted at the Site; there was no communication from the planning and zoning department to Plaintiffs in this regard after their submission of the revised site plan on June 12, 2019. Nor did Jackson have any prior communications with plaintiffs about the matter or afford them any opportunity to take corrective action or to be heard on the contemplated revocation of the Land Use Certificate before issuance of the Stop Work Order and the July 31 letter. (*See* Doc. 78, PageID.2912 & 2919-20 (Jackson's testimony)). There was simply no advance communication, documentation or warning

from Baldwin County or Jackson before these adverse actions were taken. (*See id.*).

Jackson testified that he did not revoke the Land Use Certificate but, instead, revoked the approval of the land use certificate and then denied the land use certificate (*see, e.g.,* Doc. 78, PageID.2938); however, while such language is contained in the letter, it simply cannot be gainsaid that what Jackson did was to revoke Plaintiffs' land use certificate, as reflected by Jackson's own testimony (Doc. 79, PageID.3062 (Jackson's admission that he revoked the land use certificate)), the face of the Stop Work Notice (Doc. 84-21, PageID.4024 ("This construction is in violation of the following provisions [of the zoning ordinance]: Revoked Land Use Certificate by Baldwin County Planning Director.")), and the recorded position of the Baldwin County Commission District 4, Board of Adjustment during its regular meeting on December 12, 2019 (*see* Doc. 84-5, PageID.3473-74 & 3476-77). Indeed, the meeting minutes even suggest that Jackson recognized that the Land Use Certificate was revoked. (*See id.,* PageID.3477 ("Mr. Danley asked when was the permit withdrawn? Mr. Jackson responded, July 31st. Mr. Danley stated so in essence they would have to reapply for a permit. Mr. Jackson responded there were two parts. There was the stop work order and the *revocation* of the Land Use Certificate. With the *revocation* of the Land Use Certificate, they did not have a pending Land Use Certificate or building permit.")) (emphasis supplied). Moreover, planning technician Crystal Bates testified that planning director Vince Jackson "denied and revoked" the land use certificate (Doc. 78, PageID.2848) and that he otherwise had no ability to change or modify her decision for land use applications (*id.,* PageID.2849). As well, Lee testified that Jackson "revoked the land use[.]" (Doc. 78, PageID.2868).

Accordingly, it is determined that the undisputed evidence supports a conclusion that Jackson's action/ letter on July 31, 2019 constituted a revocation of Plaintiffs' land use certificate.

2. *"Stacked Parking" and the Parking Ordinance.*

The critical feature of plaintiffs' Site development plan culminating in issuance of the Stop Work Order was the "stacked parking" arrangement. "Stacked parking" describes a parking configuration that allows for two (or more) vehicles to be parked one in front of the other on an axis perpendicular to the roadway, such that when both spaces are filled, the vehicle closer to the roadway obstructs the ingress and egress to the roadway from the vehicle further from the roadway. This configuration implicates § 15.3.1 of the Ordinance (the "Parking Ordinance"), which provides that "[o]ff-street parking spaces . . . must be connected with a street or alley by a driveway which affords unobstructed ingress and egress to each space." (Doc. 84-18, PageID.3723).[17] Indeed, the July 31 letter specifically cited § 15.3.1 and the lack of unobstructed ingress and egress to each space as the reason for Jackson's decision to revoke the Land Use Certificate. (Doc. 84-4, PageID.3470).

The Parking Ordinance was not new, having been on the books since 2017. During that time, Baldwin County had never prohibited stacked parking configurations for residential properties within Planning District 25 (where plaintiffs' Site was located) and had in fact approved plans containing such arrangements. (*See generally* Doc. 78, PageID.2856-58 (Lee's trial testimony);

[17] This section of the zoning ordinance, § 15.3.1, applies to the entirety of Baldwin County; it is not a section limited solely to Planning District 25. (Doc. 78, PageID.2943).

see also id., PageID.2954 ("[W]e knew that there had [] been some [stacked parking] that had been approved in the past.")). In an email to Jackson dated May 17, 2019, Lee indicated that § 15.3.1 "has never been used to require parking plans for residential developments." (Doc. 84-13, PageID.3510; *see also* Doc. 78, PageID.2856-57 (Lee's testimony that § 15.3.1 was "never used when we were looking at residential parking[.] . . . [N]o one ever applied it that way.")). Jackson responded to Lee, "You're right about section 15.3. I just believe it's intended for situations which are different from what we are talking about here.[18]. . . I know we have probably approved land uses down there with stacked parking. We can't just up and decide to reverse course." (Doc. 84-13, PageID.3510; *see also* Doc. 78, PageID.2859 (Lee's trial testimony that she agreed with Jackson that the zoning department could not "just up and decide to reverse course" with respect to its previous interpretation of § 15.3.1)). Lee replied, "I don't think we've required an actual parking plan. . . . I know I ha[d] one recently where the applicant said they had 4 parking spaces under the house (had to be stacked) and I approved it." (Doc. 84-13, PageID.3510; *see* Doc. 78, PageID.2859-60 (Lee's testimony that at one time the zoning department just looked to see whether "there was enough room for the number of [] parking spaces they said they had" and, for instance, if they said the parking spaces were under the house, the zoning department could tell there was enough room but only because they were stacked under the house)). Thus, the record unambiguously reflects that Baldwin County had an established history of not construing

[18] *See also* Doc. 78, PageID.2858 (Lee's testimony that it was the belief of everyone in the zoning department at that time that § 15.3.1 was intended for commercial parking lots and the like)).

§ 15.3.1 to prohibit stacked parking configurations for residential developments (*cf.* Doc. 84-16, PageID.3539 (referencing the "new" interpretation for parking)),[19] and had routinely approved land uses that included such a feature (*see* Doc. 78, PageID.2954 ("[W]e knew that there had [] been some [stacked parking] that had been approved in the past.")). Yet Baldwin County shut down plaintiffs' development (after previously approving their Site plan) for having a stacked parking configuration. (*Compare* Doc. 84-4 *with* Doc. 84-21). Jackson admitted that this is the first time he can remember in his tenure as planning director (from 2011 to 2020) where a determination/change in interpretation of a zoning ordinance caused the revocation of a land use certificate. (Doc. 78, PageID.2959).

What changed between March 2019 (when plaintiffs submitted their Land Use Certificate application with stacked parking arrangement, with no objection or request for revision by Baldwin County) and July 31, 2019 (revocation of Land Use Certificate because of stacked parking arrangement) was that Baldwin County and Jackson, in particular, came under pressure from members of the community to adopt a new interpretation of the Parking Ordinance that would prohibit plaintiffs' planned Site development. (*See* Doc. 78, PageID.2949; *see id.,* PageID.2960 (Jackson testified that Stanton had frequently complained to him and his staff about the EZ Breezy duplex development Plaintiff Bordelon was involved with and, further, that

[19] Jackson could not specifically recall whether stacked parking had ever been banned by the planning and zoning department in Baldwin County before Breezy Shores (Doc. 78, PageID.2946) but he was certainly unaware of any land use certificate applications, within the thousands he had seen in his tenure, that were turned down for stacked parking (*id.,* PageID.2947).

Stanton wanted to prevent the Breezy Shores property from being similarly developed)). In particular, on May 17, 2019, Paul Stanton, a neighboring landowner, who was also a member of the Fort Morgan Civic Association, sent a series of emails to Lee and Jackson floating the notion that stacked parking spaces at the Site should be deemed a violation of § 15.3.1. (*See, e.g.,* Doc. 84-11, PageID.3504; *compare id. with* Doc. 78, PageID.2855 (Lee's trial testimony that Stanton was expressing his opinion regarding how Section 15.3.1 ought to be interpreted in his emails on May 17, 2019); *id.,* PageID.2950 (Jackson's testimony that Stanton was advocating for a new interpretation of the parking ordinance)). Lee's initial reaction was to reject Stanton's interpretation, notifying him that, "[a]s to Section 15.3.1, it is staff's opinion that the language pertaining to 'unobstructed ingress and egress' refers to a more traditional parking lot found in commercial settings. . . . [S]tacked parking is not addressed in the parking standards for Planning District 25." (Doc. 84-11, PageID.3503; *see also* Doc. 78, PageID.2855-56 (same established through the trial testimony of Lee)).[20] Stanton immediately replied with a follow-up email stating, "I respectfully disagree with this determination. . . . I respectfully request [] a determination by the Zoning Administrator which is appealable. . . . I do believe an error has been made in the interpretation of the parking rules." (Doc. 84-14, PageID.3517). Lee's reaction to Stanton's "barrage of emails" was that Stanton was

[20] Lee concluded this email with "We are aware that it is an issue and it may be addressed in a text amendment[]" to the zoning ordinance at some point (Doc. 84-11, PageID.3503) because the zoning and planning department was aware of the issue with parking in Planning District 25, specifically, with people blocking the right of way, and wanted Stanton to know that the issue could be addressed in a future text amendment (*see* Doc. 78, PageID.2857).

"trying to catch us in some kind of trap." (Doc. 84-13, PageID.3510; *see also* Doc. 78, PageID.2858). Ultimately, Jackson effectively put an end to the May 17 email exchange by informing Stanton that no land use certificate or building permit had yet been issued for the Site, and that no final determination had been made as to the proposed duplex's compliance or noncompliance. (Doc. 84-11, PageID.3501).[21] Jackson's email to Stanton made no mention of the Parking Ordinance or Stanton's novel proposed interpretation of it to prohibit stacked parking configurations at residential developments going forward. (*See id.*).

On June 20, 2019 and June 24, 2019, Stanton again contacted Jackson about the Site, demanding "an official determination regarding whether or not Stacked Parking complies with the requirement in Section 15.3 regarding unobstructed ingress and egress of each parking space to the street." (*See, e.g.,* Doc. 84-11, PageID.3497-98) (emphasis in original).[22] Jackson responded on June 26, 2019, that he wanted to speak with Stanton in person or by telephone, explaining, "I think you will be pleased[.]" (*See* Doc. 84-15, PageID.3526). And while Stanton emailed Jackson later that afternoon stating

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[21] Lee testified that Jackson's email to Stanton (which she and others also received) and his specific statement that the land use certificate was denied on April 1, 2019, was correct in the sense that it was incomplete but not a denial in the sense that Plaintiffs would have to reapply or pay another fee. (Doc. 78, PageID.2864-65; *see also id.,* PageID.2961 (similar testimony from Jackson)).

[22] It is apparent that Stanton was opposed to Plaintiffs' construction on the Site, at least in part because he had a website advertising access to the beach through Plaintiffs' lot. (Doc. 79, PageID.3184 (Bordelon's testimony); *see also id.,* PageID.3185 ("[Stanton] even had a large arrow drawn on his website saying enter the beach here, the arrow pointed right in the middle of our empty lot, which was the Breezy Shores lot.")).

a desire to meet with Jackson the following afternoon (*id.*), it is clear from Jackson's trial testimony that he did not meet Stanton in person (Doc. 78, PageID.2964 ("[W]e never did have a meeting.")) or speak to him on the phone (*see id.,* PageID.2981). Nevertheless, by July 3, 2019, Jackson had prepared a draft letter construing the Parking Ordinance, which he forwarded to Stanton with a note reading: "When you have a chance, please review the attached letter, and let me know if this is what you are looking for in terms of an interpretation. I'll ask Wayne to review it as well." (Doc. 84-10, PageID.3493; *see also* Doc. 84-12, PageID.3509 (Jackson also sent the draft letter to Dyess on July 3); *see id.* (Dyess' response that the letter looked good to him, but that Jackson needed to be prepared to debate the meaning of "unobstructed"); *see* Doc. 78, PageID.2971 (Jackson's testimony that he wanted to make sure with Stanton that the contents of the July 3 letter would suffice Stanton's request for a formal determination)). Jackson sent a follow-up email to Stanton on July 8, 2019: "This is a follow-up to see if you have any comments or questions on the attached determination letter." (Doc. 84-10, PageID.3493)[23] Stanton replied less than two hours later, "Thanks Vince. This is great." (Doc. 84-10, PageID.3493). In that July 3 letter (which was addressed to Stanton), Jackson wrote the following:

> After careful consideration, it is my determination, as Zoning Administrator, that Section 15.3.1 does in fact prohibit stacked parking spaces in a manner which would potentially obstruct ingress and egress to each space. This determination is specific to

[23] Despite this follow-up email to Stanton, Jackson's testimony made it clear that the determination set forth in the July 3 "draft" letter was, in fact, final. (Doc. 78, PageID.2974).

> the supplemental parking requirements which are found in the Local Provisions for Planning District 25, and which are applicable to single-family and two-family properties (Section 2.3.25.3(c)).[24]

(Doc. 84-20, PageID.4023). Jackson did not inform anyone other than Linda Lee and Wayne Dyess, the County Administrator,[25] of this policy change. (Doc. 78, PageID.2898 (Jackson's testimony that Bates was unaware of "intervening things" from Plaintiffs' initial application to Bates' July 2019 approval of the application); *see also* Doc. 79, PageID.3061 (Jackson's admission that word did not get out to all of his staff members); Doc. 78, PageID.2964-65 (the policy change was not emailed to the county commissioners, though

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[24] According to Jackson, his determination was not specific to Planning District 25 (Doc. 78, PageID.2948 ("It applies everywhere.")), but, as well, admitted that this parking issue is not one that would arise in every planning district because "the additional parking requirements in Planning District 25 make it more pertinent to Planning District 25." (*Id.* ("[I]t's very unlikely that that issue would come up somewhere else.")). He later admitted that when the determination was made, the "focus [at] that point was Planning District 25." (*Id.,* PageID.2968). Indeed, it is clear to the Court that the focus of the July 3 determination was, more pointedly, Plaintiffs' Breezy Shores site.

[25] Dyess, County Administrator of the Baldwin County Commission (Doc. 79, PageID.3081), testified that Jackson had the authority to make this determination/interpretation, which was an official interpretation of the zoning ordinance, and appealable to the Board of Adjustment. (*See* Doc. 79, PageID.3082). According to Jackson, he spoke to Dyess before he made the determination and, as well, *may have* consulted a book published by the American Planning Association on parking, other zoning ordinances, and internet searches on parking lot requirements/designs. (Doc. 78, PageID.2955-56).

Lee knew about it)).[26] There was no public announcement (*see id.,* PageID.2965 (the policy change was not published on the zoning and planning department's website)) and no amendments or revisions to the Parking Ordinance itself were made (*see* Doc. 78, PageID.2980 (defense counsel's admission that the determination was never published)). And certainly, Mike Bordelon and Steve Jones were not notified of the policy change when the determination was made by Jackson on July 3, 2019. (Doc. 78, PageID.2966; *see also* Doc. 79, PageID.3115 (Jones' testimony that he did not know about stacked parking until July 31, or thereabouts)). And while Jackson testified that Stanton could have appealed this determination in early July, Bordelon and Jones admittedly could not because they did not know about the determination in early July (Doc. 78*,* PageID.2969-70) and, of course, then received

[26] Indeed, there can be little question but that Jackson's failure in communicating with the zoning staff in general and particularly with respect to this change in policy, led to Jackson being counseled by Dyess. (*Compare* Doc. 78, PageID.2927 (Jackson's testimony that in January of 2020, he was counseled in writing, not formally reprimanded, by his boss, Wayne Dyess, for not holding monthly staff meetings, with Dyess specifically indicating that the issues at the Site subject to this lawsuit could have been avoided had such meetings been held) *with* Doc. 79, PageID.3083 (Dyess' admissions that he counseled Jackson about failing to communicate with staff and immediately after this incident counseled him that monthly staff meetings could have headed the issue off); and *id.,* PageID.3084 ("'A lack of communication was brought to light in a Fort Morgan issue regarding the administrative interpretation that was not conveyed to all staff members.'")), and, ultimately, to his demotion (*see* Doc. 79, PageID.3089 (though Jackson's demotion in September of 2020 was voluntary, one of the factors leading to that demotion involved shortcomings in communication)) and resignation.

their land use certificate application approval on July 19, 2019.

As noted, Baldwin County approved plaintiffs' Land Use Certificate (including site plan with a stacked parking configuration)[27] on July 19, 2019, more than two weeks after Jackson's letter to Stanton adopting the new interpretation (albeit unpublished and uncirculated even amongst zoning staff) of the Parking Ordinance. (*See* Doc. 78, PageID.2837). The employee who approved it, Crystal Bates,[28] testified that when

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[27] Bordelon relied on Mark Pavey, his architect, to look at the zoning ordinances and draft the site plans in accordance with what Pavey understood the ordinances to require. (Doc. 80, PageID.3264 (responding to a question asking when he started developing Breezy Shores whether he knew the parking ordinance had changed to require more spaces); *see also id.,* PageID.3276-77 (Bordelon's testimony that prior to March of 2019 he absolutely never personally read the Baldwin County Zoning Ordinance)).

[28] Bates was and is a planning technician with the Baldwin County Planning and Zoning Department and since her late-2015 hiring date has principally reviewed and approved land use certificate applications, along with zoning verifications. (*See* Doc. 78, PageID.2835-36). At the time she approved the subject land use certificate, she unquestionably had the authority to approve it. (Doc. 78, PageID.2840). Linda Lee testified that it was within Bates' powers and responsibilities in her position as planning technician to review and approve Plaintiffs' land use certificates. (Doc. 78, PageID.2870; *see also id.,* PageID.2887 ("Planning techs issue land use certificates for residential."); *id.,* PageID.2899 (Jackson's testimony that Bates' authority included reviewing and approving land use certificate applications); Doc. 79, PageID.3060-61 (Jackson's admission that when he delegated authority in his office, it was delegated, and that any action taken by a subordinate pursuant to that delegation binds the planning and zoning director and, as well, binds Baldwin County). Moreover, as explained by Lee, once Bates approved and issued the land use certificate, her decision was/is not reviewed by anyone else, and that approval empowered (or empowers) the landowner to get a

she did so, stacked parking configurations at residential properties were permitted in Planning District 25. (Doc. 78, PageID.2837; *see id.,* PageID.2846 (Bates' testimony that the subject land use application was subject to a full residential review for Fort Morgan, which included "site plan for parking, building plans showing the elevations, U.S. Fish and Wildlife permits, ADEM permit, and of course sewer, water, and driveway.")). And that Bates made no mistakes in approving the Land Use Certificate (inclusive of the site plan) is apparent from the trial testimony (*see id.; compare id. with id.,* PageID.2901 (Jackson's testimony that in granting approval, Bates did nothing wrong, and that Steve Jones did nothing wrong in taking the modified plan and ADEM certificate to the planning and zoning department)); *see id.,* PageID.2840 (Bates' testimony that she was not reprimanded because of her approval of the land use certificate)), including that of former Zoning Administrator Jackson (*id.,* PageID.2900-01 (Jackson's testimony that Bates was not reprimanded and that in granting approval of Plaintiffs' application she did nothing wrong because she was unaware of the interpretation regarding parking)), since Jackson's policy change to the Parking Ordinance was never communicated to Bates or any other member of the staff, with the exception of Lee (Doc. 78, PageID.2898 & 2900-01 (Jackson's testimony that Bates did not know about "intervening things," inclusive of the interpretation regarding parking)).

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building permit. (Doc. 78, PageID.2888; *see also* Doc. 79, PageID.3060-61)). For his part, Jackson explained that a properly approved land use certificate is a "land use certificate where you have approval" (Doc. 79, PageID.3074), which certainly describes Bates' actions vis-à-vis Plaintiffs' application.

The impetus for the Stop Work Order and the July 31 letter was (once again) correspondence from Stanton.[29] In an email dated July 30, 2019, Stanton notified Jackson that pilings were being driven and construction had begun at the Site. Stanton stated, "If this has NOT been approved, Construction and Pyle [sic] driving should stop immediately tomorrow morning (7/31/19.)." (Doc. 84-9, PageID.3489; *see also* Doc. 78, PageID.2903-04 (Jackson's trial testimony regarding Stanton's July 30, 2019 email); *see id.*, PageID.2905-07 (Jackson admits that he responded to Stanton's email at 5:55 p.m. on July 30, 2019, stating "'Paul, I'm aware of the situation. I will send someone down tomorrow to issue a stop-work order. I will contact you tomorrow with more information[,]'" but never identified when he found out that Plaintiffs had their land use certificate and building permit, although he did try to suggest that the code enforcement officer was sent to the Site "to place a stop-work order if it was warranted.")). The following morning, Jackson and Baldwin County issued the Stop Work Order and later the July 31 letter notifying Plaintiffs for the first time of the novel interpretation of the Parking Ordinance to prohibit stacked parking configurations like the one in the Site plans. (*See* Doc. 78, PageID.2910 (Jackson's testimony that it was possible the stop-work notice was placed on the Site prior to issuance of his July 31 letter); *compare id. with id.,* PageID.2921 (Jackson's

[29] Certainly, Jackson did not keep abreast of the status of the land use application of the Plaintiffs, though he certainly could have (Doc. 78, PageID.2933); instead, Jackson was unaware Plaintiffs' land use application had been approved until he received the email from Stanton on July 30, 2019, advising that pilings were going into the ground (*see id.*).

unequivocal testimony that he did not write his letter on July 30)).

C. The Revised Incidental Take Permit and the Story Ordinance.

Understandably surprised by the abrupt posting of the Stop Work Order at the Site with no prior warning on the morning of July 31, 2019 (*see* Doc. 78, PageID.2911, 2921 & 2924 (Jackson's testimony that he did not reach out directly to Steve Jones or Mike Bordelon on July 31—or July 30, by calling them—that there were problems with the project and that a stop-work notice was going to be posted, but simply wrote the July 31 letter)), Plaintiffs contacted the planning department in an effort to resolve the issue (*see id.,* PageID.2911-12; Doc. 79, PageID.3115-16 (Jones' testimony that he reached out first to Linda Lee and then to Jackson)). At that time, Plaintiffs learned that their Land Use Certificate had been revoked by Jackson.[30] Jackson outlined four options for plaintiffs to resolve the issue in an August 1, 2019 email to Steve Jones: (i) revising the plans to allow unobstructed ingress/egress for each parking space; (ii) requesting a variance from off-street parking requirements; (iii) appealing the "denial" (as clearly established heretofore, a revocation) of the land use certificate (or asking for a staff determination pertaining to parking, which could also be appealed); or (iv) reducing the number of bedrooms in the duplex to reduce the

[30] Bates could not remember a land use certificate being revoked during her tenure in the zoning department (before this revocation) and agreed that it would be unusual to have anything revoked. (Doc. 78, PageID.2840; *see also id.,* PageID.2872-73 (Lee has been in the planning department since 2006 and has been involved with thousands of land use certificate applications, and in none of those cases was the land use certificate revoked)).

number of required parking spaces. (*See* Doc. 84-6, PageID.3479).[31] Although plaintiffs disagreed with defendants' interpretation of the Parking Ordinance, they elected the first option, and moved forward to resolve the parking issue and obtain a revised incidental take permit ("ITP") from the United States Fish and Wildlife Service ("USFWS"). (*See* Doc. 79, PageID.3116 (Jones' testimony that Plaintiffs' quickly drew up a new parking plan); Doc. 84-26, PageID.4068 (notice from attorney that Plaintiffs would not appeal to the BOA)).

A short time after the Stop Work Order was issued, plaintiffs submitted a revised Site plan containing a revised parking configuration that complied with Baldwin County's new interpretation of the Parking Ordinance. (*See* Doc. 78, PageID.2995 (testimony of Vince Jackson); Doc. 79, PageID.3116 (Jones' testimony that the revised Site plan with revised parking configuration was submitted about a week later); Doc. 79, PageID.3186 (Bordelon's testimony that a new site plan was

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[31] According to Jackson, his purported action in revoking approval and denying the land use simply put the Plaintiffs' land use application back to an incomplete status, with the requirement that the Plaintiffs provide a revised site plan showing they would meet the parking requirements "and that would probably mean a revised Incidental Take Permit." (Doc. 78, PageID.2939). Thus, the planning and zoning department was looking for a revised site plan (*id.,* PageID.2943), no new application or filing fee (*id.,* PageID.2940; *compare id. with id.,* PageID.2941 ("[I]f it had been longer than six months, we might ask for a new application."); *but cf.* Doc. 79, PageID.3075 (Jackson's diametrically opposed testimony that Plaintiffs' land use certificate that had been approved was revoked and denied, such that they no longer had a land use certificate; he went on to testify that the certificate was improper because it did not meet the standard for unobstructed ingress and egress based on his July 3 interpretation/determination)).

submitted within a few days)). In response, Linda Lee notified Plaintiffs on August 16, 2019, that (per the Planning Director) they would need a revised ITP from the USFWS before they could resume construction on the Site. (Doc. 84-26, PageID.4069; *see also* Doc. 84-7, PageID.3486).[32] It was Lee's understanding that Plaintiffs just had to revise their parking plan and obtain the revised ITP from the USFWS to get the stop-work notice lifted and resume construction on the Site. (*See* Doc. 78, PageID.2868-69).

William Lynn, a biologist at the USFWS, confirmed receipt of plaintiffs' application for a revised incidental take permit on August 20, 2019. (*See* Doc. 79, PageID.3189 (Bordelon testified that the application for the revised ITP permit was submitted on August 20, 2019)). Approximately six weeks later, on October 2, 2019, Lynn notified Plaintiffs that the incidental take permit "is very close to being issued, hopefully later this week." (Doc. 44, PageID.599).[33] On October 7,

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[32] When Plaintiffs purchased the lot on which they planned to build Breezy Shores, "there was an ITP permit available that was part of the purchase[,]" and all Plaintiffs had to do was a name change to change the permit into the name of Breezy Shores, which occurred in June of 2018. (Doc. 79, PageID.3176; *see also id.,* PageID.3176-77 (the name-change application was submitted to the USFWS on May 31, 2018, and Plaintiffs received the permit back on June 28, 2018)). And the reason a revised ITP permit was required was because the new parking plan increased the size of parking and, therefore, there was a larger "impact" or "take." (Doc. 79, PageID.3185 (Bordelon's testimony); *compare id. with* Doc. 80, PageID.3308- 09 ((Bordelon explained that an ITP permit is required if construction is in an area the USFWS has designated a beach mouse habitat and that such designation "limits the amount of the lot you can impact with construction")).

[33] It remains unclear exactly what happened at the USFWS between August 20 and October 2. The record reflects that certain non-party property owners in Fort Morgan actively lobbied Lynn

2019, Lynn indicated that Plaintiffs' "permit is almost ready for printing," with only two minor additional steps for plaintiff to take. (Doc. 44, PageID.597).[34] Plaintiffs promptly complied with those requests, including paying for the permit (Doc. 79, PageID.3189), and received confirmation by October 10, 2019 (*see id.* (when the check cleared on October 10, 2019, Bordelon understood that the application was complete, and

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and the USFWS to delay issuing a determination on plaintiffs' application for a revised incidental take permit. For example, on August 21, 2019, a property owner sent an email to Lynn that included the following passage: "Again, please help us delay [the Site] anyway you can. This new parking interpretation and the proposed 2 story limit will dramatically reduce the size of these mega structures." (Doc. 84-16, PageID.3539). This email attached a copy of a proposed new Baldwin County ordinance limiting single- and two-family structures to two stories and observed that the Site "is the first structure in District 25 to be required to comply with this new 'interpretation' for parking. This is a huge win for the beach." (*Id.*). And while there was no direct evidence offered at trial that Lynn or anyone else at USFWS actively delayed processing plaintiffs' revised incidental take permit application in acquiescence to this request from a community activist, the evidence is that plaintiffs' revised incidental take permit application was not approved by Lynn until after Baldwin County's brand-new zoning ordinance limiting the height of single-family and two-family structures in Planning District 25 to two habitable stories was enacted on October 15, 2019.

[34] On October 7, 2019, Jackson emailed Lynn about a "series of proposed zoning text amendments pertaining to Planning District 25 (Fort Morgan)[,]" asking that he comment on them and highlighting that his department had received "a good deal of pushback[,] particularly on the proposed two story height limitation for single family and duplex structures." (Doc. 84-17, PageID.3544). Jackson conceded at trial that the pushback came from those people who wanted to construct rental property and their understanding that they likely would not realize as much money from a two-story structure versus a three-story structure. (Doc. 78, PageID.3000).

they were waiting on the actual physical copy of the permit to be sent)). When days passed without receipt of the permit, plaintiffs reached out to Lynn on October 15, 2019 to inquire as to the status of the Site's incidental take permit. (Doc. 79, PageID.3189 (Bordelon emailed Lynn)). Lynn did not respond. (*See id.,* PageID.3190)). Bordelon emailed Lynn again on October 22, 2019 (*id.*) and the USFWS finally issued the revised incidental take permit on October 25, 2019 (*see* Doc. 84-22, PageID.4028 ("Attached is a digital copy of your ITP permit modification.")).[35] Plaintiffs immediately forwarded that permit to Baldwin County and requested that the Stop Work Order be lifted. (Doc. 79, PageID.3191 (Bordelon's testimony that Plaintiffs went back to Jackson and requested removal of the stop-work order); *see* Doc. 84-22, PageID.4028; Doc. 78, PageID.3001-03)). Plaintiffs believed that once the parking was changed and the revised ITP submitted, the stop-work order/notice would be lifted. (Doc. 79, PageID.3186 (Bordelon testimony)).

Unfortunately for plaintiffs, Baldwin County had undertaken other steps antithetical to the proposed Site development in the interim. On October 15, 2019, as plaintiffs awaited issuance of their USFWS incidental take permit after having complied with all prerequisites, Baldwin County enacted a brand-new zoning ordinance limiting the height of single-family and two-family structures in Planning District 25 to two habitable stories (the "Story Ordinance").[36] (*See generally* Doc.

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[35] Plaintiffs never received any explanation for why it took more than 8 weeks to get their revised ITP permit. (Doc. 79, PageID.3190-91).

[36] Bordelon was unaware of the story ordinance until after it was passed; he was unaware of it being noticed or of a comment period. (Doc. 80, PageID.3291).

84-19; *see also* Doc. 79, PageID.3057).[37] This Story Ordinance, which had been in the works since at least June 19, 2019 (*see id.,* PageID.3073 (meeting Jackson and Dyess had with a Fort Morgan group discussing parking and story limitations)),[38] was of pivotal importance because plaintiffs' Site plan, as previously submitted to and approved by Baldwin County, called for three habitable stories in the duplex (*see* Doc. 79, PageID.3169-70 (Bordelon's testimony that the site

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[37] The precise language of the Story Ordinance is as follows: "The maximum height of single family and two-family structures shall be limited to two (2) habitable stories." (Doc. 84-18, PageID.3592). But the height of a two-story structure still could be up to 35 feet. (Doc. 78, PageID.3001).

According to Jackson, the pivotal factor that wrought this change was input from the Fort Morgan Volunteer Fire Department, not other members of the community. (*See* Doc. 79, PageID.3055-56). For his part, Bordelon testified that the story ordinance, on its face, reads as though "they no longer want three-story buildings in Fort Morgan[] . . . only [] up to two floors[,]" based on the rationale of fire safety (Doc. 80, PageID.3298) but then set about to demonstrate the absurdity of that rationale (*id.*, PageID.3298-99 ("I can build a two-story building with cathedral ceilings on the first floor and have my second floor be at the same height as what a three-story third floor would be. So, it makes zero difference on height issues for fire safety. So, I do not understand why the ordinance was passed, other than it was a hurried-up measure to try to stop another larger building being built in Fort Morgan.")).

[38] Yet, neither Jackson nor anyone with the planning and zoning department placed Plaintiffs on notice of this possible significant change to the zoning ordinance, whether in the July 31 letter or at any other time in the interim between July 31, 2019 and October 15, 2019, when the text amendment was adopted. (*See, e.g.,* Doc. 79, PageID.3192 (Bordelon's testimony that prior to October 25, 2019, no one in the zoning and planning department told Plaintiffs that the height ordinance would be applied to their circumstances, and they had no reason to believe that it would be so applied)).

plan originally submitted to the zoning and planning department was for a 14-bedroom three-story duplex, just like his property next door, EZ Breezy)).[39] Prior to enactment of the Story Ordinance, numerous (probably more than ten) single or two-story homes in Planning District 25 had been constructed with three or more stories. (*See, e.g.,* Doc. 79, PageID.3170 (Bordelon's testimony that his property next to the Site, EZ Breezy, was a 3-story)). One or more Fort Morgan property owners had been actively pushing for the Story Ordinance for some time, with the cooperation of defendant Jackson. (*See generally* Doc. 79, PageID.3050-53; *compare id. with* Doc. 68, PageID.1950). Indeed, on August 20, 2019, Jackson sent one property owner "the proposed amendments to the local provisions for Planning District 25," including "[t]he section pertaining to the limit on habitable stories[.]" (Doc. 84-16, PageID.3538). In turn, the property owner contacted Lynn of the USFWS by email on August 21, 2019, as aforesaid (after meeting him in person on August 20, 2019)—while Plaintiffs' incidental take permit application was pending—and wrote, "[T]he ordinance now proposes a

[39] According to Steve Jones, the original plans drawn up by the architect included a fire suppression system to make the duplex safer. (Doc. 79, PageID.3122-23). Bordelon testified, however, that the sprinkler system was not put into the plans until well after March 27, 2019 (the date when the original plans were received by the planning and zoning department), when he was told by his architect, Mark Pavey, that a sprinkler system would be required. (Doc. 80, PageID.3261-62; *but cf. id.,* PageID.3277 (Bordelon's additional testimony that the sprinklers were integrated into the plan by Pavey before final approval and obtainment of the building permit—so, before July 17, 2019—but the witness could not state exactly when that occurred)).Bordelon's EZ Breezy had been built to withstand hurricanes and it was his intention to build Breezy Shores in the same manner as EZ Breezy was built. (Doc. 79, PageID.3172).

limit of 2 stories for all single- and two-family structures. This 2-story limit will greatly reduce the number of bedrooms that can be built in one of these duplexes. *Again, please help us delay [the Site] anyway you can*. . . . [T]he proposed 2 story limit will dramatically reduce the size of these mega structures." (Doc. 84-16, PageID.3539). In a separate communication, the property owner informed Lynn that the Story Ordinance would likely be voted on by the Baldwin County Commission in October 2019. (Doc. 84-16, PageID.3536-37). The implication, of course, is that property owners wanted the Story Ordinance to be in place before Plaintiffs could obtain their revised USFWS permit, the last impediment to lifting the Stop Work Order. For his part, Jackson denied asking Lynn to delay issuance of the revised ITP permit pending the new text amendment(s) he was pushing forward. (Doc. 78, PageID.2996).

Because of these intervening developments relating to issuance of the Story Ordinance, defendants did not lift the Stop Work Order when plaintiffs submitted their revised incidental take permit on October 25, 2019. Instead, on November 5, 2019, Jackson sent an email to Plaintiffs' counsel explaining, "A new issue has arisen regarding this property and the proposed duplex structure." (Doc. 84-22, PageID.4027).[40] Jackson detailed the Story Ordinance adopted on October 15, 2019, and outlined the ramifications of that amendment for Plaintiffs as follows:

> When the stop work order was imposed, the land use certificate application was rescinded

[40] Jackson testified that until a building permit is properly issued, applicants are subject to changes in the zoning ordinance. (Doc. 79, PageID.3036).

> and denied. As a result, there was no pending application at the time the text amendments were adopted.[41] A new land use certificate application, which shows compliance with all current zoning requirements including the [Story Ordinance], will be required to move forward. . . . [A] duplex (two-family dwelling) with three habitable stories cannot be approved.

(*Id.* (footnote omitted)).[42] Jackson advised that the plaintiffs only options were: (i) to revise the Site plan so the structure would be no more than two habitable stories; (ii) to seek a variance from the Story Ordinance from the Board of Adjustment; or (iii) to appeal the determination to the Board of Adjustment. (Doc. 84-22, PageID.4027).

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[41] Jackson testified that if his department had received those two additional items from Plaintiffs before the two-story text amendment, Plaintiffs' application would have been approved (Doc. 78, PageID.3006), which testimony appears to be in direct contravention to this statement in his email to Plaintiffs. (*Compare id. with* Doc. 84-22, PageID.4027).

[42] This became Jackson's position in November of 2019, as opposed to August of 2019, because of purportedly being "past" 6 months. (*See* Doc. 78, PageID.3007-09). And while the ordinance only "speaks" to a building permit having to be received/issued within 6 months of approval of a land use certificate application (*see* Doc. 84-18, PageID.3752), Jackson testified that it had always been the policy (certainly unwritten) of the Baldwin County zoning and planning department that a land use certificate is good for only 6 months, specifically, 6 months from when it is originally submitted (Doc. 78, PageID.3008; *id.* at PageID.3010 ("[T]he date that the land use certificate was turned in was more than six months before and it was our position at that point that they would've needed to submit a new application.")). As previously explained, this alleged "policy" is inconsistent with the language contained in the Zoning Ordinance.

Revising the Site plan to two habitable stories was potentially financially crippling for plaintiffs because of the corresponding reduction in rental revenues the property could generate.[43] As a result, plaintiffs elected to appeal Jackson's decision to the Board of Adjustment.[44] (Doc. 84-2; *see also* Doc. 79, PageID.3057 & Doc. 80, PageID.3295-96).[45] On December 12, 2019,

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[43] In addition, Plaintiffs had already incurred the following costs between March 1, 2019 and June 20, 2019: (i) a builders' fees in the amount of $11,366.00; (ii) copies of plans in the amount of $49.91; (iii) sewer tap fee in the amount of $2,750.00; (iv) a permit fee in the amount of $25.00; (v) $14,231.00 in pilings' cost; and (vi) window costs in the amount of $28,145.41. (Doc. 84-24, PageID.4063). Bordelon testified that he believed the "total" was higher than $56,567.32 and was in the range of $68,000, including $3,000.00 for moving pilings. (Doc. 80, PageID.3271-72). According to Bordelon, he does not personally owe any money for work done on the project (*id.,* PageID. 3273) and that Jones has some funds remaining in the project account from draws totaling $90,000 that Plaintiffs supplied him (*id.*).]

[44] And while Bordelon understood that he could have built the two-story house at any time (Doc. 80, PageID.3302), all his design plans for a three-story duplex would have been out the window (*id.,* PageID.3310 (he spent $22,000 on site plans and designs); *see also* Doc. 79, PageID.3174 (similar testimony)) and he would still need to have the revised two-story plans reviewed by the USFWS to satisfy that agency that the plans for the two-story duplex were "within the parameters of [their] take." (Doc. 80, PageID.3310).

[45] The Court reads Plaintiffs' appeal to the Board of Adjustment as seeking a variance (*see* Doc. 84-2, PageID.3330 ("Appellant requests that the Board lift the Stop Work order and reinstitute the Land Use Permit and Building Permit previously issued, *or in the alternative take such action as necessary to allow Appellant to proceed with construction as previously approved.*")), as did Bordelon (*see* Doc. 80, PageID.3296 ("Sure [this language was a request for a variance], we'd take [it] any way we could.")). Ultimately, Bordelon testified that he is "asking that [Plaintiffs'] building be built because it was already approved to be built

following a hearing, the Board of Adjustment entered a written Notice of Action reflecting that it upheld the administrative decision of the zoning administrator and denied the appeal. (*See* Doc. 84-5, PageID.3478 ("Mr. Church made a motion to uphold the Administrative Decision of the Zoning Administrator and the stop work order be upheld and the appeal denied. The motion received a second from Mr. Mitchell and carried unanimously."); *see also generally* Doc. 84-23 (Board of Adjustment Staff Report which recommended to the board that the administrative decision be upheld, and

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before the ordinance was passed." (Doc. 80, PageID.3300). The Addendum to the Appeal reads, in relevant measure, as follows:

> [Brezzy Shores LLC] had vested rights in the permits issued prior to October 15, 2019, the effective date of the new height ordinance. It was instructed, erroneously, to rectify the parking issue after permits had already been issued. When that occurred, the permits did not lapse, but rather were held in abeyance until those issues were rectified. After they were, the permits should have been reactivated notwithstanding the changes that occurred on October 15, 2019, given that Appellant's now-non-conforming use (three stories) had already been approved and permitted. *Budget Inn of Daphne, Inc. v. City of Daphne,* 789 So.2d 154, 159 (Ala. 2000) ("an existing nonconforming use is a vested property right that a zoning ordinance may not abrogate except under limited circumstances"); *Port of Mobile v. Louisville & N.R. Co.,* 4 So. 106, 84 Ala. 115, 122 (Ala. 1888) (once a right has vested equity can be invoked to prevent a later-passed ordinance from depriving the owner of that right).

(Doc. 84-2, PageID.3332-33). Bordelon testified that he had no reason to believe that allowing Breezy Shores to be built as a three-story duplex would unreasonably increase the congestion in public streets, increase the danger of fire, imperil the public safety, or impair the health, safety, comfort, morals, or general welfare of the inhabitants of Baldwin County. (Doc. 80, PageID.3298).

the appeal denied)). Plaintiff Breezy Shores filed a Notice of Appeal to the Circuit Court of Baldwin County, Alabama, on December 16, 2019. (*See* Doc. 44, PageID.271). That Notice of Appeal commenced this litigation which, following removal to this Court, now comes before the undersigned for final determination following a three-day bench trial.

D. Damages.

Franklin Reed, a real estate appraiser (Doc. 79, PageID.3138), produced an expert report (*see id.*) and offered expert testimony respecting two credible valuation methods—the cost approach and the sales comparison approach—to develop an overall opinion of value from (or between) two different dates with respect to the subject property, Breezy Shores, LLC (*see id.,* PageID.3138-39). The date of August 1, 2020 was chosen for the sales comparison approach because that was the point in time where there existed "a hypothetical value of completion[]" and Reed's report contained sales prices of comparable properties to Breezy Shores, LLC (*id.,* PageID.3140 ("I examined the local MLS as well as looked at anything that was off market to find comparably-sized beach front properties that were primarily used for vacation rentals.");[46] *see also id.,* PageID.3040-41 (under this approach he also considered the number of bedrooms, 14)). Under the sales comparison approach, Reed valued the duplex at $3,180,000.00. (Doc. 79, PageID.3143). The expert offered further testimony that the average cost per bedroom can be determined using the sales comparison

[46] One of the comparables utilized was EZ Breezy (*see* Doc. 79, PageID.3153), which Bordelon sold in July of 2021 for $3,050,000.00 (*id.,* PageID.3172-73). EZ Breezy was built for $1,200,000.00 and the lot cost $450,000. (*Id.*).

approach by taking the value of the subject property ($3,180,000.00) and dividing the value by the number or bedrooms at the subject property (14), to arrive at $227,142.00 per bedroom. (*Id.,* PageID.3146-48).[47] Reed concluded his sales comparison approach testimony with the observations that "[p]rice per bedroom is a valid way for a short-term vacation rental property, because the value is driven by the rents[]" and that the more bedrooms or the more units of any metric that you have, the price associated with each unit goes downward. (*Id.,* PageID.3149).

With respect to his cost approach analysis, Reed also utilized the anticipated project completion date of August 1, 2020, and calculated the number $281.67 per square foot, signifying the replacement cost new of the subject project per square foot. (*See id.,* PageID.3149-50). Under this approach, multiplying price per square foot ($281.67) by the total square footage (9,360) rendered a total value of $2,636.449.00[48] which, when added to the land value of $562,500, renders a total value of approximately $3,200,000.00.[49] (*See id.,* PageID.3151; Doc. 84-3, PageID.3400).[50] And given

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[47] The average price per bedroom of Reed's five comparable properties was an almost identical $227,191.00 (*see id.,* PageID.3148), which told Reed that "the metric of price per bedroom is pretty consistent with [his] concluded value on the price per square foot." (*Id.,* PageID.3149).

[48] "[T]he total cost new of the structure [is] $2,636,449, or $281.67 per square foot. (Doc. 84-3, PageID.3400).

[49] "[W]e have developed an opinion that the 'As Complete' hypothetical market value of the Fee Simple estate of the subject property, as of March 11, 2021," was $3,350,000. (*See* Doc. 84-3, PageID.3339).

[50] Reed agreed on cross-examination that there was a third general approach to value property, the income approach; however, he did not use that approach because "[s]hort-term vacation rentals

that the two values rendered by the two different approaches ($3, 200,000.00 and $3,180,000.00) are close (only $20,000.00 apart), this "adds confidence to each approach." (Doc. 79, PageID.3165).

Bordelon expected Breezy Shores to be constructed by July of 2020. (Doc. 79, PageID.3194). And because he believes that it will take at least a year to construct it beginning today, he believes that he has lost approximately 3 years of rental income. (*See id.*). Taking as a reference the 2019 rental of the 18-bedroom EZ Breezy next door, from which Plaintiffs received net revenue of $257,000[51]—the gross revenue was $357,000, but rental management expenses, lodging tax, and repairs took that down to $257,000[52]—[53]and then accounting for the fact that Breezy Shores has only 14 bedrooms (as opposed to 18), Bordelon estimated that the total net revenue he lost per year was $199,888.00, which totals $599,666.00 for three years. (Doc. 79, PageID. 3195-96).

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are tricky" in regards to this approach because one is often not privy to the expenses associated with management of the properties and, therefore, "when you try to get comparables to help support a cap rate or other metrics for the income approach, it's very fragmented, so it makes that approach less reliable." (Doc. 79, PageID.3152-53).

[51] This was Bordelon's net revenue theory. (Doc. 80, PageID.3303).

[52] The "actual" and "true" numbers were $256,546 for the EZ Breezy duplex of 18 bedrooms, making the estimated net revenue for a 14-bedroom duplex (Breezy Shores) $199,538.28; this latter number multiplied by 3 totals $598,614.84. (Doc. 80, PageID.3210-11).

[53] In 2020, the gross revenue on EZ Breezy was $315,000, with the net being $198,000 or $200,000. (Doc. 79, PageID.3196). According to Bordelon, however, 2020 was an outlier because it "was the COVID year[.]" (*Id.,* PageID.3197 ("We had a record year in '21 and '22 bookings are really, really strong.")).

In addition, Bordelon testified that when Steve Jones provided his initial cost plan, the cost of Breezy Shores was estimated at $1.12 million, $138.00 a square foot based on 8,089 square feet. (Doc. 80, PageID.3112-13). However, the cost of building materials and construction costs in general have indisputably risen since July of 2020,[54] the projected end date of the Breezy Shores duplex, with Jones testifying construction would be $225.00 a square foot and Bordelon testifying that the minimum would be $225.00 a square foot but probably closer to $235.00 a square foot based on his recent experiences. (*Id.* at 3213 & 3248; *compare id. with* Doc. 79, PageID.3197-98; *see* Doc. 79, PageID.3121-22 (Jones estimated that the cost per square foot had risen to $225.00 due to increased costs of materials—lumber, tile, HVAC, etc.—and labor)). Multiplying the Breezy Shores square footage of 8,089 by $225 renders a total of $1.82 million and by $235 renders a total of $1.9 million. (Doc. 80, PageID.3213 & 3248). And subtracting the original costs of $1.12 million from those numbers renders totals of $700,000.00 and $780,000.00, respectively. (*See id.,* PageID.3213 & 3249*; compare id. with id.,* PageID.3214 (the "actual" differences are $699,118.44 and $780,008.44)).[55]

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[54] Bordelon admitted that by August of 2021, he was aware that the costs of construction had significantly risen. (*See id.,* PageID.3252). And even before then, in June of 2021, Bordelon was relaying information he received from Steve Jones that the increase in costs had risen from $62,654.00 to a projected $125,308.00. (Doc. 80, PageID.3270; *see also id.* (Bordelon's further testimony that he believed in June of 2021 that the increased costs would be higher, but he could not "substantiate how much.")).

[55] Bordelon further testified that if Plaintiffs had to build Breezy Shores as a two-story duplex he would lose 4 bedrooms, with his square footage moving from 8,089 to about 5,550. (Doc. 80, PageID.3214). The diminution in value of a three-story versus

CONCLUSIONS OF LAW

A. Whether Certain Evidence Introduced at Trial Should be Deemed Inadmissible and Stricken. Before substantively addressing Plaintiffs' remaining claims in this action, the Court must first handle some procedural matters, most of which touch upon evidence and testimony related to damages purportedly suffered by Plaintiffs in this matter. The Court will address the damages issues in the order that the Defendants addressed them in their post-trial brief. (*See* Doc. 89, PageID.4206-23).

1. Evidence of Increased Construction Costs. Defendants contend that all evidence Plaintiffs offered at trial regarding increase in construction costs is due to be stricken from the record because of a failure to disclose. The following represents a timeline of Plaintiffs' disclosure of information regarding damages for an increase in costs caused by delay: (1) on April 21, 2020, Plaintiffs produced their initial disclosures, noting that while damages were not completely determined, they included "compensatory damages for labor and materials incurred based upon issuance of the initial permit that was erroneously stopped by the Defendants, attorneys' fees, and costs of litigation[]" (Doc. 88-3,

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a two-story would be calculated by the bedrooms, "[s]o the value would be directly impacted by the reduction in the number of bedrooms from 14 to 10." (*Id.,* PageID.3215). "So, the net revenue . . . that I had testified I predicted for Breezy Shores at 14 bedrooms is actually closer to $200,000 a year. So, if it was 10 bedrooms, we'd take 10 divided by 14 to get the proration. Multiply[ing] that by the 200,000, plus or minus a thousand. I can't remember the exact figures. It would take us to 142,857. So, subtract then 142[,] . . . 857 from the 200,000 and we lose 57,143 a year on the 10 bedrooms at the net revenue level." (Doc. 80, PageID.3220)

PageID.4173);[56] (2) on January 20, 2021, Plaintiffs provided a comprehensive "Updated Damages Disclosure" (Doc. 88-4, PageID.4177-80), inclusive of an "[i]ncreased cost of building" of $62,654.00 (*id.,* PageID.4177 ("Since Plaintiffs' project was initially permitted and under construction, the cost of building materials and labor has risen. Plaintiffs' contractor, Steve Jones, has estimated that this increased cost amounts to approximately $62,654.00, as reflected in the Breezy Shores Cost Plan updated document dated 1/24/2021.")); (3) during the January 29, 2021 Rule 30(b)(6) deposition of Michael R. Bordelon, Bordelon testified that the increased cost of building was $62,654.00 and that he relied upon Steve Jones for the "cost side of building" (Doc. 45-8, PageID.1335 & 1344); (4) on March 15, 2021, Plaintiffs again updated their disclosures regarding damages and, again, advised that the increased cost of building remained at $62,654.00 (Doc. 88-5, PageID.4185); (5) on May 20, 2021, Bordelon executed an affidavit, stating that "since the project was initially permitted and under construction, the cost of building materials and labor has risen significantly, and the project will now cost myself and Breezy Shores, LLC an additional $62,654.00 to build[]" (Doc. 44, PageID.283); (6) on or about May 21, 2021, Steve Jones executed a sworn declaration containing the statement that "since the project was initially permitted and under construction, the cost of building materials and labor has risen significantly, and the project will now cost Mr. Bordelon and Breezy Shores, LLC an additional $125,308.00 to build[]" (Doc. 44, PageID.289); (7) in the Joint Pretrial

[56] Plaintiffs' initial disclosures include an earlier statement regarding "evidence of damages incurred by Defendants['] issuance of the stop work order and denial of Plaintiffs' appeal to the Board of Adjustment." (Doc. 88-3, PageID.4172).

Document filed on November 24, 2021, contains Plaintiffs' damages, including $125,308.00, for increased cost of building (Doc. 68, PageID.1958); and (8) in the Joint Supplement to the Joint Pretrial Document, filed on December 17, 2021, Plaintiffs again sought increased construction costs totaling $128,308.00, "subject to some fluctuation between the present date and trial as market forces dictate." (Doc. 71, PageID.1989). Based on the trial testimony, Plaintiffs now seeks increased construction costs totaling $700,000 (actual number is $699,118.44) to $780,000 (actual number is $780,008.44) (*see* Doc. 80, PageID.3213-14 & 3249), numbers obviously far in excess of the $128,308.00 number (even subject to "*some fluctuation*" between December 17, 2021 and the trial dates of January 24-26, 2022, "as market forces dictate"). In other words, the market did not change in the 38-40 days between December 17, 2021 and the trial dates in this case to such a drastic extent to account for the increase in construction costs Plaintiffs now seek.

Rule 26(a)(1)(A)(iii) of the Federal Rules of Civil Procedure requires each party to disclose to all other parties "a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34[57]

[57] Defendants also served written discovery on Plaintiffs seeking information regarding their damages. (*Compare* Doc. 88-1, PageID.4121 (seeking the production of all documents or records supporting Breezy Shores, LLC's' claims for damages) and *id.,* PageID.4117 (interrogatory seeking an identification and description of all damages and injuries Breezy Shores, LLC claimed were caused by each Defendant, inclusive of a description of the type of such injury or damage, and the nature and amount of relief being sought "for each such injury or damages.") *with* Doc. 88-2, PageID.4148 (seeking the production of all documents or records supporting Mike Bordelon's' claims for damages) and *id.,*

the documents or other evidentiary material . . . on which each computation is based, including materials bearing on the nature and extent of injuries suffered[.]" *Id.* (footnote added). Moreover, under Rule 26(e), parties are required to supplement or correct their disclosures and discovery responses "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.]" *Id.* As the Defendants correctly point out, failure to disclose or supplement as required in the Federal Rules of Civil Procedure, ordinarily leads to the exclusion of the undisclosed evidence. *See* Fed.R.Civ.P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."). Indeed, the Eleventh Circuit has utilized Rule 37(c)(1) to uphold the exclusion of undisclosed evidence of damages, including both undisclosed categories of damages and undisclosed computations. *See, e.g., Circuitronix, LLC v. Kinwong Electronic (Hong Kong) Co., Ltd.,* 993 F.3d 1299, 1307-08 (11th Cir. 2021) (upholding the exclusion of lost-profit damages due to Circuitronix' failure to disclose its computation of those damages); *Mee Industries v. Dow Chemical Co.,* 608 F.3d 1202, 1221-22 (11th Cir. 2010) (affirming the district court's exclusion of loss of

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PageID.4145-46 (interrogatory seeking an identification and description of all damages and injuries Bordelon claimed were caused by each Defendant, inclusive of a description of the type of such injury or damage, and the nature and amount of relief being sought "for each such injury or damages.").

goodwill damages because Mee's initial disclosures did not include "loss of goodwill" as a category of damages), *cert. denied,* 562 U.S. 1138, 131 S.Ct. 936, 178 L.Ed.2d 754 (2011).

Here, of course, as set forth above, Plaintiffs certainly disclosed increased construction costs as a category of damages; however, Plaintiffs obviously never came close to disclosing the amount of this category of damages they were seeking until the dates of trial. And this Court finds that Plaintiffs have not carried their burden of establishing that the failure to disclose the true amount of this category of damages "'was substantially justified or is harmless.'" *Mitchell v. Ford Motor Co.,* 318 Fed.Appx. 821, 824 (11th Cir. Mar. 9, 2009), quoting Fed.R.Civ.P. 37(c)(1). After all, Plaintiffs were aware of the increased costs of construction as this litigation proceeded—as evidenced by the number of times they amended their initial disclosures in this regard—and they should have put pen to paper long before a few days prior to trial to realize the true "upshot" in that increase in the costs of construction. And this failure to disclose the true number was not harmless, particularly when Plaintiffs inability to identify when the massive jump in costs might have occurred is combined with the undeniable fact that the Defendants expected the evidence to be presented at trial would be consistent with that produced over the course of the litigation, evidencing far less drastic increases. Any suggestion by Plaintiffs that the Defendants could have done more respecting this aspect of damages simply cannot be heard because Defendants were entitled to reasonably rely upon Plaintiffs' disclosures, as supplemented. For this Court to make a contrary finding would undermine the contents of Rule 26(e), requiring timely supplementation when a party learns that in

some material respect the disclosure is incomplete or incorrect.

And while this Court cannot let Plaintiffs' drastic increase in the costs of construction offered at trial stand, it would be throwing the baby out with the bath water to wholly strike all evidence regarding increased construction costs. This is not solely because the Defendants were well aware prior to trial that Plaintiffs would produce evidence that they will experience at least $128,308.00 in increased construction costs, "subject to some fluctuation between the present date and trial as market forces dictate[.]" In addition, it is determined that the testimony of Steve Jones, in particular, constitutes admissible evidence that the costs of construction have increased from $138.00 a square foot to $225.00 a square foot,[58] so as to justify an award of damages of $128,308.00. Thus, as discussed in *Circuitronix* and not eschewed, *see* 993 F.3d at 1308, this Court joins the Second, Sixth, and Seventh Circuits and exercises its considerable discretion to fashion a lesser sanction than exclusion of all evidence

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[58] Defendants raise no objection to Jones' testimony beyond that it was not timely disclosed. (*See* Doc. 89, PageID.4209-4212). Even if they did interpose objection to this testimony, that objection would be overruled because Jones, as a building contractor, was competent to give lay opinion testimony regarding the increase in construction costs based on knowledge he gained from building houses and duplexes off Fort Morgan Road and the surrounding Gulf Shores, Alabama area in general and his testimony in this regard was helpful to the Court and probative because it was based on data (actual numbers and easy formulaic calculations), not speculation or unwarranted assumptions. *Compare United States v. Musselwhite, infra,* 709 Fed.Appx. at 972 *with United States v. An Easement and Right-of-Way Over 6.09 Acres of Land, More or Less, in Madison County, Alabama, infra,*140 F.Supp.3d at 1240-43. Accordingly, the Court declines to strike Jones' testimony regarding increased construction costs.

regarding increase in the costs of construction (despite Plaintiffs' inability to establish substantial justification or harmlessness). Thus, the Court relies upon Jones' testimony, specifically the testimony that the total increase in costs of construction is approximately $128,308.00, which is the last "hard" number provided by Plaintiffs prior to the trial of this cause.

2. Evidence Regarding the Purported Difference in Value Between a Two-Story Property and a Three-Story Property. Defendants seek the striking of all evidence offered at trial, through the testimony of Mike Bordelon, regarding the purported difference in value between a two-story property and a three-story, claiming that Plaintiffs failed to disclose any difference in fair market value and that Mike Bordelon is not competent to testify regarding the difference in value. (Doc. 89, PageID.4213-21; *compare id. with* Doc. 92, PageID.4255-59). This Court finds no need to address this issue, however, because the Defendants' argument in this regard is read as an attack solely on Bordelon's testimony related to lost value between a two-story property versus a three-story property (*see* Doc.4213-21), as opposed to also attacking Bordelon's testimony regarding loss of rental income (*compare id. with* Doc. 79, PageID.3194-96),[59] and since this Court is not

[59] Indeed, the Defendants did not interpose objection to Bordelon's loss of rental income testimony, at least when he initially testified regarding loss of rental income. (*See id.*). To the extent Defendants now object to that testimony, the Court OVERRULES all objections.

Rule 701 of the Federal Rules of Evidence "authorizes 'a lay witness to testify in the form of opinions or inferences drawn from [his] observations when testimony in that form will be helpful to the trier of fact.'" *United States v. An Easement and Right-of-Way Over 6.09 Acres of Land, More or Less, in Madison County, Alabama,*140 F.Supp.3d 1218, 1240 (N.D. Ala. 2015), quoting *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 169, 109 S.Ct. 439,

102 L.Ed.2d 445 (1988) (other citation omitted); *see also* Fed.R.Evid.701 ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."). It is well-established that "testimony by a witness relating to the value of his own land or property may be admissible as a lay opinion[,]" 140 F.Supp.2d at 1240-41 (citing numerous cases and quoting from the Advisory Committee Note to the 2000 Amendment to Rule 701), provided this testimony is based "upon commonly understood considerations of worth flowing from his perceptions and knowledge of his property" and not upon more broadly technical or specialized knowledge, *id.* at 1242; *see United States v. Musselwhite,* 709 Fed.Appx. 958, 972 (11th Cir. Sept. 22, 2017) (recognizing more generally that it has "previously held that 'Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences.'"), *cert. denied,* U.S. ___, 138 S.Ct. 2611, 201 L.Ed.2d 1005 (2018), and *cert. denied sub nom. Sotolongo v. United States,* ___ U.S. ___, 138 S.Ct. 2587, 201 L.Ed.2d 304 (2018). Finally, "'[q]ualified and knowledgeable witnesses may give their opinion or estimate of the value of the property taken, but to have probative value, that opinion or estimate must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation.'" 140 F.Supp.2d at 1243, quoting *United States v. Sowards,* 370 F.2d 87, 92 (10th Cir. 1966) (other citation omitted).

Considering the foregoing, this Court HOLDS that Mike Bordelon was competent to give lay opinion testimony regarding loss of rental income based on his knowledge of rental income he gained from managing and renting the EZ Breezy 18-bedroom duplex located next door to the Site of the proposed 14-bedroom Breezy Shores duplex, *see Musselwhite, supra,* 709 Fed.Appx. at 972, and his testimony in this regard was helpful to the Court and probative because it was based on data (actual numbers and easy formulaic calculations), not speculation or unwarranted assumptions. *See United States v. An Easement and Right-of-Way Over 6.09 Acres of Land, More or Less, in Madison County,*

finding a permanent taking in this case but, instead, only a temporary taking and is enjoining the Defendants from enforcing the Baldwin County parking and story ordinances against Plaintiff and instructing Defendants to allow the immediate recommencement of the building of the three-story duplex Breezy Shores, this measure of damages is of no relevance and will not be awarded.

3. Whether Additional Evidence Regarding Damages Should be Stricken due to the Failure to Disclose Same. As a final matter, Defendants contend that any evidence of expenditures "not reflected in Doc. 84-24, specifically including, but not limited to, any and all evidence of expenditures alleged to have occurred in the interim between the initial issuance of the permit and after the stop work order are due to be excluded." (Doc. 89, PageID.4222-23). Defendants, therefore, seek to exclude all evidence of damages about which Steve Jones and Mike Bordelon gave oral testimony, including the testimony regarding the purported $3,000 expended to move the pilings from the Site (Doc. 79, PageID.3135) and Bordelon's testimony that additional unspecified costs not reflected on Doc. 84-24 were incurred by Plaintiffs (Doc. 79, PageID.3178 ($68,000.00 was spent on materials)). The Court, in its discretion, will NOT CONSIDER Bordelon's oral testimony regarding $68,000 spent by Plaintiffs on materials for the project because that testimony is speculative, at best. Instead, the undersigned will hew to the expenses set forth in Doc. 84-24, save for Jones' testimony regarding the $3,000 expended for moving the pilings from the Site. This is a specific sum to which Defendants can hardly confess much surprise since the evidence reflects complaints about the pilings being on the Site until moved (*see*

Alabama, 140 F.Supp.3d at 1243. Accordingly, the Court will not strike Bordelon's testimony regarding lost rental income.

Doc. 79, PageID.3135 (Jones' testimony that the pilings had to be removed from the Site at the request of Fort Morgan)).

B. Mike Bordelon has Established Independent Standing in his Individual Capacity. The Defendants contend that Mike Bordelon has failed to carry his burden of establishing independent standing in his individual capacity. (*See* Doc. 89, PageID.4223). In support of this argument, Defendants contend that Plaintiffs have not identified any individualized, compensable harm suffered by Bordelon prior to the litigation being filed and there being no evidence that he has a direct ownership interest in Breezy Shores, LLC. (*Id.*; *see also id.* ("Plaintiff Bordelon has not put forth any authority that would support the idea that an individual witness or corporate representative could somehow gain standing after a lawsuit was filed based on his participation in it, and no such authority exists.")). Plaintiffs counter, arguing Bordelon has established individual capacity in this action by virtue of owning a self-directed IRA that owns a part of Breezy Shores, LLC, being personally involved in managing the Breezy Shores project, and by being personally responsible for the costs of litigation. (Doc. 92, PageID.4260).

The Court disagrees with Defendants that Plaintiff Bordelon is trying to gain standing after this lawsuit was filed in the Circuit Court of Baldwin County, Alabama (and then removed to this Court at the Defendants' instance) because the trial testimony and evidence established not only that Bordelon was personally responsible for the costs of litigation (*compare* Doc. 80, PageID.3280 *with* Doc. 60, PageID.1879, n.2, citing Doc. 51, PageID.1745 & 1747, ¶¶ 2 & 9) but also that he began incurring these costs well before suit

was filed in Baldwin County Circuit Court, as his various attorneys were actively "on the job" and pursuing this matter in connection with the revised ITP and the administrative appeal related to the "story ordinance" (*see, e.g.,* Doc. 84-2, PageID.3330, 3335 (Baldwin County Appeal of Administrative Decision dated November 18, 2019 and filed by Kristopher O. Anderson, Esquire, Plaintiffs' attorney then and now); Doc. 84-5, PageID.3474 (Anderson appears before the Baldwin County Commission District 4 Board of Adjustment, at its regular meeting on December 12, 2019); Doc. 84-7, PageID.3486 (Linda Lee's August 16, 2019 email to Steve Jones advising Jones that the Planning Director told her "the County's attorney, David Conner[,] was supposed to notify *Mr. Bordelon's attorney* that you all would not be allowed to start construction without an approved ITP from USFWS." (emphasis supplied)); Doc. 84-8, PageID.3487 (Bordelon's November 5, 2019 email to Vince Jackson referencing his *attorney, Mark Taupeka*); Doc. 84-22 (November 2019 email exchanges between Bordelon's attorney, Mark Taupeka, and Baldwin County officials—Jackson and Dyess—or attorneys for Baldwin County); Doc. 84-25, PageID.4066-67 (September 19, 2019 email from Mark Taupeka to Vince Jackson and Jackson's October 2, 2019 reply); Doc. 84-26, PageID.4068-72 (email exchanges from August of 2019 establishing that Mark Taupeka was working for Bordelon to facilitate lifting of the Stop Work Order)). Moreover, and for an altogether different reason, this Court is not convinced that Bordelon cannot sue individually based on his ownership of a self-directed IRA, which owns 50% of Breezy Shores, LLC, and his management of the Breezy Shores project. *See FBO David Sweet IRA v. Taylor,* 4 F.Supp.3d 1282, 1284-85 (M.D. Ala. 2014) (determining that under the facts presented in that

case, the owner/beneficiary of a self-directed IRA "acts as a trustee for all intent and purposes[,]" and could, therefore, bring suit on behalf of the IRA). For these separate and independent reasons, therefore, the Court finds that Bordelon has standing and is a proper party plaintiff in this matter.

C. Plaintiffs' Appeal—Count I of the Second Amended Complaint. Plaintiffs' Second Amended Complaint (filed July 1, 2020) limited their Notice of Appeal under Baldwin County Zoning Ordinance § 18.10 to whether Jackson, Baldwin County, and the Baldwin County Commission 4 Planning and Zoning Board of Adjustment properly rejected their request for the Stop Work Order to be lifted. (Doc. 21, PageID.144-46). In the Joint Pretrial Document filed November 24, 2021, Plaintiff Breezy Shores, LLC described its Count I claim as an appeal of "the Board of Adjustment's denial of its request for a variance from the story restriction that would allow it to construct a three-story duplex on the subject property." (Doc. 68, PageID.1944). In this document, Plaintiffs cited to Baldwin County Zoning Ordinance § 18.6 but in making their variance argument stated the variance was governed by "Baldwin County Zoning Ordinance 18.4.2; 18.10 (version effective December 16, 2019)," (Doc. 68, PageID.1945), which contained different language than the language in §§ 18.6.1 and 18.6.2 (*compare id. with* Doc. 71, PageID.1996-97). In the Joint Supplement to the Joint Pretrial Document, filed on December 17, 2021, Plaintiffs identified the correct version of the Appeal Ordinance as Section 18.10 and supplied a copy thereof (*see* Doc. 71, PageID.1981) but for the first time identified the correct version of the Variance Ordinance at Sections 18.6.1 and 18.6.2 (*see id.,* PageID.1981-82), making no reference to a purported § 18.4.2 (*see id.*).

Based on the foregoing "procedural background," Defendants initially contend that Plaintiffs have "waived their right to put forth a different interpretation of Section 18.6." (Doc. 71, PageID.1982; *compare id. with* Doc. 89, PageID.4224 (maintaining the waiver argument)). To the extent this Court has not been clear in this regard, the Defendants' waiver argument is rejected because if, indeed, Plaintiffs did put forth a different interpretation of Section 18.6 in the supplemental pretrial document that different interpretation was put forth sufficiently in advance of trial, by more than one month (*compare* Doc. 71 (supplement to joint pretrial document filed December 17, 2021) *with* Doc. 78 (bench trial began on January 24, 2022)), that the Defendants had time to prepare for this "version" and meet it head-on. Moreover, as the Defendants themselves recognized in the supplement to the joint pretrial document, "[t]here was not a 'section 18.4.2 (version effective December 16, 2019);' rather, Section 18.6, as reflected in Doc. 45-1, PageID.903, has always governed." (Doc. 71, PageID.1982-83). Therefore, because the Plaintiffs' (§ 18.6.1 and 18.6.2) variance arguments come as no surprise to the Defendants, the waiver argument is not adopted by the Court.

Section 18.6.1 of the Zoning Ordinance provides that "[t]he Board of Adjustment shall authorize upon application in specific cases such variance from the terms of these zoning ordinances as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of these zoning ordinances will result in unnecessary hardship and so that the spirit of these zoning ordinances shall be observed and substantial justice done[.]" (Doc. 84-18,

PageID.3754).[60] Section 18.6.2 then goes on to outline the "special" conditions upon which a variance "may be authorized," including that "the granting of the application is necessary for the preservation of a property right and not merely to serve as a convenience to the applicant or based solely upon economic loss." (*Id.*).[61]

As set forth at some additional length, *infra*, the Plaintiffs' possessed a vested property right in construction of their three-story Breezy Shores duplex at the time—July 31, 2019—when Vince Jackson improperly revoked Plaintiffs' land use certificate and placed a

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[60] The Court agrees with the Defendant Board of Adjustment that Section 18.6.1 of the Baldwin County Zoning Ordinance is drawn from § 45-2-261.12 of the Alabama Code, which grants boards of adjustments certain enumerated powers, including the power "[t]o authorize upon appeal in specific cases the variance from the terms of the zoning regulations as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the zoning regulations will result in unnecessary hardship and so that the spirit of the ordinance or regulations required shall be observed and substantial justice done." Ala.Code § 45-2-261.12(3).

[61] To the extent the Defendants mean to suggest in their post-hearing brief that an applicant must establish all conditions identified in Section 18.6.2 before a variance can be approved (*see* Doc. 89, PageID.4225-26; *compare id. with* Doc. 84-18, PageID.3754), the Court rejects this broad reading of this variance section, particularly since Defendants make no mention whatsoever of the condition in subsection (e) (*see id.* ("(e) Any owner of record of real property upon the date of the adoption by the Baldwin County Commission of the zoning ordinances for the planning district in which such property is located shall automatically obtain a variance, if needed, for a single family dwelling notwithstanding the type of dwelling to be placed or constructed on the property.")). This telling omission establishes that a variance can be authorized based upon the existence of any of the listed conditions, not upon the existence of all or a majority of those conditions. (*See id.*).

Stop Work Order on the "Site." Because the face of the Stop Work Order states that it was posted based on Jackson's revocation of the land use certificate, it cannot be gainsaid that Jackson's letter to Plaintiffs' contractor constituted his attempt at revoking the land use certificate, despite the "leeway" he attempted to accord himself through the contents of the letter itself. However, as Baldwin County's Zoning Ordinance provides, the only permissible action by Jackson after Bates approved Plaintiffs' application and issued a land use certificate was to follow the procedures in § 18.2.5 of the Zoning Ordinance to revoke the Land Use Certificate. And since it is undisputed that Plaintiffs made no false statement or misrepresentation in the application or on the site plan (Doc. 78, PageID.2860 (Lee's testimony that she was unaware of any false statements in Plaintiffs' land use application); *see also id.,* PageID.2897 (Jackson's trial testimony confirmed his deposition testimony that the land use certificate application submitted by Plaintiffs did not contain any misstatements or misrepresentations)) and Jackson (nor anyone else at his behest) issued a warning to the Plaintiffs after which they failed to comply with the requirements of Baldwin County's zoning ordinances (Doc. 78, PageID.3013), the provision for revocation of the land use certificate had no application in this case (*see* id.); therefore, Jackson had no authority or power to revoke Plaintiffs' Land Use Certificate. And, again, while Jackson attempted to suggest that he possessed the authority to revoke the "approval" of the land use certificate and then deny the land use certificate application, as stated in his letter, the Defendants offered this Court no provision in the Baldwin County Zoning Ordinance granting Jackson the authority to revoke approval of a land use certificate (once granted)

and then deny the land use certificate.[62] As somewhat of an aside, it is also relevant to note that the impetus

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[62] To be sure, the idea was "floated" at the bench trial that § 18.1 of the zoning ordinance gave the planning director the authority to correct mistakes violative of the zoning ordinance. (*See* Doc. 79, PageID.3096-97; *see also id.,* PageID.3101-02 (Dyess could not point to any provision in the zoning ordinances giving the planning director the opportunity to correct perceived mistakes but stated: "I think just as the duty of the administrator and the enforcement of the ordinance, I believe that included those decisions to correct things and that's his primary job is to make those decisions. And ultimately, those decisions are made by him and that's where it stops at, except for the appeals process.")). Section 18.1.1 provides that "[t]he duty of administering and enforcing the provisions of these zoning ordinances is hereby conferred upon the Zoning Administrator[]" (Doc. 84-18, PageID.3751) and Section 18.1.2 provides that "[t]he Zoning Administrator is authorized and empowered to administer and enforce the provisions of these zoning ordinances to include receiving applications, inspecting sites, and issuing land use certificates for projects and uses and structures which are in conformance with the provisions of these zoning ordinances." (*Id.*). These sections say nothing, however, about correcting mistakes and even if they could be implicitly read as allowing correction for mistakes, there was no mistake violative of the zoning ordinance made in this case because when Bates approved Plaintiffs' land use certificate (as she was empowered to do and she did so validly), she was unaware—as were Plaintiffs—of Jackson's July 3, 2019 interpretation/determination regarding the Parking Ordinance (an ordinance, which before Jackson's unpublished July 3, 2019 interpretation had never been read to prohibit stacked parking configurations for residential developments). Therefore, the land use certificate was properly approved and once issued that certificate could only be revoked, thereby "landing" this Court back on Section 18.2.5 of the Baldwin County Zoning Ordinance, not §§ 18.1.1, 18.1.2.

Additionally, and for the first time at trial, the Defendants, through Jackson, offered the theory that § 21.4.1 of the Baldwin County Zoning Ordinance provided other options to him as zoning and planning director to remedy potential violations of the zoning ordinance through a stop-work order. (Doc. 79, PageID.3038 ("The

planning and zoning director may issue or cause to be issued a stop-work order on a premises, lot, or parcel that is in alleged violation of any provision of these ordinances or is being maintained in a dangerous or unsafe manner.'"); *see also id.,* PageID.3039 ("A stop-work order may be issued in place of or [in] conjunction with any other actions or procedure identified in these ordinances.")). Section 21.4.1 reads in its entirety as follows:

> The Planning and Zoning Direction may issue, or cause to be issued, a Stop Work Order on a premises, lot or parcel that is in alleged violation of any provision of these ordinances or is being maintained in a dangerous or unsafe manner. A Stop Work order may be issued in place of or in conjunction with any other actions and procedures identified in these ordinances. Such Order shall be in writing and shall be given to the owner of the property, or to his agent, or to the person doing the work, and shall state conditions under which work may be resumed. Upon receipt of a Stop Work Order, all work associated with the violation shall immediately cease. Any person who continues to work shall be in violation of these ordinances and subject to penalties and remedies contained herein. The Stop Work order may be appealed to the respective Board of Adjustment for which the activity is located.

(Doc. 84-18, PageID.3775). Jackson testified this provision gave him the authority to issue the stop-work order (*id.*) and such orders are flexible (*see id.,* PageID.3039-40). While this Court does not question the general ability of the Planning Director to issue Stop Work Orders on premises that are in violation of any provisions of the Baldwin County Zoning Ordinance, the problem in this case is that the Stop Work Order was based on Section 18.2.5, revocation of a land use certificate, and not based on the Parking Ordinance or any interpretation/determination antecedent thereto. And here is the even bigger problem. Because, as aforesaid, Jackson had no basis to revoke the land use certificate under § 18.2.5. and no other section of the Zoning Ordinance gave him the specific authority to revoke approval of the land use certificate and then deny it, his actions on July 31, 2019 were decidedly improper and without basis (or authority). Stated somewhat differently, Jackson certainly had the authority to

for Jackson's actions on July 31, 2019 was the specific complaint by Paul Stanton, who (along with a group of homeowners in the area) were intent on preventing the construction of the three-story Breezy Shores duplex. Under these circumstances, which show an improper and impermissible revocation of Plaintiffs' land use certificate, an undeniable hardship was imposed upon the Plaintiffs because this improper action ultimately led to Plaintiffs' inability to comply with Jackson's parking ordinance determination/interpretation until the newly-minted story ordinance was approved in October of 2019.[63] And, finally, there can be no dispute that denial of authorization of a variance in this case will work a significant financial hardship on the Plaintiffs, as the three-story duplex upon which construction had begun in July of 2019 (for use as a 14-room short-term vacation rental property for three to four years and then sold) will now be relegated to a 10-room rental property.

The approval of Plaintiffs' request for a variance in this case will not be contrary to the public interest particularly where, as aforesaid, Plaintiffs had already begun the construction of their three-story duplex well

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issue a Stop Work Order on Plaintiffs' project that was not based on Section 18.2.5 and revocation of the land use certificate, since there was no basis to revoke the land use certificate, but that is not what happened here. Plaintiffs' land use certificate was improperly revoked under the Zoning Ordinance.

[63] It was established during the bench trial that Paul Stanton and other residential property homeowners in District 25 similarly situated to him actively campaigned for the story ordinance and its applications to Plaintiffs' Breezy Shores construction project and, as well, actively campaigned William Lynn to delay approval of Plaintiffs' application for a revised incidental take permit until after the proposed story ordinance for District 25 was approved in October of 2019.

before the story ordinance was passed and were stopped by improper revocation of the land use certificate and there were three-story residential properties in Baldwin County Planning District 25 that had been built prior to approval of the story ordinance in October of 2019, including EZ Breezy, a three-story duplex constructed by Bordelon in 2015 (*see* Doc. 80, PageID. 3263). Indeed, a variance in this case will promote the public interest because it should have been apparent to the Board of Adjustment that Plaintiffs were at all times actually in possession of a valid land use certificate (because, as aforesaid, it was improperly/impermissibly revoked) and properly-issued building permit (which, as apparent form the provisions of the Zoning Ordinance, specifically § 18.2.4, could be issued anytime during the six-month period following issuance of the land use certificate on July 19, 2019, that is, anytime until January 19, 2020), and had begun construction of the three-story Breezy Shores duplex under those properly-issued permits before the October 15, 2019 adoption of the story ordinance (that is, the story amendment), such that their building of the three-story Breezy Shores duplex was grandfathered in pursuant to Section 20.2.2 of the Baldwin County Ordinance ("To avoid undue hardship, nothing in these ordinances shall require a change in plans, construction or designed use of buildings on which a building permit has been properly issued prior to the adoption of these ordinances or amendments thereto."). Moreover, and most importantly, the Defendants purported safety concerns, particularly as regards the increase in the danger of fire between three-story properties and two-story properties, is illusory, not real, because, at all times pertinent hereto, the height limitation ordinance (of 35') has remained in effect without change. In other words, a residential structure (of two stories or three stories) can still be built to a height of 35' thereby

begging how the story limitation will decrease the fine danger since any fire will have the same area of coverage. Finally, it would strain common sense and logic to find that a variance granted in this one case (allowing a third story with 4 additional rooms) would unreasonably increase the congestion in the public streets.

These foregoing circumstances and considerations countenance the granting of a variance, as only with a variance can substantial justice in this case be done. *See generally Board of Zoning Adjustment for the City of Lanett,* 265 Ala. 504, 510, 92 So.2d 906, 910-11 (Ala. 1957). Accordingly, this Court ORDERS and AUTHORIZES a variance in this case from the terms of the story ordinance in Planning District 25 approved in October of 2019, that allows Plaintiffs to construct their Breezy Shores duplex as a three-story duplex rather than a two-story duplex. Alternatively, the Defendant Board of Adjustment is AUTHORIZED to grandfather-in Plaintiffs' building of their three-story Breezy Shores duplex under the provisions of Section 20.2.2 of the Baldwin County Zoning Ordinance.

D. Declaratory Judgment—Count II of the Second Amended Complaint. In its ruling on summary judgment, the Court specifically determined that this case would proceed to a bench trial on Count Two of Plaintiffs' Second Amended Complaint (Declaratory Judgment) related to Counts Six (taking without just compensation), Count Seven (vested rights respecting equitable remedies against Baldwin County and Vince Jackson in his official capacity), and Count Nine (negligence/wantonness as to equitable remedies against Baldwin County and Vince Jackson in his official capacity). (Doc. 60, PageID.1916).

There can be little question but that in actions brought under the Declaratory Judgment Act, 28 U.S.C. § 2201,

"'a declaratory judgment may only be issued in the case of an actual [or justiciable] controversy.'" *A & M Gerber Chiropractic LLC v. GEICO General Ins. Co.,* 925 F.3d 1205, 1210 (11th Cir. 2019) (citations omitted); *see also Atlanta Gas Light Co. v. Aetna Cas. & Surety Co.,* 68 F.3d 409, 414 (11th Cir. 1995) (holding that in all actions brought under the Declaratory Judgment Act, "the threshold question is whether a justiciable controversy exists."). Alabama law is the same as "[a]ll that is required for a declaratory judgment action is a [b]ona fide justiciable controversy." *Gulf South Conference v. Boyd,* 369 So.2d 553, 557 (Ala. 1979) (citation omitted); *see also Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C.,* 828 So.2d 285, 288 (Ala. 2002) (same).

> For an actual controversy to exist, "the facts alleged, under all the circumstances, [must] show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941).
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> Even when an actual controversy exists, the court still has "unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton,* 515 U.S. at 286, 115 S.Ct. 2137. When determining whether to exercise its discretion, the court considers practicality, judicial efficiency, and the "facts bearing on the usefulness of the declaratory judgment remedy[] and the fitness of the case for resolution." *Id.* at 288 89, 115 S.Ct. 2137.

Bennett v. CIT Bank, N.A., 482 F.Supp.3d 1205, 1215 (N.D. Ala. Aug. 27, 2020), *correcting on denial of reconsideration on other grounds,* 544 F.Supp.3d 1225

(N.D. Ala. June 16, 2021); *see also Huff v. Countrywide Home Loans, Inc.,* 2013 WL 2248036, *2 (N.D. Ala. May 22, 2013) (recognizing that "[a] controversy is justiciable where present 'legal rights are thwarted or affected [so as] to warrant proceedings under [Alabama's] Declaratory Judgment statutes.").

Here, the Defendants Baldwin County and/or Vince Jackson nowhere contend that there exists no justiciable controversy between them and the Plaintiffs regarding Counts Six, Seven, and Nine of the Amended Complaint (*see* Doc. 89, PageID.4247-48 (only discussing whether Plaintiffs have standing to request an injunction regarding the issuance of non-published zoning determinations[64])); therefore, to the extent this Court finds that Plaintiffs have established Counts Six, Seven, and Nine, it will consider whether Plaintiffs are entitled to entry of declaratory judgment relief.

E. Whether Plaintiffs have Established a Temporary Takings Claim. The Takings Clause of the Fifth Amendment prohibits private property from being "taken for public use without just compensation." U.S.CONST. amend. V. The Fifth Amendment's Takings Clause is made applicable to the States through the Fourteenth Amendment, *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 536, 125 S.Ct. 2074, 2080, 161 L.Ed.2d 876 (2005) (recognizing that "[t]he Takings Clause of the Fifth Amendment[is] made applicable to the States through the Fourteenth [Amendment.]"); *see Rivadeneira v. University of South Florida,* 2022 WL 445661, *2 (M.D. Fla. Feb. 14, 2022) ("A § 1983 claim may be based upon

[64] The Court agrees with the Defendants that Plaintiffs raised their entitlement to this specific declaratory relief much too late and, therefore, this Court will not enjoin the Defendants from henceforth issuing non-published zoning determinations.

a violation of the Bill of Rights if the right in question has been incorporated into the Fourteenth Amendment Due Process Clause and made applicable to the states. The Fifth Amendment's right to just compensation for the taking of property is incorporated. Thus, the Takings Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment.") (internal citations omitted). While Plaintiffs make no specific mention of 42 U.S.C. § 1983 in their Second Amended Complaint (*see* Doc. 21), § 1983 provides the vehicle for the presence of this case in this Court (*compare id. with* Doc. 1, PageID.2 ("The Amended Complaint alleges that, in addition to Alabama law, Defendants violated the 5th and 14th Amendments of the United States Constitution, as made applicable by 42 U.S.C. § 1983.") and Doc. 48, PageID.1728 (in arguing Vince Jackson was entitled to qualified immunity on all federal claims alleged against him, the Defendants quoted from the Supreme Court's decision in *Carroll v. Carman,* 574 U.S. 13, 135 S.Ct. 348, 350 (2014) regarding the clearly established prong of the qualified immunity analysis, inclusive of the statement that "[a] government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.")). *Compare Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308, 312, 125 S.Ct. 2363, 2366 (2005) (recognizing that the provision for federal-question jurisdiction set forth in § 1331 "is invoked by and large by plaintiffs pleading a cause of action created by federal law (*e.g.,* claims under 42 U.S.C. § 1983).") *with Knick v. Township of Scott, Pennsylvania,* U.S. ___, 139 S.Ct. 2162, 2177 & 2179, 204 L.Ed.2d 558 (2019) ("We conclude that a government violates the Takings Clause when it takes property without compensation,

and that a property owner may bring a Fifth Amendment claim [in federal court] under § 1983 at that time. . . . A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government.") and *Pakdel v. City and County of San Francisco, California,* ___ U.S. ___, 141 S.Ct. 2226, 2230, 210 L.Ed.2d 617 (2021) (recognizing that in *Knick,* the petitioners brought their takings claim under § 1983, "which 'guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials."'").

Before taking a deeper dive into takings jurisprudence, the Court would be remiss in failing to acknowledge that the defendant subject to liability on Plaintiffs' takings claim is Baldwin County. *Knick, supra,* 139 S.Ct. at 2179 ("A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government."); *cf.* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]") *with, e.g., McDowell v. Brown,* 392 F.3d 1283, 1289 (11th Cir. 2004) (recognizing that "the Supreme Court has held that counties . . . are 'persons' within the scope of § 1983, and subject to liability."). Moreover, the Court also finds that Baldwin County's liability can be traced to the actions of Vince Jackson, to whom the County indisputably gave final decision-making authority with respect to administration (including interpretation) and enforcement of the Zoning Ordinance, and

whose actions were taken in implementation and execution of the Zoning Ordinance; therefore, Baldwin County is liable for the actions taken by Jackson, as a final decisionmaker, particularly where, as here, the Board of Adjustment upheld all of Jackson's actions despite being placed on notice of the impropriety of Jackson's actions on July 31, 2019. *See, e.g., McKusick v. City of Melbourne, Florida,* 96 F.3d 478, 483 (11th Cir. 1996) (recognizing municipal liability can be established "when the allegedly unconstitutional municipal action 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers'"); *Little v. City of North Miami,* 805 F.2d 962, 967 (11th Cir. 1986) ("Because we conclude that the resolution in question can be fairly characterized as a 'decision officially adopted and promulgated' by the City Council of North Miami, we conclude that the minimum requirements for imposing municipal liability have been alleged."); *cf. Mandel v. Doe,* 888 F.2d 783, 793 (11th Cir. 1989) (recognizing that "municipal liability may attach to a single decision made by a municipal official if that municipal official is the final policymaker for the municipality with respect to the subject matter in question.").

Returning to Plaintiffs' takings claim, Defendants' are correct that except for a limited set of cases that amount to a *per se* taking of property [that is, where government regulatory action requires an owner to suffer a permanent physical invasion of his property and where the regulation completely deprives an owner of "'*all* economically beneficial us[e]'" of his property], which are not applicable here (*see* Doc. 85, PageID.4077 (in their post-trial brief, Plaintiffs admitted "the regulatory takings analysis set forth in *Penn Central* . . . applies here[.]")), "regulatory takings challenges are governed by the standards set forth in *Penn Central*

Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)." *Lingle, supra,* 544 U.S. at 538, 125 S.Ct. at 2081; *see KI Florida Properties, Inc. v. Walton County,* 2021 WL 5456668, *5 (N.D. Fla. Oct. 15, 2021) ("A regulatory taking occurs when private property rights are eliminated or *diminished* through government regulation. Regulatory takings come in two types. The first is a categorical taking, in which the property owner is deprived of all economically viable use of the property. . . . The second type, a non-categorical taking, includes anything less and is subject to analysis under the balancing test set out in *Penn Central* . . . .") (emphasis supplied), *appeal filed* (Nov. 15, 2021).

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transp. Co., 438 U.S. at 124, 98 S.Ct. at 2659 (all internal citations omitted); *see also Lingle, supra,* 544 U.S. at 539, 125 S.Ct. at 2082 ("The *Penn Central* factors . . . have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules."); *accord Murr v. Wisconsin,* ___ U.S. ___, 137 S.Ct. 1933, 1943, 198 L.Ed.2d 497 (2017) ("[W]hen a regulation impedes the use of property without depriving the

owner of all economically beneficial use, a taking still may be found based on 'a complex set of factors' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. . . . A central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility. This has been and remains a means to reconcile two competing objectives central to regulatory takings doctrine. One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership. . . . The other persisting interest is the government's well-established power to 'adjus[t] rights for the public good.'").[65]

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquires (reflected in *Loretto, Lucas,* and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the

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[65] In *Lingle,* the Supreme Court determined that the "substantially advances" formula announced in *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), "a case involving a facial takings challenge to certain municipal zoning ordinances," actually prescribed "an inquiry in the nature of a due process, not a takings, test," and, therefore, held "no proper place" in Supreme Court "takings jurisprudence." 544 U.S. at 540, 125 S.Ct. at 2082 & 2083; *see also id.* at 548, 125 S.Ct. at 2087 ("We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.").

> classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

Lingle, supra, 544 U.S. at 539-40, 125 S.Ct. at 2082 (all internal citations omitted).

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, California,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), the Supreme Court held that a property owner may recover compensation for "'temporary' regulatory takings—those takings which are ultimately invalidated by the courts." 482 U.S. at 310, 107 S.Ct. at 2383; *see also id.* at 311, 313 & 318-19, 107 S.Ct. at 2383, 2385 & 2388. The holding in *First English* was limited to "the facts presented," with the Court refusing to "deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and

the like[,]" which were not before it. 482 U.S. at 321, 107 S.Ct. at 2389. Moreover, *First English* was not just limited to its facts but, as well, that case did not provide any guidance on the "quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 328, 122 S.Ct. 1465, 1482, 152 L.Ed.2d 517 (2002). In *Tahoe-Sierra,* the Supreme Court refused to find that a moratorium on development imposed during the process of devising a comprehensive land-use plan constituted a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution, *see id.* at 306 & 342, 122 S.Ct. at 1470 & 1489; instead, it was persuaded that "the better approach to claims that a regulation has effected a temporary taking 'requires careful examination and weighing of all the relevant circumstances[,]'" *id.* at 335, 122 S.Ct. at 1486, and concluded that "the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule." *Id.* at 342, 122 S.Ct. at 1489.[66]

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[66] The Defendants argue that Plaintiffs cannot make out a temporary regulatory taking "during the pendency of litigation bringing only state law challenges against some regulation that does not amount to a total deprivation." (Doc. 89, PageID. 4238-40). In making this argument, Defendants cite prominently to a California case in which the court concluded that "a regulatory *mistake* resulting in a delay does *not*, by itself, amount to a taking of property." *Landgate, Inc. v. California Costal Comm'n,* 17 Cal.4th 1006, 1018, 953 P.2d 1188 (Cal. 1998) (some emphasis supplied), *cert. denied,* 525 U.S. 876, 119 S.Ct. 179, 142 L.Ed.2d 146 (1998). First, as it relates to the seminal "regulation" in this case (that is, Jackson's July 31, 2019 actions revoking Plaintiffs'

Before addressing the *Penn Central* factors and all relevant circumstances in this case, the undersigned identifies the actions that for this Court constitute a regulatory taking. The undersigned recognizes that in *Knick v. Township of Scott, Pennsylvania,* 588 U.S. ___, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019), the Supreme Court overruled its previous decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (holding that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and, therefore, cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law), by relying on the "'settled rule [] that exhaustion of state remedies is *not* a prerequisite to an action under 42 U.S.C. § 1983[.]'" *Pakdel, supra,* ___ U.S. at, 141 S.Ct.

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land use certificate and posting a stop work order), the Defendants have identified no regulatory "mistake," as there was certainly no mistake made by Bates when she issued Plaintiffs a valid land use certificate nor was anything about Jackson's improper/impermissible revocation of Plaintiffs' validly-issued land use certificate a mistake. Moreover, under all the circumstances in this case surrounding Jackson's July 31, 2019 actions (particularly in light of what happened shortly before that time and what occurred thereafter with passage of the story ordinance in October of 2019 and the consequential permanent partial taking of Plaintiffs' property due to the reduced profitability of their property), there is no question that Jackson's actions on July 31, 2019 constituted a physical invasion of Plaintiffs' property sufficient to support a temporary takings claim (as do the actions of the County in October of 2019 adopting the story ordinance). Accordingly, for these reasons and those supplied by the Plaintiffs in their reply in support of their post-trial brief (*see* Doc. 92, PageID.4265-67), which are adopted as if fully set out herein, the Court rejects the Defendants argument that Plaintiffs cannot establish a claim for a temporary taking.

at 2228, quoting *Knick, supra,* 588 U.S. at ___, 139 S.Ct. at 2167; *see also id.* at ___, 139 S.Ct. at 2167-68 ("We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time."). So, exhaustion of state remedies is not required before bringing a Fifth Amendment takings claim; however, it is just as clear that "[w]hen a plaintiff alleges a regulatory taking in violation of the Fifth Amendment [as the Plaintiffs in this case do], a federal court should not consider the claim before the government has reached a 'final' decision." *Pakdel, supra,* ___ U.S. at ___, 141 S.Ct. at 2228 (citation omitted); *see also id.* ("After all, until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation."); *cf. MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 348, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986) ("It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property."). The Court in *Pakdel* made clear that "[t]he

finality requirement is relatively modest[]" because all plaintiffs must demonstrate is that "'there [is] no question . . . about how the "regulations at issue apply to the particular land in question."'" *Id.* at ___, 141 S.Ct. at 2230.

Here, the Defendants contend that the July 31, 2019, "denial" of Plaintiffs' land use certificate, in conjunction of the issuance of the stop work order, was not an independent final regulatory action that can serve as an independent basis for a takings claim.[67] (*See* Doc. 89, PageID.4230). The Court disagrees with the Defendants' position in this regard and here is why. While the Defendants would very much like this Court to find that the land use certificate was "denied" by Vince Jackson on July 31, 2019, because that is what his letter to Plaintiffs' contractor stated, there was no procedural avenue under Baldwin County's Zoning Ordinance by which Jackson could deny a certificate that had already been approved (as was the case here); instead, his only means of attack on an already-approved land use certificate was to revoke it under § 18.2.5 of the Zoning Ordinance. Accordingly, Jackson's action on July 31, 2019, amounted to a revocation of the land use certificate which, in conjunction with the stop work order,[68] halted all construction on Plaintiffs' Breezy Shores duplex. And since that revocation was "based" on Jackson's July 3, 2019 interpretation/ determination of Baldwin County's Parking Ordinance

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[67] The undersigned pretermits, as unnecessary, any discussion of Plaintiffs' assertion that the Defendants' failure to allow the resumption of construction in October of 2019, constitutes an independent basis for a takings claim.

[68] The face of the stop work order references that the construction of the project was violative of the Planning Director's revocation of the land use certificate. (*See* Doc. 84-21, PageID.4024).

(that is, that the Ordinance disallowed stacked parking at residential properties), it is impossible for this Court to discern how Jackson's action in revoking Plaintiffs' land use certificate, in conjunction with the stop work order, was anything other than a final regulatory action since there is no question how Baldwin County's "top" zoning and planning official felt the Parking Ordinance applied to Plaintiffs' property. *See Pakdel, supra,* ___ U.S. at ___, 141 S.Ct. at 2230 ("The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary. This requirement ensures that a plaintiff has actually 'been injured by the Government's action' and is not prematurely suing over a hypothetical harm. . . . Along the same lines, because a plaintiff who asserts a regulatory taking must prove that the government 'regulation has gone "too far,"' the court must first 'kno[w] how far the regulation goes.' . . . Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution."). This is particularly true since § 18.2.6 of the Zoning Ordinance only supplies an appeal from the "*denial* of the land use certificate" (Doc. 84-18, PageID.3753), not the revocation of a land use certificate (which is what happened here). Therefore, the Court will now focus its analysis on the *Penn Central* factors, as they relate to the July 31, 2019 revocation of land use certificate/concurrent stop work order (which the Court has determined to be a final regulatory decision) and Baldwin County's admittedly final decision to apply its newly-minted Story Ordinance to prohibit Plaintiffs' construction of a three-story duplex.[69]

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[69] As to both, this Court considers the takings temporary because, as set forth elsewhere in this opinion, those takings have

1. Consideration of the *Penn Central* Factors in Relation to the July 31, 2019 Revocation of Plaintiffs' Land Use Certificate and Issuance of a Stop Work Order.

a. Economic Impact of Defendants' Actions. With respect to the economic impact factor, it is clear that this Court should "compare the value that has been taken from the property with the value that remains in the property[.]" *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472 (1987). And while the Supreme Court has certainly recognized that "a reduction in the value of property is not necessarily equated with a taking[,]" *Andrus v. Allard,* 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979), and that a "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim[,]" *id.,* that reed is not too slender in this case given that in this case the Stop Work Order constitutes a physical property restriction. Thus, Jackson's actions on July 31, 2019, improperly revoking Plaintiffs' land use certificate and issuing the Stop Work Order (which improper taking continued through the October 15, 2019 amendment to Baldwin County's zoning ordinance), had profound economic impact on Plaintiffs inasmuch as the credible testimony offered at the bench trial established that for the three years construction of

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been invalidated due principally to the fact that Plaintiffs possessed a vested property right in constructing their three-story Breezy Shores duplex before Jackson's improper actions on July 31, 2019, and the equities in this case lead inexorably to preservation of Plaintiffs' vested property right. Moreover, the Court only discusses the decision regarding the Story Ordinance parenthetically given the finding that the July 31, 2019 revocation of land use certificate/concurrent stop work order unequivocally amounted to an improper (temporary) taking of Plaintiffs' property without just compensation.

their three-story duplex has been delayed, they have and will lose $599,666.00 in net rental income (i.e., they will earn no rental income for this period and will lose 100% of their projected rental income).

b. Interference with Distinct Investment-Backed Expectations. The Court agrees with Plaintiffs that their "reasonable investment-backed expectations" are judged by the regulatory environment in existence as of the time they acquired the property at issue. *Compare Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (en banc), *cert. denied,* 535 U.S. 1096, 122 S.Ct. 2293, 152 L.Ed.2d 1051 (2002), *with Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1349 (Fed.Cir. 2004), *cert. denied,* 543 U.S. 1188, 125 S.Ct. 1406, 161 L.Ed.2d 191 (2005). Relevant to the determination of a party's reasonable expectations are the following three factors: "(1) whether the plaintiff operated in a 'highly regulated industry;' (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have 'reasonably anticipated' the possibility of such regulation in light of the 'regulatory environment' at the time of purchase." *Appolo Fuels,* 381 F.3d at 1349, citing *Commonwealth Edison, supra,* 271 F.3d at 1348. Each of these factors weigh in favor of a finding of reasonable expectations.

First, the undersigned agrees with Plaintiffs that while real estate development certainly involves compliance with zoning regulations and building codes, it simply does not rise to the level of a "highly regulated" industry of the type recognized in *Appolo Fuels, supra,* (recognizing that the coal mining business is a highly regulated industry) and Supreme Court precedent, *see City of Los Angeles, California v. Patel,* 576 U.S. 409,

424, 135 S.Ct. 2443, 2454, 192 L.Ed.2d 435 (2015) (recognizing that liquor sales, firearms dealing, the mining industry, and running an automobile junkyard are closely regulated industries). Moreover, there was no evidence presented at the bench trial which would indicate that Plaintiffs were aware of any issues at the time of their purchase of the property that would spawn revocation of their land use certificate and concomitant stop work order or, indeed, any evidence suggesting they could have "reasonably anticipated" revocation of their land use certificate (and posting of the stop work order), nor anything suggesting that they anticipated passage of an amendment to the Zoning Ordinance reducing the allowable stories in Planning District 25. Indeed, all credible evidence presented during the bench trial was to the contrary. It was established through the testimony of Mike Bordelon, that the Plaintiffs purchased the property in 2018 to build a short-term vacation rental property, with plans to rent it for three to four years, and then sell the property and use the sales proceeds to purchase another piece of property, as had been done with the property adjacent thereto. At the time of purchase, there was certainly nothing to suggest to Plaintiffs that there were any parking issues of the type which arose in July of 2019 or that the Baldwin County Planning Director would be influenced by a property owner intent on halting Plaintiffs' project to reverse the interpretation of the parking ordinance and that this new and unique interpretation would then lead to the improper and impermissible revocation of Plaintiffs' validly issued land use certificate and building permit (nor, at the time of purchase, was there anything indicating that Baldwin County would amend its Zoning Ordinance to reduce the allowable stories in Planning District 25). Accordingly, it is found

that Defendant Jackson's July 31, 2019 actions in improperly revoking Plaintiffs' land use certificate and placing a stop work order on their project severely interfered with Plaintiffs' distinct investment-backed expectations.

c. Character of the Government Action. As recently recognized by the Eleventh Circuit in *South Grande View Dev. Co., Inc. v. City of Alabaster, Alabama,* 1 F.4th 1299 (2021), "the 'character of the government action' is another way to examine the severity of the government interference with property rights." *Id.* at 1311, citing *Lingle, supra,* 544 U.S. at 539, 125 S.Ct. 2074. In this case, it is determined that the July 31, 2019 actions of Jackson in revoking Plaintiffs' land use certificate and issuing the Stop Work Order were more akin to a physical invasion by Baldwin County given that one of its officials actually went on-site to post the Stop Work Order after Plaintiffs had a vested property right in constructing their three-story Breezy Shores duplex. And, as made clear elsewhere, the Defendants' actions were improper because the Baldwin County Zoning Ordinance provided no basis to revoke approval of the land use certificate and then to deny the certificate but only a means to revoke the land use certificate once it was properly issued, as was the case here.[70] As

[70] Again, the Defendants insistence that the approval of the land use certificate by Crystal Bates was a mistake is categorically wrong and this argument is rejected both because the clear testimony at trial was that Bates did nothing wrong in approving Plaintiffs' land use certificate on July 21, 2019 (it being clear that the Zoning Department had never read or applied the County's Parking Ordinance to apply to residential properties in Planning District 25 so as to prevent stacked parking at such properties) and because there can be no mistake when an employee of the very department that approves land use certificates (and who has the power and duty to approve land use certificates) is unaware

previously determined and found, the testimony at trial demonstrated that neither of the bases recognized in § 18.2.5 of the Zoning Ordinance to revoke the Land Use Certificate issued on July 17, 2019[71] existed (*compare, e.g.,* Doc. 78, PageID.2860 (Lee's testimony that she was unaware of any false statements in Plaintiffs' land use application) and *id.,* PageID.2897 (Jackson's trial testimony confirmed his deposition testimony that the land use certificate application submitted by Plaintiffs did not contain any misstatements or misrepresentations) *with* Doc. 78, PageID.3013 (testimony establishing that neither Jackson nor anyone else at his behest issued a warning to the Plaintiffs after which they failed to comply with the requirements of Baldwin County's zoning ordinances)), such that the provision for revocation of the land use certificate had no application in this case (*see* id.) and Jackson had no authority or power to revoke Plaintiffs' Land Use Certificate. Thus, the July 31, 2019 Stop Work Order, which was indisputably based on Jackson's ostensible revocation of Plaintiffs' land use certificate was, itself, improper/impermissible and amounted to a physical invasion of Plaintiffs' property without just compensation.[72]

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of an unpublished and internally uncirculated interpretation of the Parking Ordinance (or determination regarding the Parking Ordinance) prohibiting stacked parking at all properties in Planning District 25.

[71] After issuance of the land use certificate on July 17, 2019, the building permit was issued on July 23, 2019, and the Plaintiffs immediately began constructing their three-story duplex, breaking ground with the placement of pilings in advance of pouring the foundation.

[72] In light of the Court's determination that the July 31, 2019 actions by Jackson and Baldwin County amounted to an improper (albeit temporary) taking of Plaintiffs' property without just

compensation, the Court does not address Plaintiffs' arguments regarding the Story Ordinance at any significant length; instead, the Court simply notes that the action in October of 2019 respecting the Story Ordinance constituted a continuation of the improper taking of Plaintiffs' property that began on July 31, 2019 and, more importantly, was itself a confiscatory measure and taking because Plaintiffs' land use certificate and building permit should have been (and, indeed, were) in place even if a temporary stop work order was possibly appropriate when the amendment was passed (on a basis other than revocation of the land use certificate, that is). That this Court has properly considered Jackson's actions on July 31, 2019 as inextricably tied to and connected to the County's October 15, 2019 story amendment is inherently appropriate because the individual(s) working behind the scenes to prevail upon Vince Jackson and Baldwin County to interpret the Parking Ordinance to their liking and then to stop Plaintiffs' project were the very same individuals pushing for approval of the Story Ordinance and its immediate application to Plaintiffs' project. Accordingly, it should surprise no one that this Court finds the Story Ordinance produced the following: (1) a significant economic impact on Plaintiffs due to the delay in building and the reduced rental income that will be realized from a two-story project as opposed to a three-story project, as well as the reduced sales price for a two-story duplex versus a three-story duplex; (2) clear interference in distinct investment-backed expectations based upon the analysis previously supplied; and (3) the application of the Story Ordinance to Plaintiffs was nothing more or less than a continuation of the improper physical invasion of Plaintiffs' property wrought by the improper actions of Vince Jackson on July 31, 2019, as reflected by the fact that the same individuals who brought about the initial and improper work stoppage on Plaintiffs' project were the same individuals who successfully campaigned the Defendants to adopt the Story Ordinance and specifically apply it to Plaintiffs' project. The amendment of the zoning ordinance on October 15, 2019 by Baldwin County (along with Jackson's July 31, 2019 actions) permanently deprived Plaintiffs of building their three-story duplex but for this Court's present action in finding that Plaintiffs should have been granted a variance to build their three-story duplex (or that the Board of Adjustment should have applied Section 20.2.2 of the Zoning Ordinance to grandfather-in

On July 31, 2019, Defendant Baldwin County, by and through the actions of Jackson, improperly (albeit temporarily, since the Court is now invalidating that taking) took Plaintiffs' property without just compensation, and the application of Baldwin County's October 15, 2019 "story" amendment to its zoning ordinance constituted a continuation of the improper taking of Plaintiffs' property that began on July 31, 2019.

2. Just Compensation Due and Owing to Plaintiffs on Account of Defendants' Improper Temporary Taking(s).

"[T]he Constitution requires compensation for a temporary regulatory taking[,]" *Wheeler v. City of Pleasant Grove,* 833 F.2d 267, 270 (11th Cir. 1987) (citation omitted), and the starting point for inquiry into damages is to ask "'What has the owner lost?'" *Id.,* quoting *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195, 30 S.Ct. 459, 460, 54 L.Ed.725 (1910); *see A.A. Profiles, Inc. v. City of Fort Lauderdale,* 253 F.3d 576, 583 (11th Cir. 2001) ("The goal of the Fifth Amendment's just compensation requirement is to return the affected property owner to 'as good position pecuniarily as he would have occupied if his property had not been taken.'").

In the temporary takings context, it is well-established that "lost income" is a proper measure of

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Plaintiffs' construction of their three-story Breezy Shores duplex). So, even if the Story Ordinance did not permanently take away Plaintiffs' ability to build a duplex, there was a permanent partial taking because of the reduced profitability of the property (reduced because Plaintiffs faced the loss of one story and 4 rooms that could be rented) and, therefore, the story ordinance qualifies as a temporary taking that can be rectified by the granting of a variance or by the Board of Adjustment's application of Section 20.2.2 of the Zoning Ordinance to grandfather-in Plaintiffs' construction of their three-story Breezy Shores duplex.

compensation. *A.A. Profiles, Inc.*, 253 F.3d at 584. Moreover, this Court agrees with the Federal Circuit in *Yuba Natural Resources, Inc. v. United States,* 904 F.2d 1577 (Fed.Cir. 1990), that because the property is returned to the owners when the taking ends, "the just compensation to which the owner[s are] entitled is the value of the use of the property during the temporary taking[,]" *id*. at 1580-81, citing *First English, supra,* 482 U.S. at 319, 107 S.Ct. at 2388, and, most importantly, that "[t]he usual measure of just compensation for a temporary taking . . . is the fair rental value of the property for the period of the taking." *Id.* at 1581, citing *Kimball Laundry Co. v. United States,* 338 U.S. 1, 7, 69 S.Ct. 1434, 1438, 93 L.Ed. 1765 (1949) (finding the "proper measure of compensation is the rental that probably could have been obtained[.]").

Considering the foregoing, this Court now holds that the just compensation due and owing to Plaintiffs from the Defendant Baldwin County under the unique circumstances of the taking in this case consist of the fair rental value of the property for the period of the taking, as well as the $3,000.00 incurred by Plaintiffs in moving pilings from the property and increased construction costs now facing Plaintiffs, as it is fair to conclude that these latter costs are certainly a part of what the Plaintiffs have lost. And based on the competent evidence offered during the bench trial, the Court AWARDS to Plaintiffs the following damages based on the improper (and now invalidated) temporary takings by the Defendants: (1) $128,308.00 in increased construction costs; (2) $632,980.76 in lost rental

income/revenue;[73] and (3) $3,000.00 for moving the remaining pilings from the Site.

F. Vested Property Rights—Count Seven. In Count Seven of the Second Amended Complaint, Plaintiffs aver that the Defendants violated their vested property rights by "(a) issuing the Stop Work Order that caused Plaintiffs to incur additional costs, and (b) by refusing to allow Plaintiffs to complete construction once the Parking Ordinance issue raised in the Stop Work Order was resolved." (Doc. 21, PageID.158). In the summary judgment order it was determined that Count Seven should proceed to trial with respect to equitable remedies against Baldwin County and Vince Jackson in his official capacity. (Doc. 60, PageID.1916). With respect to their first vested-rights argument, it is Plaintiffs' undeniable position, based on the entirety of the trial testimony, that they obtained a vested right to construct their three-story duplex on the subject "Site." The Plaintiffs' "vested property rights under [] Alabama law rests in the doctrine of equitable estoppel." *Greenbriar Village, L.L.C. v. City of Mountain Brook,* 202 F.Supp.2d 1279, 1290 (N.D. Ala. 2002), *affirming in part and reversing in part on other grounds,* 345 F.3d 1258 (11th Cir. 2003).

In deciding whether Plaintiffs possessed a vested property right to construct the three-story duplex on the "Site," the Court is guided by the Alabama

[73] Given the date of this Order, the fact that Plaintiffs expected their project to be completed in July 2020, in time to be rented in August of 2020 and thereafter, and it being clear that the earliest Plaintiffs' project can be expected to be completed and rented is October of 2023, this number represents the total of lost rental income due and owing Plaintiffs.

Supreme Court's recent decision in *Breland v. City of Fairhope,* 337 So.3d 741 (Ala. 2020).

> In *Grayson v. City of Birmingham*, 277 Ala. 522, 173 So.2d 67 (1963) . . ., this Court addressed the framework for evaluating a vested-rights claim. There, a company obtained approval from the Jefferson County Planning and Zoning Commission to have agricultural property rezoned to residential and commercial parcels. The company then improved the commercial parcels by paving streets, adding water pipes and storm sewers, and grading, leveling, and clearing the lots, at a cost (as of the mid 1950s) of $3,518. About two years after that approval, the City of Birmingham annexed the land and rezoned the commercial parcels to residential. The company sued Birmingham to challenge the rezoning of the plaintiffs' property.
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> On appeal, this Court explained that such a rezoning "must stand or fall on vested rights, which, in the absence of a contract, depend for their existence on equitable fairness, both to the property owner and to the general public." 277 Ala. at 525, 173 So.2d at 69. This Court further held that the question of vested rights is a fact-intensive inquiry in which "changes, investments, and permits" relating to the "structures initiated or completed, are made the criteria of hardships imposed on the property owner and judicially recognized to sustain the claims of vested rights." *Id.*
>
> This Court noted in *Grayson* that the plaintiffs' investments in the property, standing alone, might "serve to establish [the plaintiffs']

> contention that they have acquired a vested right in the property." 277 Ala. at 526, 173 So.2d at 70. But the Court also weighed the landowner's interests against "the reasonable necessity for protecting and promoting the health, safety, morals, and general welfare of the public" underlying Birmingham's rezoning of the plaintiffs' property – in that case, minimizing traffic hazards near a school, 277 Ala. at 528, 173 So.2d at 72. As such, the landowner's loss relating to its "naked lots, which [were] without structural initiation thereon" and with "no building permit granted," was of "minor weight" compared [to] the city's zoning responsibilities. 277 Ala. at 525, 527, 173 So.2d at 69, 71.

337 So.3d at 750.

Here, the Plaintiffs possessed a vested property right in constructing their three-story duplex on the "Site." After all, Plaintiffs were in possession of a validly issued (and valid) land use certificate,[74] as well

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[74] To the extent the Defendants argue otherwise (*see* Doc. 89, PageID.4241-42), their arguments are rejected. Moreover, to the extent the parties rely on a "test" different from that set forth in *Breland, supra,* those arguments too are rejected.

In particular, the Court finds that the Defendants' suggestion that approval/issuance of the land use certificate was a mistake is simply incorrect. Indeed, the evidence at trial revealed not only that Bates had the specific authority to approve and issue land use certificates, as delegated to her (and others) by the Planning Director in accordance with the Planning and Zoning Ordinance, but, as well, that the approval and issuance of the Plaintiffs' land use certificate was not a mistake but, instead, was a reflection of the manner (or custom) in which Bates (and others) exercised their responsibilities and duties vis-à-vis the issuance of such certificates (which, at the time, allowed for stacked parking in

as a building permit, the sole items necessary to begin construction of their duplex under Baldwin County's Planning and Zoning Ordinance. Moreover, in good faith reliance on these validly-issued documents/permits, Plaintiffs began their construction and improved the "Site" by initiating the duplex by driving pilings into the ground.[75] To the extent the Defendants would argue that revocation of Plaintiffs' land use certificate and posting of the stop work order was reasonably necessary for protecting and promoting the safety of the public because of Jackson's prior (that is, July 3, 2019) interpretation of the Parking Ordinance as disallowing stacked parking on this Site, the Defendants are wrong both because, as explained many times now, the revocation of the land use certificate was improper/ impermissible and because the Parking Ordinance (admittedly adopted in 2017) had never before been interpreted to prohibit stacked parking at residential properties in Planning District 25 and the impetus for this change in interpretation had nothing to do with the health, safety and welfare of the general public and everything to do with Paul Stanton (and his fellow owners of property neighboring that of the subject property) requesting a change in interpretation of the Parking Ordinance in order to thwart Plaintiffs' construction of their duplex.

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terms of residential construction). That no mistake was made is clear considering no less than Vince Jackson's testimony that Bates did nothing wrong in approving and issuing the land use certificate in this case on July 17, 2019.

[75] Plaintiffs paid the labor costs associated with this activity. (*See* Doc. 79, PageID. 3135 (Jones' testimony that money was expended to put the initial pilings in the ground)).

Given the equitable considerations here,[76] this Court concludes that Plaintiffs obtained a vested right to construct their Breezy Shores duplex as initially permitted. Accordingly, the undersigned ENJOINS the Defendants from in any manner prohibiting Plaintiffs' construction of their Breezy Shores duplex as initially permitted. Stated somewhat differently, the Court now DECLARES that Plaintiffs be allowed to construct their three-story Breezy Shores duplex as initially permitted without any obstruction from the Defendants, principally Defendant Baldwin County.

G. Negligence and Wantonness. In the Second Amended Complaint, Plaintiffs aver that the Defendants had a "duty rooted in Alabama common law to properly perform their duties under the Baldwin County Zoning Ordinance and other applicable laws to administer zoning matters within Planning District 25[;]" breached this duty by, first, "issuing the Stop Work Order," and then by "refusing to lift the Stop Work order[;]" and contend that since "the Stop Work Order was unauthorized by the Baldwin County Zoning Ordinance and predicated upon a new interpretation of the Parking Ordinance, Jackson and Baldwin County acted wantonly with reckless indifference to the property rights of

[76] The Defendants' belief that the "equities" in this case favor them is misguided and, indeed, untenable, as it would be decidedly inequitable for this Court to find in favor of Defendants who bent over backwards to place barrier after barrier in Plaintiffs' way to build their three-story duplex at the urging of Paul Stanton and a group of Fort Morgan homeowners whose sole goal was to block the construction of Plaintiffs' Breezy Shores duplex. Instead, the "equites" wholly favor Plaintiffs, who followed Baldwin County's Zoning Ordinance to obtain a validly issued land use certificate, then a building permit, and finally began constructing their three-story duplex until that construction was improperly and impermissibly halted by the Defendants.

Plaintiffs[;]" and, as a direct result of these actions by the Defendants, Plaintiffs were damaged. (Doc. 21, PageID.160).

The parties agree regarding the legal elements of negligence and wantonness. (*See* Doc. 68, PageID.1953-54). "In *Lemley v. Wilson*, 178 So.3d 834[, 841-42] (Ala. 2015), this Court set out the elements a plaintiff must prove to establish negligence and wantonness: '"To establish negligence, the plaintiff must prove: (1) a duty to a foreseeable plaintiff; (2) a breach of that duty; (3) proximate causation; and (4) damage or injury. *Albert v. Hsu*, 602 So.2d 895, 897 (Ala. 1992). To establish wantonness, the plaintiff must prove that the defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty. To be actionable, that act or omission must proximately cause the injury of which the plaintiff complains. *Smith v. Davis*, 599 So.2d 586 (Ala. 1992)."'" *Hilyer v. Fortier,* 227 So.3d 13, 22 (Ala. 2017).

In this case, this Court must first consider the Defendants' argument that they owed no duty to Plaintiffs because they are entitled to substantive immunity. (*See, e.g.,* Doc. 89, PageID.4244-45).

> The "substantive immunity" rule is a narrow exception to the general rule that a municipality or a county is chargeable with the negligence of its employees or agents performed in the line and scope of their duty. *Rich v. City of Mobile,* 410 So.2d at 387. This exception is based on
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> > "public policy considerations . . . [that] override the general rule and prevent the imposition of a legal duty, the breach of

> which imposes liability, in those narrow areas of governmental activities essential to the well-being of the governed, where the imposition of liability can be reasonably calculated to materially thwart the City's legitimate efforts to provide such public services."

Id. The court in *Rich* stated that "the substantive immunity rule . . . must be given operative effect only in the context of those public service activities of governmental entities . . . so laden with the public interest as to outweigh the incidental duty to the individual citizens." 410 So.2d at 387 88. Thus, we must determine whether a county's exercise of its zoning power is a public-service activity so laden with the public interest as to outweigh any incidental duty that activity might create to an individual citizen.

As recognized in *Pollard v. Unus Properties, LLC,* 902 So.2d 18 (Ala. 2004), "'[t]he authority for zoning laws is found within the bounds of the police power, asserted for the public welfare'" and zoning restrictions must "'bear some substantial relation to the public health, safety, morals, or general welfare, or as otherwise elsewhere expressed, the "public convenience or the general prosperity."'" 902 So.2d at 23, 24 . . . .

Further, in § 11-3A-2, Ala. Code 1975, the legislature granted the county commission of each county of this state the authority to "provide for its property and affairs; and for the public welfare, health, and safety of the citizens throughout the unincorporated areas

> of the county by exercising certain powers for the protection of county and public property under its control."
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> . . .
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> [I]t cannot be disputed that zoning powers are a public-service activity and may not be exercised for the benefit of individual landowners to the exclusion of the interests and well-being of all citizens of a county or municipality. Thus, the exercise of the zoning powers granted to a governmental body is a public-service activity to be exercised for the benefit of the governmental entity and the well-being of the governed.

Payne v. Shelby County Comm'n, 12 So.3d 71, 77-78 & 78 (Ala. Civ. App. 2008) (footnote omitted).

In light of the foregoing, this Court finds that to the extent Jackson, who was all times relevant hereto responsible for administration and enforcement of the Baldwin County Zoning Ordinance (including approval of land use certificates of the type presented by Plaintiffs and enforcing the Baldwin County Zoning Ordinance, a part of which was the Parking Ordinance), had any duty respecting such administration and enforcement (under which would "fall" issuance of the Stop Work Order, given that such Orders are allowable under the Zoning Ordinance), that duty was owed by Jackson (and Baldwin County) to the general public, and it was not a duty owed simply to the Plaintiffs. *See Payne, supra,* 12 So.3d at 79 ("[W]e conclude that the adoption of the conditional rezoning resolution did not create a duty owed by the County Commission or the Planning Commission to the Paynes over and above that owed

to the general public.").[77] Accordingly, Plaintiffs' negligence claims fail. Their wantonness claims also fail on the basis of substantive immunity and because nothing about the evidence offered at the bench trial "sounds" in wantonness.

CONCLUSION

For the reasons set forth above, the following FINDINGS and ORDERS are entered:

1. Count One of Plaintiffs' Second Amended Complaint, which is an appeal of "the Board of Adjustment's denial of its request for a variance from the story restriction that would allow it to construct a three-story duplex on the subject property," is decided in Plaintiffs' favor. A variance from the terms of the story ordinance in Planning District 25, approved in October of 2019, is GRANTED and Plaintiffs are authorized to construct their Breezy Shores duplex as a three-story duplex rather than a two-story duplex. Defendant Baldwin County, through its Commission 4 Planning and Zoning Board of Adjustment is ORDERED to authorize a variance from the terms of the story ordinance in Planning District 25 approved in October of 2019 or in the alternative, to grandfather-in the right to build a three-story duplex under the provisions of Section 20.2.2 of the Baldwin County Zoning Ordinance;

2. Plaintiffs prevail on Count Six of the Second Amended Complaint. It is determined that Defendants Vince Jackson and Baldwin County TEMPORARILY TOOK Plaintiffs' property without just compensation

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[77] In other words, any duty owed by Defendants in interpreting the Parking Ordinance or in applying the written provisions of the Zoning Ordinance (particularly, § 18.2.5) would not be a specific duty owed to Plaintiffs over and above what would be owed to the general public.

based upon actions which initially began on July 31, 2019 (but also include the Story Ordinance actions in October of 2019). In accord with Count Two of the Second Amended Complaint, it is determined that the July 31, 2019 Stop Work Order amounted to a physical invasion of Plaintiffs' property without just compensation. In combination, the application of the Stop Work Order and the Story Ordinance would permanently take from Plaintiffs their opportunity to build a three-story duplex;

3. On July 31, 2019, Plaintiffs had a vested right to construct their Breezy Shores duplex as initially permitted by the Defendants. Therefore, Defendant Baldwin County is ENJOINED from prohibiting Plaintiffs' construction of their Breezy Shores three-story duplex as initially permitted. To this end, Defendant Baldwin County is ORDERED to immediately withdraw the Stop Work Order and reinstate the land use certificate and building permit so that Plaintiffs can resume construction on their Breezy Shores project;

4. Defendants are ORDERED to pay unto Plaintiffs a total sum of $764,289.00 in accordance with Count Seven of the Second Amended Complaint as compensation for the temporary taking of their property starting on July 31, 2019 and is expected to last at least through October 2023;

5. The Court determines that Plaintiffs cannot prevail on Count Nine of the Second Amended Complaint (alleging the Defendants' negligence and wantonness) on account of the substantive immunity rule/doctrine; and

6. Plaintiffs, as prevailing parties in an action brought pursuant to 42 U.S.C. § 1983, are entitled to apply for an award of attorneys' fees provided they file

a motion seeking such reimbursement and the authority therefor not later than November 30, 2022.

DONE and ORDERED this the 28th day of October, 2022.

s/William E. Cassady
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13958

MIKE BORDELON, BREEZY SHORES, LLC,

Plaintiffs-Appellees,

versus

BALDWIN COUNTY, AL, BALDWIN COUNTY PLANNING AND ZONING DIRECTOR,

Defendants-Appellants,

BALDWIN COUNTY COMMISSION DISTRICT 4 PLANNING AND ZONING BOARD OF ADJUSTMENT, *et al.*,

Defendants.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:20-cv-00057-C

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before WILSON, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

APPENDIX D

Baldwin County
Zoning Ordinance

Amended as of December 1, 2020
Baldwin County Commission
Baldwin County Planning and
Zoning Commission

* * *

(e) Accessory dwellings are permitted by right in residential districts in Planning District 24 provided they are contained entirely within the structure of a single family dwelling and provided they do not exceed sixty percent (60%) of the size, in square feet, of the principal residence.

(f) There shall be no limit on the number of habitable stories for a single family dwelling in the RSF-2, Single Family district provided that maximum building height shall not exceed forty (40) feet and the ridge of the roof shall not exceed forty-five (45) feet measured from the proposed finished grade.

(g) A water storage tank/tower may be allowed as a conditional use under the OR, Outdoor Recreation zoning designation, subject to the approval of the Baldwin County Planning and Zoning Commission.

2.3.25 *Planning District 25.*

2.3.25.1 Effective Date

On June 19, 1992, a majority of qualified electors in Planning District 25 voted to institute County Zoning. On November 16, 1993, the County Commission adopted the Planning District 25 Zoning Map and Ordinances.

2.3.25.2 District Boundaries

A legal description of the boundaries for Planning District 25 may be found under Appendix A.

2.3.25.3 Local Provisions for Planning District 25

(a) Multiple family buildings in the "RMF-6, Multiple Family" district may be erected to a maximum height or seven (7) habitable stories. The required side yards shall be increased by 4-feet for each additional story over two (2) habitable stories. The maximum impervious surface ratio shall not exceed .50.

(b) No PRD development is allowed to exceed maximum height requirements by more than 10-feet or 1 story.

(c) Off-street Parking.

As a supplement to Section 15.2, Parking Schedule, the following off-street parking requirements shall be applicable to single family dwellings and two-family dwellings:

1. Up to Four (4) Bedrooms: Two (2) spaces per dwelling unit.
2. Up to Six (6) Bedrooms: Three (3) spaces per dwelling unit.
3. Seven (7) Bedrooms and more: Four (4) spaces per dwelling unit, plus one (1) additional space per dwelling unit for every bedroom over eight (8).

(d) HDR, High Density Residential District, shall not be available in Planning District 25.

(e) The maximum height of single family and two-family structures shall be limited to two (2) habitable stories.

(f) Dune Walkovers.

1. As used in this section, the following definition shall apply:

   Dune walkover. A raised walkway constructed for the purpose of protecting the beach and dune system between mean high tide and the construction control (CCL) line from damage that may result from anticipated pedestrian traffic to the beach, and which is no more than six (6) feet in width for multiple family/commercial/public structures, no more than four (4) feet in width for single family/two family structures, constructed without roof or walls, elevated at least one (1) foot above the dune, and extends seaward of the vegetation line.

2. Land Use Certificate.

   A. A land use certificate which meets the requirements of Section 18.2, as well as the standards found herein, shall be submitted to and approved by the Zoning Administrator, or his/her designee, prior to the issuance of a building permit.

   B. A recent survey showing the location, size and alignment of all proposed structures and the ADEM CCL and

property lines shall be submitted along with the required land use certificate application. Said survey shall be prepared and stamped by a Professional Land Surveyor registered in the State of Alabama.

3. A dune walkover shall be constructed to the following standards:

   A. There shall be no more than one (1) dune walkover per parcel.

* * *

Article 15 Parking and Loading Requirements

Section 15.1 Generally

15.1.1 Off-street automobile storage or parking spaces shall be provided with vehicular access to a street or alley, and shall be equal to at least the minimum requirements for the specific land use as herein provided.

15.1.2 The required number of parking spaces for any number of separate uses may be combined in one lot, but the required space assigned to one use may not be assigned to another use at the same time, except that portion of the parking space required for an existing church whose peak attendance will be at night or on Sundays may be assigned to a use which will be closed at night or on Sundays.

15.1.3 Where business and multifamily unit developments require large numbers of parking spaces, such spaces may be accommodated in parking decks provided that no such parking deck shall exceed 3 levels above ground or 25% of the height of the principal structure, whichever is greater. Parking deck design shall be compatible with the design of the principal structure.

15.1.4 Any use not specified by these ordinances shall require one (1) parking space for each 300 square feet of gross floor area in the building. Where the use is mixed, total requirements for off-street parking shall be the sum of the requirements for the various uses computed separately.

Section 15.2 Parking Schedule

15.2.1 *Dwellings*.

(a) *One and two family dwellings*. 2 spaces for each dwelling unit.

(b) *Multiple family dwellings*. 1.6 spaces for each unit.

(c) *Hotels, motels, and tourist homes*. 1.25 spaces for each guest bedroom.

(d) *Manufactured Housing Park*. 2 spaces per unit.

(e) *Dormitory, boarding house or rooming house*. One space for each guest bedroom.

15.2.2 *Institutional.*

(a) *Churches or other place of worship*. One space for each 4 seats in the main auditorium or sanctuary.

(b) *Private clubs, lodges, country clubs and fraternal buildings*. One space for each 200 square feet of gross floor area.

(c) *Theaters, auditoriums, coliseums, stadiums and similar places of assembly*. One space for each 4 seats or seating spaces.

(d) *Libraries, museums, art galleries and similar uses*. One space for each 500 square feet of gross floor area.

(e) *College or university.* 10 spaces per classroom.

(f) *High school*. 7 spaces per classroom.

(g) *Elementary or middle school*. 2.5 spaces per classroom.

(h) *Business or trade school*. One space per 4 seats.

(i) *Kindergartens, play schools, or day care centers*. One space per employee.

15.2.3 *Health facilities*.

(a) *Hospitals, sanitariums, nursing homes, homes for aged and similar institutional uses*. 1 space for each 4 beds.

(b) *Kennels and animal hospitals (veterinarian)*. One space per 500 square feet of gross floor area.

(c) *Medical, dental and health offices*. One space for each 200 square feet of gross floor area.

(d) *Mortuaries and funeral homes*. One space for each 4 parlor or chapel seats.

15.2.4 *Business and office.*

(a) *Commercial establishments and offices including but not limited to food stores, banks, furniture stores, or personal service establishments*. One space for each 200 square feet of gross floor area.

(b) *Restaurants, night clubs, bars, cafes, and similar eating/drinking places*. One space for each 100 square feet of gross floor area.

(c) *Shopping centers.* One space per 200 square feet of gross floor area.

15.2.5 *Recreation and amusement*.

(a) *Skating rinks, dance halls, exhibition halls, pool rooms and other places of amusement or*

assembly without fixed seating arrangements. One space for each 200 square feet of floor area.

(b) *Bowling alleys.* 4 spaces for each alley.

(c) *Marinas.* One space for each slip or berth plus 1 space for each 500 square feet of dry boat storage area.

(d) *Golf course.* 4 spaces per golf hole.

(e) *Golf driving range.* One space for each driving tee area.

(f) *Amusement park.* One space per 200 square feet of area within enclosed buildings, plus One space for every 3 persons that the outdoor facilities are designed to accommodate.

15.2.6 *Industrial, warehouse and similar establishments*.

(a) *Industrial / manufacturing.* One space for each 500 square feet of gross floor area.

(b) *Warehouses*. One space for each 1,000 square feet of gross floor area.

(c) *Mini warehouses.* 2 parking spaces shall be provided for the manager's quarters plus one additional space for every 25 storage cubicles to be located at the project office for use of clients.

Section 15.3 Design Standards and Improvement Requirements

15.3.1 *Off-street parking space defined*. An off-street parking space is an area of not less than 171 square feet which is permanently reserved for the temporary storage of one automobile. The minimum dimension of an off-street parking space is 9' x 19'. Off-street parking spaces may not be located in a street or alley and must be connected with a street or alley by a

driveway which affords unobstructed ingress and egress to each space.

15.3.2 *Parking area dimensions.* The design and dimensions of the parking area shall be in accordance with the following dimensions table:

* * *

Article 18 Administration

Section 18.1 Administration, Interpretation and Enforcement

18.1.1 The duty of administering and enforcing the provisions of these zoning ordinances is hereby conferred upon the Zoning Administrator.

18.1.2 The Zoning Administrator is authorized and empowered to administer and enforce the provisions of these zoning ordinances to include receiving applications, inspecting sites, and issuing land use certificates for projects and uses and structures which are in conformance with the provisions of these zoning ordinances.

18.1.3 The Zoning Administrator shall keep records of all permits and certificates issued and maps, plats, and other documents with notations of all special conditions involved. He shall file and safely keep copies of all sketches and plans submitted, and the same shall form a part of the records of his office and shall be made as a public record.

18.1.4 Where the exact location of a boundary cannot be determined by the methods described in *Section 12.10: Rules for Determining Zoning District Boundaries*, the Zoning Administrator shall interpret the map and render a decision. Any such decision may be appealed to the Board of Adjustment.

18.1.5 In any case where a requested use is not specifically provided, the Zoning Administrator shall determine the appropriate zoning classification by reference to the most clearly analogous use or uses that are specifically provided.

Section 18.2 Land Use Certificates

18.2.1 *Authorization.* A land use certificate shall be obtained from the Zoning Administrator prior to the commencement of development and issuance of any building permit including electrical, HVAC and plumbing permits.

18.2.2 *Application procedure.*

(a) The Zoning Administrator shall receive the application for a land use certificate upon determination that it complies with all applicable submission requirements.

(b) Where appropriate, the Zoning Administrator shall circulate the application to the Building Official, County Engineer, and/or Coastal Program Director for review and comment.

(c) The land use certificate shall be issued or denied within 7 days otherwise it shall be deemed to be approved.

18.2.3 *Application submittal.*

(a) *Application form.* The land use certificate shall be on a form provided by the Zoning Administrator.

(b) *Plans and specifications.* Each application for a land use certificate shall be accompanied by an accurate site plan drawn to scale showing: the actual shape, dimensions and size of the lot to be built upon, the size, shape, height, floor area and location of the buildings to be erected;

dimensions and locations of existing buildings; width of front, side and rear yards; existing and proposed parking; ingress to and egress from the site; and such other information as may be reasonably requested to determine compliance with these zoning ordinances including but not limited to a landscaping plan, erosion control plan, stormwater management plan, and utilities plan.

(c) *State and Federal permits.* Written evidence of applications for all required permits showing compliance with ordinances of the Corps of Engineers, Alabama Department of Environmental Management, Alabama Coastal Area Management Program and Baldwin County Health Department shall accompany the application for a land use certificate, and the land use certificate may be conditioned upon the actual receipt of said permits by the applicant.

(d) *Application fee*. The applicant for a land use certificate shall be required to pay an application fee according to the current schedule of fees established by the County Commission for the particular category of application. This fee shall be nonrefundable irrespective of the final disposition of the application.

18.2.4 *Conditions and restrictions on approval.* A land use certificate shall be valid for the issuance of a building permit for 180 days after issuance. After that time a new land use certificate must be obtained. A record of the application and site plan shall be kept in the files of the Zoning Administrator for a period of not less than 3 years.

18.2.5 *Revocation of land use certificate.* The Zoning Administrator may revoke a land use certificate issued

in a case where there has been a false statement or misrepresentation in the application or on the site plan for which the Certificate was issued or if after a documented warning has been issued the applicant has failed to comply with the requirements of these zoning ordinances. Revocation of the land use certificate shall also cause suspension of the building permit until such time as in the judgment of the Zoning Administrator, the applicant is in compliance with the requirements of these zoning ordinances.

18.2.6 *Right of appeal.* The applicant may appeal the denial of the land use certificate to the Board of Adjustments in writing within twenty (20) calendar days after the rejection of the application.

Section 18.3 Building Permits

It shall be unlawful to commence the excavation for or the construction of any building or other structures, including accessory structures, or to store building materials or erect temporary field offices, or to commence the moving, alteration, or repair of any structure, including accessory structures, until the Building Official has issued a permit for such work including a statement that the plans, specifications and intended use of such structure in all respects conform with the provisions of these zoning ordinances. Applications for building permits including electrical, HVAC and plumbing permits shall be made to the Building Official on forms provided for that purpose.

Section 18.4 Certificate of Occupancy

No land or building or other structure or part thereof hereafter erected, moved or altered in its use shall be used until the Building Official shall have issued a Certificate of Occupancy stating that such land or structure or part thereof is found to be in conformity

with the provisions of these zoning ordinances. It shall be the duty of the Building Inspector to make a final inspection thereof, and to issue a Certificate of Occupancy if the building or premises or part thereof is found to conform to the provisions of these zoning ordinances or, if such certificate is refused, to state the refusal in writing with the cause.

Section 18.5 Appeals to the Board of Adjustment

18.5.1 The Board of Adjustment shall hear and decide appeals where it is alleged there is an error in any order, requirement, decision or determination made by the Zoning Administrator or other administrative official in the enforcement of these zoning ordinances.

18.5.2 Appeals to the Board of Adjustment may be taken by any person aggrieved or by any officer or department of Baldwin County affected by any decision of any administrative officer representing the County in an official capacity in the enforcement of these zoning ordinances. Such appeal shall be taken within 30 days of said decision by filing with the officer from whom the appeal is taken and with the Board of Adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall transmit forthwith to the Board of Adjustment all papers constituting the record upon which the action was taken.

18.5.3 An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the Board of Adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would in his opinion cause imminent peril to life or property. Such proceedings shall not be stayed otherwise than by a restraining order which

may be granted by the Board of Adjustment or by a Court of Record on application and notice to the officer from whom the appeal is taken and on due cause shown.

Section 18.6 Variances

18.6.1 *Authorization.* The Board of Adjustment shall authorize upon application in specific cases such variance from the terms of these zoning ordinances as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of these zoning ordinances will result in unnecessary hardship and so that the spirit of these zoning ordinances shall be observed and substantial justice done; provided, however, that the foregoing provisions shall not authorize the Board of Adjustment to approve a use or structure in a zoning district restricted against such use or structure.

18.6.2 *Standards for approval*. A variance may be authorized based upon the existence of the following conditions:

(a) Exceptional narrowness, shallowness or shape of a specific piece of property existing at the time of the enactment of these zoning ordinances.

(b) Exceptional topographic conditions or other extraordinary situation or condition of a specific piece of property.

(c) That the granting of the application is necessary for the preservation of a property right and not merely to serve as a convenience to the applicant or based solely upon economic loss.

(d) That the granting of the application will not impair an adequate supply of light and air to adjacent property or unreasonably increase the congestion in public streets, or increase the

danger of fire, or imperil the public safety, or unreasonably diminish or impair established property values within the surrounding areas, or in any other respect impair the health, safety, comfort, morals, or general welfare of the inhabitants of Baldwin County.

(e) Any owner of record of real property upon the date of the adoption by the Baldwin County Commission of the zoning ordinances for the planning district in which said property is located shall automatically obtain a variance, if needed, for a single family dwelling notwithstanding the type of dwelling to be placed or constructed on the property.

Section 18.7 Hearing of Appeals and Variances 18.7.1 *Application procedure.*

(a) Any appeal or application for variance must be submitted to the Planning & Zoning Department at least 15 days prior to the regularly scheduled meeting of the Board of Adjustment.

(b) The Zoning Administrator shall, upon determination that the application complies with all applicable submission requirements, receive the application and schedule it for public hearing by the Board of Adjustment.

(c) The Zoning Administrator shall, 5 days before the scheduled public hearing by the Board of Adjustment, provide notice of such hearing by certified mail to adjacent property owners as their names appear in the county tax records.

(d) The Board of Adjustment shall render a decision at the conclusion of the public hearing or within 45 days from the date of the public hearing if it

is determined that action must be deferred to allow for additional input and review.

(e) Any application may be withdrawn prior to action thereon by the Board of Adjustment at the discretion of the applicant initiating the request upon written notice to the Zoning Administrator.

18.7.2 *Submission requirements.* No appeal or application for variance shall be considered complete until all of the following has been submitted:

(a) *Application form.* The application shall be submitted on forms to be provided by the Zoning Administrator.

(b) *Plans and specifications.* Each application shall be accompanied by an accurate site plan drawn to scale and such other information as may be reasonably requested to support the application.

(c) *State and Federal permits.* Written evidence of applications for all required permits showing compliance with regulations of the Corps of Engineers, Alabama Department of Environmental Management, Alabama Coastal Area Management Program and Baldwin County Health Department shall accompany the application.

(d) *Application fee*. The applicant shall be required to pay an application fee according to the current schedule of fees established by the County Commission for the particular category of application. This fee shall be nonrefundable irrespective of the final disposition of the application; however, where an applicant is successful in reversing a decision of the Zoning

Administrator the fee shall be returned to the applicant.

(e) *Association approval.* Prior approval from active neighborhood associations, boards or committees, if applicable, shall accompany all Board of Adjustment applications and requests.

Section 18.8 Special Exceptions

18.8.1 *Authorization*. The Board of Adjustment may, under the prescribed standards and procedures contained herein, authorize the construction or initiation of any use that is expressly permitted as a special exception in a particular zoning district; however, the county reserves full authority to deny any request for a special exception, to impose conditions on the use, or to revoke approval at any time, upon finding that the permitted use will or has become unsuitable and incompatible in its location as a result of any nuisance or activity generated by the use.

18.8.2 *Application procedure.*

(a) An application for special exception approval must be submitted to the Planning & Zoning Department at least 15 days prior to the regularly scheduled meeting of the Board of Adjustment.

(b) The Zoning Administrator shall, upon determination that the application complies with all applicable submission requirements, receive the application and schedule it for public hearing by the Board of Adjustment.

(c) The Zoning Administrator shall, 5 days before the scheduled public hearing by the Board of Adjustment, provide notice of such hearing by certified mail to the owners of property adjacent

to the proposed special exception as their names appear in the county tax records.

(d) The Board of Adjustment shall render a decision at the conclusion of the public hearing or within 45 days from the date of the public hearing if it is determined that action must be deferred to allow for additional input and review.

(e) Any petition for special exception approval may be withdrawn prior to action thereon by the Board of Adjustment at the discretion of the applicant initiating the request upon written notice to the Zoning Administrator.

18.8.3 *Submission requirements.* No request for special exception approval shall be considered complete until all of the following has been submitted:

(a) *Application form.* The application shall be submitted on forms to be provided by the Zoning Coordinator.

(b) *Plans and specifications.* Each application for special exception approval shall be accompanied by an accurate site plan drawn to scale showing: the actual shape, dimensions and size of the lot to be built upon, the size, shape, height, floor area and location of the buildings to be erected; dimensions and locations of existing buildings; width of front, side and rear yards; existing and proposed parking; ingress to and egress from the site; and such other information as may reasonably be requested to determine compliance with these Zoning Ordinances including but not limited to a landscaping plan, erosion control plan, stormwater management plan, and utilities plan.

(c) *State and Federal permits.* Written evidence of applications for all required permits showing compliance with regulations of the Corps of Engineers, Alabama Department of Environmental Management, Alabama Coastal Area Management Program and Baldwin County Health Department shall accompany the application for conditional use approval, and the conditional use may be conditioned upon the actual receipt of said permits by the applicant.

(d) *Application fee*. The applicant for a special exception shall be required to pay an application fee according to the current schedule of fees established by the County Commission for the particular category of application. This fee shall be nonrefundable irrespective of the final disposition of the application.

(e) *Association approval.* Prior approval from active neighborhood associations, boards or committees, if applicable, shall accompany all Board of Adjustment applications and requests.

18.8.4 *Standards for approval.* A special exception may be approved by the Board of Adjustment only upon determination that the application and evidence presented clearly indicate that all of the following standards have been met:

(a) The proposed use shall be in harmony with the general purpose, goals, objectives and standards of the Baldwin County Master Plan, these ordinances, or any other official plan, program, map or ordinance of Baldwin County.

(b) The proposed use shall be consistent with the community welfare and not detract from the public's convenience at the specific location.

(c) The proposed use shall not unduly decrease the value of neighboring property.

(d) The use shall be compatible with the surrounding area and not impose an excessive burden or have substantial negative impact on surrounding or adjacent uses or on community facilities or services.

18.8.5 *Conditions and restrictions on approval.* In approving a special exception, the Board of Adjustment may impose conditions and restrictions upon the property benefited by the special exception as may be necessary to comply with the standards set out above, to reduce or minimize any potentially injurious effect of such special exception upon the property in the neighborhood, and to carry out the general purpose and intent of the ordinances. In approving any special exception, the Board of Adjustment may specify the period of time for which such approval is valid for the commencement of the proposed special exception. The Board of Adjustment may, upon written request, grant extensions to such time allotments not exceeding 6 months each without notice or hearing. Failure to comply with any such condition or restriction imposed by the Board of Adjustment shall constitute a violation of these ordinances. Those special exceptions which the Board of Adjustment approves subject to conditions shall have specified by the Board of Adjustment the time allotted to satisfy such conditions.

Section 18.9 Decisions of the Board of Adjustment

In exercising its authority, the Board of Adjustment may reverse or affirm, wholly or partly, or modify the order, requirement, decision or determination appealed from and make such order, requirement, decision or determination as should be made and, to that end,

shall have all the powers of the officer from whom the appeal is taken. The concurring vote of 4 members of the Board of Adjustment shall be necessary to reverse any order, requirement, decision or determination of any such administrative official or to decide in favor of the applicant on any matter upon which it is required to act.

Section 18.10 Appeal from Decision of the Board of Adjustment

Any party aggrieved by a final judgment or decision of the Board of Adjustment may, within 15 days thereafter, appeal the final judgment to the Circuit Court of Baldwin County, Alabama, by filing with the Circuit Court and the Board of Adjustment a written notice of appeal specifying the judgment or decision from which the appeal is taken. In case of such appeal, the Board of Adjustment shall cause a transcript of the proceedings and the action to be certified to the Court where the appeal is taken, and the action of such court shall be tried de novo.

Section 18.11 Conditional Uses

18.11.1 *Authorization*. The Planning Commission may, under the prescribed standards and procedures contained herein, authorize the construction or initiation of any use that is expressly permitted as a conditional use in a particular zoning district; however, the county reserves full authority to deny any request for a conditional use, to impose conditions on the use, or to revoke approval at any time, upon finding that the permitted use will or has become unsuitable and incompatible in its location as a result of any nuisance or activity generated by the use.

18.11.2 *Application procedure.*

(a) An application for conditional use approval must be submitted to the Planning & Zoning Department at least 30 days prior to the regularly scheduled meeting of the Planning Commission.

(b) The Zoning Administrator shall, upon determination that the application complies with all applicable submission requirements, receive the application and schedule it for public hearing by the Planning Commission.

(c) The Zoning Administrator shall, 5 days before the scheduled public hearing by the Planning Commission, provide notice of such hearing by certified mail to the owners of property adjacent to the proposed conditional use as their names appear in the county tax records.

(d) The Planning Commission shall render a decision at the conclusion of the public hearing or within 45 days from the date of the public hearing if it is determined that action must be deferred to allow for additional input and review.

(e) Any petition for conditional use approval may be withdrawn prior to action thereon by the Planning Commission at the discretion of the applicant initiating the request upon written notice to the Zoning Administrator.

18.11.3 *Submission requirements.* No request for conditional use approval shall be considered complete until all of the following has been submitted:

(a) *Application form.* The application shall be submitted on forms to be provided by the Zoning Administrator.

(b) *Plans and specifications.* Each application for conditional use approval shall be accompanied by an accurate site plan drawn to scale showing: the actual shape, dimensions and size of the lot to be built upon, the size, shape, height, floor area and location of the buildings to be erected; dimensions and locations of existing buildings; width of front, side and rear yards; existing and proposed parking; ingress to and egress from the site; and such other information as may reasonably be requested to determine compliance with these zoning ordinances including but not limited to a landscaping plan, erosion control plan, stormwater management plan, and utilities plan.

(c) *State and Federal permits.* Written evidence of applications for all required permits showing compliance with regulations of the Corps of Engineers, Alabama Department of Environmental Management, Alabama Coastal Area Management Program and Baldwin County Health Department shall accompany the application for conditional use approval, and the conditional use may be conditioned upon the actual receipt of said permits by the applicant.

(d) *Application fee*. The applicant for a conditional use shall be required to pay an application fee according to the current schedule of fees established by the County Commission for the particular category of application. This fee shall be nonrefundable irrespective of the final disposition of the application.

18.11.4 *Standards for approval.* A conditional use may be approved by the Planning Commission only upon determination that the application and evidence

presented clearly indicate that all of the following standards have been met:

(a) The proposed use shall be in harmony with the general purpose, goals, objectives and standards of the Baldwin County Master Plan, these ordinances, or any other official plan, program, map or ordinance of Baldwin County.

(b) The proposed use shall be consistent with the community welfare and not detract from the public's convenience at the specific location.

(c) The proposed use shall not unduly decrease the value of neighboring property.

(d) The use shall be compatible with the surrounding area and not impose an excessive burden or have substantial negative impact on surrounding or adjacent uses or on community facilities or services.

18.11.5 *Conditions and restrictions on approval.* In approving a conditional use, the Planning Commission may impose conditions and restrictions upon the property benefited by the conditional use approval as may be necessary to comply with the standards set out above, to reduce or minimize any potentially injurious effect of such conditional use upon the property in the neighborhood, and to carry out the general purpose and intent of the ordinances. In approving any conditional use, the Planning Commission may specify the period of time for which such approval is valid for the commencement of the proposed conditional use. The Planning Commission may, upon written request, grant extensions to such time allotments not exceeding 6 months each without notice or hearing. Failure to comply with any such condition or restriction imposed by the Planning Commission shall constitute a viola-

tion of these ordinances. Those conditional uses which the Planning Commission approves subject to conditions shall have specified by the Planning Commission the time allotted to satisfy such conditions.

Section 18.12 Tolling Provisions

If subsequent to the filing of a any application/petition, the applicant/petitioner is enjoined by order of a court of competent jurisdiction from commencement of construction, the time from the entry of such order against applicant/petitioner until such time as the order is lifted or becomes final and unappealable, shall not be counted toward or against the time allowed/required by these ordinances for applicant to commence construction. The provisions of this section shall retroactively apply to all pending applications/petitions.

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Article 21 Enforcement

Section 21.1 Zoning Enforcement and Appeals

21.1.1 *Violations, penalties and remedies; generally*

21.1.2 Whenever a violation of these ordinances is identified or is alleged to have occurred, any person aggrieved may file a complaint. Such complaint shall fully state the cause and basis thereof, and shall be filed with the Planning and Zoning Director at his/her office at the Planning and Zoning Department in Bay Minette, Alabama.

Whenever the Planning and Zoning Director or his/her designee has knowledge of a violation or an alleged violation, a thorough investigation may be initiated. After such investigation, and upon the finding of a violation, the violation procedures contained in this Article shall be initiated.

21.1.3 Violation of the provisions of these ordinances, including violation of conditions and safeguards established in connection with a grant of a variance, special exception, conditional use, land use certificate or appeal, shall be addressed and punishable in accordance with sections contained herein.

21.1.4 In the event that any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or in the event that any building, structure, or land is used in violation of these ordinances, the Planning and Zoning Director may institute or cause the institution of any appropriate action or proceeding to:

(a) Prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use of the building, structure, or land.

(b) Prevent the occupancy of the building, structure, or land.

(c) Prevent any illegal act, conduct, business, or use in or about the premises.

(d) Restrain, correct, or abate the violation. Section 21.2 Violations

21.2.1 *Persons in violation*. Any person(s), whether owner, lessee, principal, agent, employee, or occupant of any land or part thereof, and any architect, engineer, builder, contractor, agent or other person who: (a) violates any provision of these ordinances, (b) permits, participates, assists, directs, creates or maintains any such violation, (c) fails to comply with any of the requirements hereof, including conditions, stipulations, or safeguards attached to any approval, permit, variance, special exception, conditional use or the like, or (d) who

erects, constructs or reconstructs any building or structure, or uses any building, structure or land in violation of any written statement or plan submitted and approved pursuant to these ordinances, shall be in violation.

21.2.2 Any person(s) in violation of these ordinances shall be held responsible for such violation and be subject to the penalties and remedies as provided herein and as provided by law.

21.2.3 *Separate violation.* Each and every person who commits, permits, participates in, assists, directs, creates or maintains a violation may be found individually in violation of a separate offense. Each day that any violation continues to exist shall constitute an additional and separate violation.

21.2.4 *Structures and uses in violation*. Any structure or lot erected, constructed, altered, occupied or used contrary to any provision(s) of these ordinances or other applicable ordinances, stipulation, condition, approvals and variance shall be declared to be unlawful.

Section 21.3 Notice of Violation

21.3.1 *Issuance.* The Planning and Zoning Director or his/her designee shall issue a written notice of violation upon receipt of a complaint or knowledge of violation, to all persons in violation. The Notice of Violation may be served by certified mail, return receipt requested, or pursuant to Alabama Rules of Civil Procedure. The Notice of Violation shall allow a reasonable time to correct or abate such violation.

21.3.2 *Notice requirements.* The Notice of Violation shall ("Notice") clearly identify the property and particular alleged violation involved, the action necessary to correct it, the time permitted for such correction,

and penalties for failure to comply. The Notice shall include but not be limited to:

(a) A description of the location of the property involved, either by street address or by legal description.

(b) A statement indicating the nature of the violation.

(c) A statement showing the time within which all necessary remedial action must be accomplished, which time may not be less than 10 days nor more than 90 days from the date of such written Notice.

(d) The name of the person(s) upon whom the Notice of Violation is served.

(e) A statement advising that upon the failure to comply with requirements of the Notice, such enforcement procedure as may be required under these zoning ordinances shall be taken.

21.3.3 *Violations threatening health, safety and welfare.* The Planning and Zoning Director may shorten or eliminate the time period to correct a violation if he/she determines that the alleged violation presents an imminent and serious threat to the public health, safety, or welfare, or the violation is irreparable or irreversible. The Notice of Violation shall, in such case, state that an immanent and serious threat to public health, safety, or welfare exists or the violation is irreparable or irreversible, along with the allowed time period for correction if any.

21.3.4 *Noncompliance.* When the Planning and Zoning Director or his/her designee determines that the violation has not been corrected or abated by end of the prescribed time period, he/she shall issue a written

notice forwarding the matter to the County Legal Department and/or the Baldwin County District Attorneys office for further action.

21.3.5 *Compliance.* Upon the submission by the violator of evidence of compliance deemed adequate by the Planning and Zoning Director, the Director may deem the violation to be resolved and compliance achieved.

21.3.6 *Diligent efforts to comply.* When, after issuance of a Notice of Violation but prior to commencement of any judicial proceedings, the Planning and Zoning Director determines that the person in violation is making a diligent effort to comply with the requirements of the Notice, the Planning and Zoning Director may issue a written stay of further enforcement actions pending full compliance. The stay shall list the diligent efforts to comply and should be provided to the violator(s). No enforcement actions shall be stayed longer than ninety (90) days.

21.3.7 *Repeat violations.* When any Notice of Violation is issued to any person for substantially the same violation for which a previous Notice of Violation has been issued to such person, no period shall be allowed for correction or abatement of the violation. Rather, in such event, the Planning and Zoning Director shall immediately cause the matter to be forwarded to the County Legal Department and/or the Baldwin County District Attorneys Office for further action.

21.3.8 *Fines.* Any person(s) violating any of the provisions herein shall be fined not more than $150.00 for each separate violation, plus all costs of court, with each day such violation continues constituting a separate violation (see 21.2.3, above). The fines provided for herein shall commence and accrue upon receipt of the Notice of Violation or the expiration of the allowed

period for correction, whichever is later. Said fines shall continue to accrue until paid, but shall not accrue on days during which the violation is properly on appeal.

Section 21.4 Additional Penalties

21.4.1 *Stop work order.* The Planning and Zoning Director may issue, or cause to be issued, a Stop Work Order on a premises, lot or parcel that is in alleged violation of any provision of these ordinances, or is being maintained in a dangerous or unsafe manner. A Stop Work Order may be issued in place of or in conjunction with any other actions and procedures identified in these ordinances. Such Order shall be in writing and shall be given to the owner of the property, or to his agent, or to the person doing the work, and shall state conditions under which work may be resumed. Upon receipt of a Stop Work Order, all work associated with the violation shall immediately cease. Any person who continues to work shall be in violation of these ordinances and subject to penalties and remedies contained herein. The Stop Work Order may be appealed to the respective Board of Adjustment for which the activity is located.

21.4.2 *Cease and abate orders.* The Planning and Zoning Director may issue, or cause to be issued, a Cease and Abate Order to any person(s) maintaining any condition, or engaged in any activity or operation, which violates these ordinances. Such Order shall be in writing and shall be given to the owner of the property, or to the person maintaining such condition or engaged in such activity and operation. Upon receipt of a Cease and Abate Order, all conditions, activities and operations associated with the violation shall immediately cease and be abated. Any person who continues or fails to abate such condition, activity

or operation shall be subject to penalties and remedies contained herein.

21.4.3 *Revocation of permits.* The Planning and Zoning Director may revoke, or cause the revocation of, permits or approvals in those cases where an administrative determination has been duly made that false statements or misrepresentations of material fact(s) were made in the application or plans upon which the permit or approval was based.

Section 21.5 Appeals

21.5.1 *Appeal of administrative enforcement decision.* Any person(s) aggrieved by a decision of the Planning and Zoning Director or his or her designee in regards to zoning enforcement may file an appeal, made on forms provided by the County, to the respective Board of Adjustment where the alleged violation has occurred. An appeal must be filed within fifteen (15) days of the date of the Notice of Violation. An appeal is deemed filed with a Board of Adjustment when received by the respective Board Chairman.

21.5.2 *Appeal of Board of Adjustment decision.* In exercising its authority, the Board of Adjustment may reverse or affirm, wholly or partly, or modify the order, requirement, decision or determination appealed from and make such order, requirement, decision or determination as the Board deems proper and, to that end, shall have all the powers of the officer from whom the appeal is taken. The concurring vote of 4 members of the Board of Adjustment shall be necessary to reverse, affirm or modify any order, requirement, decision or determination of any such administrative official or to decide in favor of the applicant on any matter upon which it is required to act.

21.5.3 *Appeal to Circuit Court from final decision of Board of Adjustment.* Any party aggrieved by a final judgment or decision of a board of adjustment may within 15 days thereafter, appeal there from to the Circuit Court of Baldwin County, Alabama, by filing with the circuit court and the board of adjustment a written notice of appeal specifying the judgment or decision from which the appeal is taken and specifying in sufficient detail the grounds for appeal so that the non-appealing party may reasonably frame a responsive pleading. For purposes of this section, an appeal shall be filed with the board of adjustment at the Baldwin County Planning and Zoning Department at its office in Bay Minette, Alabama, and shall be deemed filed when received at the Baldwin County Planning and Zoning Department regardless of the method delivery.

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Parking lot. An area not within a building where motor vehicles may be stored for the purposes of temporary, daily, or overnight off-street parking.

Parking space, off-street. An area adequate for parking an automobile with room for opening doors on both sides, together with properly related access to a public street or alley and maneuvering room, but shall be totally outside of any street or alley right-of-way.

Pennant. Any lightweight plastic, fabric, or other material, whether containing a message or not, suspended from rope, wire, string, or other material, whether containing a message or not, suspended from a rope, wire, string, or other similar device, designed to move in the wind.

Permitted use. A use by right that is specifically authorized in a particular zoning district. It is contrasted with special exceptions and conditional uses that are authorized only if certain requirements are met and

after review and approval by the Board of Adjustment and Planning Commission respectively.

Pier. An elevated deck structure, usually pile supported, extending out into the water from the shore.

Planned development. A development of land that is under unified control and is planned and developed as a whole in a single development operation or programmed series of development stages.

Planning Commission. The Baldwin County Planning and Zoning Commission.

Planning Director. The Director of the Baldwin County Planning & Zoning Department.

Planning districts. The districts into which the County is divided for planning purposes and for the purpose of holding elections to determine if an area will be subject to the County's planning and zoning authority.

Porch. A roofed-over space attached to the outside of an exterior wall of a building, which has no enclosure other than the exterior wall(s) to which it is attached. Open mesh screening shall not be considered an enclosure. Porches shall be considered as a part of the main building and shall not project into a required front yard.

Portable sign. Any sign not permanently attached to the ground or other permanent structure, or a sign designed to be transported, including, but not limited to, signs designed to be transported by means of wheels; signs converted to A-frames or T-frames; menu or sandwich board signs; balloons or other inflatable devises used as signs; umbrellas used for advertising; and signs

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APPENDIX E

Ala. Code § 45-2-261.04. Procedure for adoption and amendment of ordinances and regulations.

(a) The Baldwin County Commission may adopt ordinances and regulations as necessary to effect the provisions of this subpart. The ordinances or regulations shall be made in accordance with a master plan and designed to lessen congestion in the streets, to secure safety from fire, panic, and other dangers, to promote health and general welfare, to provide adequate light and air, to prevent overcrowding of land, to avoid undue concentration of population and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The ordinances and regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses and with the view of conserving the value of the buildings and encouraging the most appropriate use of land throughout the district. For the purpose of promoting the health, safety, morals, and general welfare of the community, the county commission may regulate and restrict the height, number of stories, and size of buildings or structures, the percentage of lots that may be occupied, the size of yards, courts, and other open spaces, the density of population and the location and use of buildings, structures, and land for trade, industry, residences, or other purposes.

(b) Prior to the adoption of a proposed ordinance or regulation, or amendment thereto, pursuant to this subpart, notice that an ordinance or regulation, or amendment thereto, will be considered shall be published for three consecutive weeks in the legal section of a newspaper of general circulation in the county. In addition, a notice shall be published at least five days

prior to the date of the public hearing in the regular section of the newspaper which shall be in the form of at least one quarter page advertisement. The notice shall state that an ordinance or regulation, or amendment thereto, will be considered by the Baldwin County Commission pursuant to this subpart and that a copy of the proposed ordinance or regulation, or amendment thereto, is available for public inspection at the nearest county courthouse or the nearest county courthouse satellite office which locations shall be clearly published in the notice. The notice required to be published by this subpart shall also state the time and place and location where all persons may be heard in opposition to or in favor of the ordinance or regulation or amendment thereto. The regulation, ordinance, or amendment thereto, shall not become effective until adoption by the Baldwin County Commission after a public hearing thereon, at which parties in interest and citizens shall have an opportunity to be heard. If a parcel of property may be rezoned by a proposed amendment, a conspicuously located sign advising the general public of the proposed amendment shall be posted on the property no less than three weeks prior to the date of the hearing.

§ 45-2-261.11. Appeals to the board of adjustment.

Appeals to the planning district board of adjustment may be taken by any person aggrieved or by any officer or department of Baldwin County affected by any decision of any administrative officer representing the county in an official capacity in the enforcement of this subpart or of any ordinance or regulation adopted pursuant to this subpart. Notwithstanding any provision herein, a board of adjustment shall have no jurisdiction to review any decision already determined by the Baldwin County Commission. The appeal shall be taken within 30 days of the decision by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall transmit forthwith to the board of adjustment all papers constituting the record upon which the action was taken. An appeal stays all proceedings in furtherance of the action appealed unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him or her that by reason of facts stated in the certificate a stay would in his or her opinion cause imminent peril to life or property. The proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application and notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for hearing the appeal, give public notice to the interested parties, and decide the appeal within a reasonable time. Any party may appear in person, by agent, or by an attorney.

§ 45-2-261.12. Powers of the board of adjustment.

The board of adjustment shall have all of the following powers:

(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 the zoning regulations adopted pursuant to this subpart.

(2) To hear and decide special exceptions to the terms of the zoning regulations adopted pursuant to this subpart.

(3) To authorize upon appeal in specific cases the variance from the terms of the zoning regulations as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the zoning regulations will result in unnecessary hardship and so that the spirit of the ordinance or regulations required shall be observed and substantial justice done. The foregoing provisions shall not authorize the board of adjustment to approve a use not permitted by the zoning regulations.

In exercising its authority, the board may, in conformity with this subpart, reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination appealed from and make the order, requirement, decision, or determination as should be made and, to that end, shall have all the powers of the officer from whom the appeal is taken. The concurring vote of a majority of the members of a board of adjustment shall be necessary to reverse any order, requirement, decision, or determination of any administrative official or decide in favor of the applicant on any matter upon which it is required to act or to approve a variance from the terms of the zoning regulations adopted pursuant to this subpart.

§ 45-2-261.13. Appeals from final decision of board of adjustment.

(a) Any party aggrieved by a final judgment or decision of a board of adjustment, except a decision on the approval or disapproval of a subdivision, within 15 days thereafter, may appeal therefrom to the Circuit Court of Baldwin County, Alabama, by filing with the circuit court and the board of adjustment a written notice of appeal specifying the judgment or decision from which the appeal is taken. In case of the appeal, the board of adjustment shall cause a transcript of the proceedings and the action to be certified to the court to which the appeal is taken.

(b) Any party aggrieved by a final judgment or decision of a board of adjustment on the decision on the final approval or disapproval of a subdivision, within 15 days thereafter, may appeal therefrom to the county commission. Any party aggrieved by the final judgment or decision of the county commission, within 15 days thereafter, may appeal therefrom to the Circuit Court of Baldwin County, Alabama, by filing with the circuit court and the county commission a written notice of appeal specifying the judgment or decision from which the appeal is taken. In case of an appeal to circuit court, the county commission shall cause a transcript of the proceedings and the action to be certified to the court to which the appeal is taken.