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02-CV-2016-900246.00

Judge: BEN H. BROOKS

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

SUZANNE SCHWARTZ ET AL VS CITY OF MOBILE ET AL
02-CV-2016-900246.00

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IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

SCHWARTZ SUZANNE, DAVIS CAROL ADAMS, WAGNER HERB, Plaintiffs, V. CITY OF MOBILE, MOBILE CITY PLANNING COMMISSION, COOPER MARINE & TIMBERLANDS CORP., MOBILE CITY COUNCIL, Defendants.	)	**Case No.:** CV-2016-900246.00

ORDER ON PENDING MOTIONS

This matter came before the Court for oral argument on June 27, 2018 on multiple pending motions, including the following:

(1) Plaintiffs' Motion for Partial Summary Judgment (Doc. 232);

(2) Defendant Cooper Marine and Timberlands Corporation's ("CMT's") Cross-Motion for Partial Summary Judgment (Doc. 252);

(3) Defendants City of Mobile's ("the City's") and Mobile City Planning Commission's ("the Planning Commission's") Motion for Partial Summary Judgment (Doc. 263); and

(4) Defendant CMT's Objection and Motion to Strike Plaintiffs' Evidentiary Submission (Doc. 280) and CMT's Objection and Motion to Strike Amended Affidavits (Doc. 312), and the City's and Commission's Joinder therein (Doc. 315).

Multiple response and reply briefs were filed with regard to these motions. At the hearing on June 27, 2018, counsel for all parties stipulated that the record was complete for purposes of these motions. Counsel for Plaintiffs likewise conceded that, if the Court finds that Plaintiffs lack standing, then all of Plaintiffs' claims necessarily fail.

After the hearing, Plaintiffs filed another Evidentiary Submission on July 17, 2018 (Docs. 322 & 323), and Defendants promptly filed an Objection and Motion to Strike Amended Affidavits with regard to this new Evidentiary Submission. (*See* Docs. 328-331). Since these recent filings relate to the pending motions addressed at the hearing, this Order will address these additional filings as well.

The Court having considered the pleadings, motions, briefs, and exhibits submitted by the parties, as well as the oral arguments and stipulations of counsel at the hearing, finds and orders as follows:

I. FINDINGS OF FACT

1. This lawsuit arises out Plaintiffs' challenge to a decision by the Planning Commission (and ultimately the City Council) to approve the handling of coal at a CMT marine cargo handling facility. (See Amended Complaint for Declaratory Judgment, Docs. 66 & 185[1]). Plaintiffs generally allege that they are residents of the City of Mobile[2] and that the Planning Commission's decision "would, or could, have an adverse effect on the use, enjoyment, and value" of their property. (Id.).
2. Plaintiffs' Amended Complaint ("Complaint") seeks a 4-part Declaration that

a. Mobile Municipal Code 64-12 is invalid as an illegal delegation of legislative authority;

b. The decision of the Planning Commission which was ratified by the City Council is arbitrary and capricious;

c. The post hoc definition of capacity that allows CMT to enlarge its scope of operations without further planning approval was a denial of due process; and

d. CMT is operating its coal handling facility illegally.

(Doc. 66, ¶ 33(a-d)).

3. CMT operates its marine cargo handling facility on the East Bank of the Mobile River. (See Planning Approval Staff Report, Doc. 253, Exhibit A-2; Minutes from 9-19-15 Planning Commission Hearing, Doc. 253, Exhibit A-3.) It loads and unloads wood pellets, pig iron, scrap, limestone, coke, ores, and mineral sands. (Id.) In addition, CMT began handling coal in 2010. (Id.) CMT has maintained proper permitting from federal and state environmental regulatory agencies related to its coal handling operations. (Id.)

4. CMT did not apply to the City for approval to handle coal in 2010 because CMT believed that its operations were permitted as of right in its district, which is zoned I-2 for Heavy Industry and permits operations in "marine cargo handling; stevedoring." (Id.) The only reference to coal in the zoning ordinance Chart of Permitted Uses is "coal mining," and CMT does not mine coal. (Id.) See also

Mobile City Code § 64-12 (Chart of Permitted Uses). Nonetheless, when the City issued a Notice of Violation and required CMT to apply for approval to handle coal, CMT complied. (See Planning Approval Staff Report, Doc. 253, Exhibit A-2.)

5. Along with its application, CMT provided the Planning Commission with copies of its federal and state environmental permits and included a description of its coal dust suppression procedures, among other things. (See CMT's Application, Doc. 253, Exhibit A-1; Planning Approval Staff Report, Doc. 253, Exhibit A-2; Minutes from 9-19-15 Planning Commission Hearing, Doc. 253, Exhibit A-3.)

6. Upon receipt of the planning approval application, a staff report was prepared by City planning personnel which analyzed the application, the materials submitted therewith, and the site, and which ultimately made recommendations concerning the application to the Planning Commission. (See Planning Approval Staff Report, Doc. 253, Exhibit A-2.)

7. The Planning Commission then held an open public hearing on CMT's application and heard from CMT and several people who opposed the application, including one of the Plaintiffs and Plaintiffs' attorney. (See Minutes from 9-19-15 Planning Commission Hearing, Doc. 253, Exhibit A-3.)

8. At the conclusion of the hearing, the Planning Commission approved CMT's application. (See 9-24-15 Letter Decision from Planning Commission, Doc. 253, Exhibit A-4.)

9. Some of the Plaintiffs and their attorney, and others opposed to the application, appealed to the City Council pursuant to Mobile City Code § 64-8(C)(2)(c). (See Letters of Appeal, Doc. 253, Exhibit A-5.)

10. The City Council, as required by § 64-8(C)(2)(c), took under submission the Planning Commission's record, including the application, hearing minutes, the Planning Approval Staff Report, and the Planning Commission's Letter of Decision. See Mobile City Code § 64-8(C)(2)(c).

11. The City Council also held its own open public hearing, wherein some of the Plaintiffs (and others) were again heard as to their reasons for opposing the application. (See Minutes from City Council's 1-5-16 Hearing, Doc. 254, Exhibit B-2.)

12. After hearing from the public and discussing the matter at the hearing, the City Council denied the appeal. (Id. See also City Council's 1-5-16 Letter, Doc. 254, Exhibit B-3.)

13. The minutes from the City Council meeting establish that the City Council heard from nine individuals who opposed CMT's application, including three of the named Plaintiffs and their attorney in this lawsuit. (See Minutes from City Council's 1-5-16 Hearing, Doc. 254, Exhibit B-2.) Then, the minutes reflect that the City Council heard from CMT's attorney about CMT's operations, location, and

federal and state permitting. (Id.) They also reflect that, in summarizing, CMT's attorney opined that the Planning Commission decision to approve its application was not arbitrary and capricious. (Id.)

14. After hearing from ten people, nine of whom spoke in opposition to CMT's application, the City Council held a "discussion." (Id.) Only after the discussion was concluded did they vote to deny the appeal. (Id.)

II. CONCLUSIONS OF LAW

A. Defendants are entitled to summary judgment because Plaintiffs have failed to establish by competent evidence that they have legal standing to pursue the asserted claims.

Defendants argue that Plaintiffs have not submitted competent evidence of Plaintiffs' legal standing to pursue these claims. Plaintiffs concede that if Defendants prevail on their standing argument, it would be fatal to all of Plaintiffs' claims.

1. Legal Standing Requirements

Section 64-8(C)(2)(c) permits "aggrieved persons" to appeal decisions of the Planning Commission to the City Council on applications for planning approval. Therefore, Plaintiffs must be "aggrieved persons" to have standing in this case. To establish that they are "aggrieved," Plaintiffs must show that CMT's approved land use would, or could, have an adverse effect on the use, enjoyment, and value of property in which they have a legal or equitable interest. *See Ferraro v. Bd. of Zoning Adjustment of Birmingham*, 970 So. 2d 299, 302 (Ala. Civ. App. 2007); *Bd. of Adjustment v. Matranga, Hess & Sullivan*, 283 So. 2d 607, 608-09 (Ala. Civ. App. 1973). Moreover, "'to qualify as a person aggrieved by an administrative decision it is necessary to demonstrate that the decision in issue will have a singular impact upon some legally protectable interest of the plaintiff.'" *Brown v. Jefferson*, 203 So. 3d 1213, 1219 (Ala. Civ. App. 2014), *cert. denied* (Ala. 2016)(quoting 4 Kenneth H. Young, *Anderson's American Law of Zoning* § 27:10 (4th ed. 1996)). The vast majority of cases in which the courts have found a landowner to have standing with regard to land use decisions for others' properties have involved plaintiffs who owned land adjacent to the subject property. *See, e.g., Brown*, 203 So. 3d at 1218-19 (adjoining neighbor was directly affected by the traffic congestion created by the students at a dance studio, where he faced blocked intersections and blocked access to his driveway); *Crowder v. Zoning Bd. of Adjustment*, 406 So. 2d 917, 919 (Ala. Civ. App. 1981) (residence located five city blocks from subject property would not confer standing as aggrieved party on plaintiff).

In addition to proving that they are statutorily "aggrieved," Plaintiffs must meet the constitutional standing requirements of the Alabama Supreme Court:

> A party establishes standing to bring a…challenge…when it demonstrates the exercise of (1) an actual concrete and particularized 'injury in fact' – 'an invasion of a legally protected interest'; (2) a 'casual connection between the injury and the conduct complained of'; and (3) a likelihood that the injury will be 'redressed by a favorable decision.' *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61... (1992).

Ex parte King, 50 So. 3d 1056, 1059-60 & n.4 (Ala. 2010) (quoting *Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, LLC*, 890 So. 2d 70, 74 (Ala. 2003)). A particularized harm means "that the injury must affect the plaintiff in a personal and individual way." *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253, 1257, n.3 (Ala. 2004) (quoting *Lujan*, 504 U.S. at 560 n.1). It "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Cedar Bluff*, 904 So. 2d at 1260 (See, J., concurring specially). General harm to the welfare and health of the community is insufficient. *Id*. at 1259, 1261 (plaintiffs lacked standing to challenge statute that they alleged would harm the town's health, welfare, peace, and morals).

Defendants argue that Plaintiffs have failed to submit competent evidence to establish legal standing in this matter, including competent evidence of any property interest adversely affected in a particularized way by CMT's coal handling operations. Defendants further argue that merely owning property within the City of Mobile does not confer standing to challenge a land use decision concerning a piece of industrial property, surrounded by industrial districts, and located across the Mobile River from commercial and residential zones. In order to address whether Plaintiffs have submitted competent evidence to establish legal standing, the Court must necessarily consider the Affidavits and Amended Affidavits submitted by Plaintiffs as well as Defendants' objections and motions to strike same.

2. The Affidavits and Amended Affidavits submitted by Plaintiffs are due to be stricken and are otherwise insufficient to establish legal standing

After CMT raised Plaintiffs' lack of standing in the summary judgment briefing (Doc. 247), four of the Plaintiffs initially submitted Affidavits via "Plaintiffs' Evidentiary Materials in Support of Their Response to Defendant Cooper's Motion for Partial Summary Judgment & in Support of Plaintiffs' Motion for Partial Summary Judgment" (Docs. 268-272). CMT moved to strike those initial Affidavits. (Doc. 280). Thereafter, Plaintiffs submitted Amended Affidavits in filings titled "Amended Affidavits

Regarding Plaintiffs' Motion for Partial Summary Judgment" (Docs. 303-304 and 307-308). CMT also moved to strike the Amended Affidavits (Doc. 312) and the other Defendants joined in that motion. (Doc. 315).

a. The initial Affidavits submitted by Plaintiffs do not establish legal standing by competent evidence.

First, the initial Affidavits that were submitted (Docs. 268-272) contain only ultimate conclusions of fact, which are insufficient to defeat summary judgment. In their initial Affidavits, Plaintiffs merely restate the allegations of their Complaint that they are "aggrieved persons" because they own or rent property within the City of Mobile limits and that approval of CMT's permit "would, or could, have an adverse effect on the use, enjoyment and value" of their property. This conclusory recitation of Alabama's aggrieved party requirement cannot defeat summary judgment. *SeeMcGee v. McGee*, 91 So. 3d 659, 669 (Ala. 2012). *See also Reid v. Jefferson Cty.*, 672 So. 2d 1285, 1290 (Ala. 1995) ("Although Reid stated in his affidavit that the pedestrian bridge hampers ingress to and egress from his property, those statements are conclusory. Thus, those statements do not constitute substantial evidence and, therefore, do not warrant submitting Reid's claim to the jury."); Ala. R. Civ. P. 56(e) (affidavits opposing motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial") (emphasis added).

Plaintiffs' initial Affidavits do not establish "that the decision [to approve CMT's application] will have a singular impact upon some legally protectable interest." *SeeBrown*, 203 So. 3d at 1219. As CMT has pointed out, general harm to the residents of the City is not the type of "singular impact" required for standing. Simply owning or renting property somewhere within the approximately 157 square miles of the City of Mobile is insufficient. This is particularly true given that CMT's facility is located across the Mobile River from any commercial and residential zones. There is nothing in Plaintiffs' initial Affidavits to establish any injury whatsoever, much less injuries that "affect the plaintiff in a personal and individual way." *SeeTown of Cedar Bluff*, 904 So. 2d at 1257, n.3, 1260-61 (Ala. 2004). Accordingly, Defendant CMT's Objection and Motion to Strike Plaintiffs' Evidentiary Submission (Doc. 280) is hereby GRANTED and Plaintiffs' conclusory initial Affidavits (Docs. 268-272) are STRICKEN from the record.

b. Plaintiffs' Amended Affidavits likewise do not provide competent evidence to establish standing.

Perhaps recognizing that their initial Affidavits were insufficient, Plaintiffs thereafter submitted Amended Affidavits in filings entitled "Plaintiffs' Amended Affidavits Regarding Plaintiffs' Motion for

Partial Summary Judgment." (*See* Docs. 303-304 and 307-308). Defendants also objected to and moved to strike the Amended Affidavits submitted therewith. (Docs. 312 and 315). Plaintiffs' amended evidentiary submission contains Amended Affidavits of Plaintiffs[3] Sarah Bohnenstiehl ("Bohnenstiehl"), Suzanne Schwartz ("Schwartz"), and Herb Wagner ("Wagner"), in which they attempt to establish their aggrieved party status and standing in this case. The Court finds that the Amended Affidavits are due to be stricken because they are improperly based on speculation, contain improper reference to hearsay, contain improper opinions that lack the appropriate expert foundation, and contain improper conclusory statements as to the ultimate issue.

The affidavits of Bohnenstiel and Schwartz indicate that they are "familiar with the news coverage of coal dust in our community and confirmation by scientific analysis that the black or dark residue which accumulates on many houses in the downtown area has been determined to contain coal dust." They further indicate that "coal dust is a hazard to humans" and speculate that it is "likely" that their health has been affected – without any explanation of *how* their health has allegedly been affected. They also claim that they have "dark residue" on their homes and Bohnenstiel even claims – without any citation or support whatsoever – that the residue on her property has been "scientifically confirmed to contain coal dust." Wagner's affidavit likewise broadly discusses "scientific" studies on coal and also claims that his health was "likely" affected by alleged coal dust from CMT's facility.

First, these statements lack foundation and are improperly based on hearsay and are due to be excluded under Ala. R. Evid. 802. Indeed, the statements are expressly premised in part on what Plaintiffs have heard through "news coverage of coal dust in our community." Plaintiffs further vaguely reference "scientific" studies or evidence (which constitute hearsay as well) without any explanation of the studies that are being referred to in the affidavits, much less how those "studies" apply to the CMT facility at issue in this case. Plaintiffs also broadly state that "coal dust is a hazard to humans" and that it is "likely" that the alleged coal dust has harmed them. These are opinions that would require an expert foundation and are being improperly asserted by these Plaintiffs who lack the qualifications to testify on these topics. Ala. R. Evid. 702 provides as follows with regard to scientific or technical testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, **a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise**.

(emphasis added). Each of the Plaintiffs seek to introduce evidence that they facially refer to as "scientific" in nature. However, none of the Plaintiffs represent that they are "qualified as an expert" on these issues. Indeed, Plaintiffs' counsel conceded at the hearing that Plaintiffs had not provided any

expert affidavits on these issues. Moreover, there is no competent evidence whatsoever in the record that the alleged "dark residue" that Plaintiffs allege they have noticed on their property is even coal dust – much less that the substance came from CMT's facility.

Similarly, Plaintiffs are not qualified to testify as to medical causation for the vague, speculative, and subjective "health" problems that they say are "likely" to have suffered in their affidavits. *See, e.g., Flowers Hosp., Inc. v. Arnold*, 638 So. 2d 851, 852 (Ala. 1994)(noting that "where the injury is purely subjective, expert evidence must be introduced.").Nor can Plaintiffs attempt to relay something that a physician may have told them about their alleged health, as it is well established in Alabama that testimony by a witness in Court as to statements made out of Court by a physician is inadmissible as hearsay. *See Central of Georgia Railway Co. v. Reeves*, 257 So.2d 839, 840 (Ala. 1972); C. Gamble, *McElroy's Alabama Evidence*, § 110.01(4) (5th ed. 1996) ("While a patient's statements to the physician-witness are admissible, when offered as a basis in part of the physician's opinion, a statement of a physician to the patient during the course of examination and treatments is not admissible for the purpose of proving the truth of the matter asserted because, as thus offered, it would constitute hearsay.").

In sum, the above-referenced statements and information contained in Plaintiffs' Amended Affidavits are all due to be stricken as improperly containing speculation and hearsay, and as lacking an appropriate expert foundation. Without the benefit of those improper speculative and unfounded statements, Plaintiffs have not established legal standing in this case. In the end, Plaintiffs have again only alleged conclusions on the ultimate issue that lack any proper foundation and certainly have not established "that the decision [to approve CMT's application] will have a singular impact upon some legally protectable interest" as required to demonstrate their legal standing. *Brown*, 203 So. 3d at 1219.

For the foregoing reasons, Defendant CMT's Objection and Motion to Strike Amended Affidavits (Doc. 312) and the City's and Planning Commission's Joinder therein (Doc. 315) are hereby GRANTED. Plaintiffs' Amended Affidavits (Docs. 303-304 & 307-308) are hereby STRICKEN from the record and are otherwise insufficient to create a genuine issue of material fact with regard to legal standing.[4]

Moreover, because Plaintiffs have failed to establish legal standing by competent evidence, Defendants' Motions for Summary Judgment (Docs. 252 and 263) are hereby GRANTED and Plaintiffs' Motion for Partial Summary Judgment (Doc. 232) is hereby DENIED. Further, as conceded

by Plaintiffs' counsel at the hearing, Plaintiffs' lack of standing is fatal to all claims asserted by Plaintiffs.

B. Defendants are entitled to summary judgment on subparts "a" and "d" of Plaintiffs' request for relief for the separate and independent reasons that planning approval is not a legislative function and the City Council ultimately made the final decision.

In subparts "a" and "d" of their claim for relief, Plaintiffs seek a declaration that:

> a. Mobile Municipal Code Section 64-12 is invalid as an illegal delegation of legislative authority;
>
> [and]
>
> d. CMT is operating its coal handling facility illegally.

(Doc. 66, ¶ 33). For the additional reasons set forth below (and independent of Plaintiffs' lack of standing), Defendants are entitled to summary judgment on both of these claims.

1. Planning approval is an administrative function, not a legislative function.

At the hearing on these matters, Plaintiffs' counsel appeared to abandon the theory that planning approval is a legislative function. Nonetheless, the Court will address the argument for the sake of completeness. The Alabama Supreme Court has differentiated between administrative and legislative authority. The power to create or change the law is legislative. The power to decide whether the facts meet the standards imposed by the law is administrative. *See Ex parte Baldwin County Planning & Zoning Comm'n*, 68 So. 3d 133 (Ala. 2010) (finding ordinance as not an unconstitutional delegation of legislative authority where it gave discretion to a planning commission to approve or disapprove applications to develop flood prone lands as it deemed appropriate).

CMT was granted planning approval pursuant to Mobile City Code §§ 64-12 and 64-8(C)(2)(c).[5] The City's Chart of Permitted Uses is contained in § 64-12. It provides that "coal mining" is permitted in the I-2 Heavy Industry district in which CMT operates its facility, so long as the Planning Commission finds the operations appropriate with regard to the enumerated factors:

> **Sec. 64-12. - Chart of permitted uses.**
>
> *1. Permitted uses.* The uses permitted in each of the zoning districts described in this section are defined as follows:
>
> ***
>
> b. *Uses requiring planning approval.* Uses in the chart identified by "P" in any column are permitted in that particular district upon approval of their location and site plan by the planning commission as being appropriate with regard to transportation and access, water supply, waste disposal, fire and police protection, and other public facilities; as not causing undue traffic congestion or creating a traffic hazard; and as being in harmony with the orderly and appropriate development of the district in which the use is located. Such uses are also

subject to any conditions and limitations specified in the "Uses and Conditions" column or elsewhere in this section, or imposed by the planning commission. See section 64-8 for application information.

Chart of Permitted Uses															
	Types of Districts														
Uses and Conditions	R-A	R-1	R-2	R-3	R-B	T-B	H-B	B-1	B-2	LB-2	B-3	B-4	B-5	I-1	I-2
***															
Coal mining:	—	—	—	—	—	—	—	—	—	—	—	—	—	—	P

Mobile City Code § 64-12(1)(b) & Chart of Permitted Uses (underlining added).

Section 64-12(1)(b) refers anyone seeking planning approval to § 64-8, which delegates to the Planning Commission the administrative duty to decide planning approval applications:

§ 64-8. Administration and enforcement.

C. Mobile city planning commission.

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2. *Administration.* In carrying out its administrative duties the planning commission shall:

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c. *Applications for planning approval.* The planning commission shall receive all applications for planning approval where such approval is required for a permitted use. Within twenty (20) days after the receipt of such application by the planning commission, the zoning administrator shall refer the application, together with his report and recommendation, to the planning commission for its consideration and action. At its next regular meeting, but in any event within forty-five (45) days of the filing of an application for planning approval with the planning commission, the planning commission shall consider such application and approve or disapprove the application; approval may establish conditions and limitations with respect to the site plan. The application, together with the planning commission's approval or disapproval, shall be filed in the office of the planning commission, and the zoning administrator shall notify the applicant of the action of the planning commission on the application. Should any person be aggrieved by the decision of the planning commission on the application for planning approval, such person may appeal such decision by filing written notice of appeal with the planning commission within fifteen (15) days from the date of such decision, and the planning

> commission shall, within fifteen (15) days after the filing of such notice of appeal, send a transcript of the application and the applicable minutes and record of the action taken by the planning commission to the city council of the City of Mobile, who shall, within fifteen (15) days after receipt of such transcript by the city clerk, hold a hearing on said appeal.

Mobile City Code § 64-8(C)(2)(c) (underlining added).

The planning approval process required the Planning Commission not to create or change the zoning law, but to apply the standards in § 64-12 as written. Therefore, the decision to approve CMT's application was an administrative decision. *SeeBaldwin County Planning & Zoning Comm'n*, 68 So. 3d at 144.

This planning approval permitting is a type of conditional use permitting, which is used by cities throughout the United States under different monikers, such as "special exceptions" and "conditional uses." Delegating conditional use permitting decisions to administrative bodies, like the Planning Commission, is neither unconstitutional nor uncommon. Alabama courts have found that conditional use permitting is the usual practice in setting use restrictions in industrially zoned areas like the I-2 district where CMT's facility is located. *SeeEx parteOrange Beach Bd. of Adjustment*, 833 So. 2d 51, 54 (Ala. 2001) (finding ordinance was not an unlawful delegation of authority where it required a city inspector to enforce a billboard law that prohibited structurally unsound and dilapidated signs). The Alabama Supreme Court has, more than once, recognized that some zoning matters, like in the instance of industrial use zones, require the local legislative body to give discretion to municipal officials where the proposed land use does not readily fit within any land use designation by right. *See Baldwin Co. Planning & Zoning Comm'n*, 68 So. 3d at 138-39, 144. *See alsoWashington Park Neighborhood Ass'n v. Bd. of Adjustment of the City of Montgomery*, 24 So. 3d 443, 446 (Ala. Civ. App. 2009) ("The special [use] process is designed to deal with uses that by their nature are difficult to fit within any zone where they can operate by right.").

The Alabama Supreme Court's discussion of special exceptions, which are another species of conditional use permits, confirms that planning approval is administrative in nature:

> [A] special exception denotes a species of administrative permission which allows a property owner to use his property in a manner which the regulations expressly permit under conditions specified in the zoning regulations themselves. Thus, a special exception is not truly an exception to the zoning regulations at all. In other words, a special exception, though it is not a regular permitted use, is a use that is expressly listed in and permitted by a set of zoning regulations, provided that it is specially approved in accordance with the procedures, and

> subject to the conditions, set forth in those regulations; whereas a variance is a use that is not listed in the zoning regulations, but is a relaxation of, or, literally, a "variance" from, the uses otherwise permitted by the zoning regulations.

Shades Mountain Plaza, LLC v. Hoover, 886 So. 2d 829, 835-36 (Ala. Civ. App. 2003), *rehearing denied* (Ala. Civ. App. 2003), *certiorari denied* (Ala. 2004) (internal quotation marks and citations omitted; underlining added). *See alsoEx parte Fairhope*, 567 So. 2d 1353, 1355 (Ala. 1990) ("A special exception is a conditionally permitted use, that is, it is an enumerated use specified in the zoning ordinances that requires the approval of an administrative board or agency.") (underlining added).

The zoning ordinance itself expressly states that planning approval is one of the Planning Commission's "administrative duties." Mobile City Code § 64-8(C)(2)(c) ("*Administration.* In carrying out is administrative duties the planning commission shall: . . . c. *Applications for planning approval*. …"). The ordinances governing amendments and rezoning, on the other hand, properly define amendments and rezoning decisions as "legislative dispositions" that must be made by the City Council. *See* Mobile City Code § 64-9.

Because planning approval decisions are administrative actions, the Planning Commission can make those decisions as authorized by ordinance. The Alabama Supreme Court has expressly held:

> It is no forbidden delegation of power for the ordinance to authorize the appointment of some official or the selection of some instrumentality for the purpose of ascertaining facts to which the legislation is directed and to put into effect the prohibitive features of such ascertained facts.

Walls v. City of Guntersville, 45 So. 2d 468, 471 (Ala. 1950) (holding ordinance was not an illegal delegation of authority where it required a building inspector to enforce an ordinance that prohibited land uses that were offensive due to noise, fumes, or other objectionable features). *See alsoMcClendon v. Shelby Co.*, 484 So. 2d 459, 464 (Ala. Civ. App. 1985), *cert. denied* (Ala. 1986) (powers granted to planning commission to handle special exceptions and variances "have long been recognized as validly delegable"). Therefore, it is no surprise that the Alabama Court of Civil Appeals has, in the past, upheld planning commissions' decisions on conditional use applications. *Shades Mountain*, 886 So. 2d at 836-37 (rejecting landowners' argument that planning commission's denial of conditional use application was void as unlawful delegation of authority).[6] *See also Ex parte Norwood*, 615 So. 2d 1210, 1212 (Ala. Civ. App. 1992) (enforcing local ordinance permitting planning commission to approve or disapprove a special use permit).

Simply stated, the delegation to the Planning Commission to decide planning approval

applications is valid and constitutional as a matter of law.

2. The applicable ordinance, § 64-8(C)(2)(c), is not a revised version of a rezoning ordinance.

Plaintiffs argue in their filings that § 64-8(C)(2)(c) replaced the zoning amendment ordinance upheld in the *Karagan* opinion and now improperly grants legislative authority to the Planning Commission. However, as correctly pointed out by Defendants, the zoning ordinance at issue in *Karagon* still exists, and it is not the currently discussed § 64-8(C)(2)(c). The ordinances at issue in *Karagon* are §§ 64-9(B)(5) & (6), which govern "amendments" to the zoning ordinances and properly reserve rezoning decisions for the City Council. *Karagon*, 476 So. 2d 60, 62 (Ala. 1985) (discussing sections "IX-B-5" and "IX-B-6" of the zoning ordinances). Section 64-8(C)(2)(c) is in an entirely separate section of Chapter 64 and does not address amendments.

§ 64-8(C)(2)(c)

C. *Mobile city planning commission.*

1. *Establishment.* Except where this chapter shall be administered by the department, as provided in section 64-8.B, this chapter shall be administered by the Mobile city planning commission, hereinafter called the planning commission; there is hereby vested in the planning commission the duties of administering this chapter and the power necessary for such administration. The zoning administrator of the City of Mobile shall be the officer in charge of the division of the planning commission concerned with the administration of this chapter.

2. *Administration.* In carrying out its administrative duties the planning commission shall:

***

c. *Applications for planning approval.* The planning commission shall receive all applications for planning approval where such approval is required for a permitted use. Within twenty (20) days after the receipt of such application by the planning commission, the zoning administrator shall refer the application, together with his report and recommendation, to the planning commission for its consideration and action. At its next regular meeting, but in any event within forty-five (45) days of the filing of an application for planning approval with the planning commission, the planning commission shall consider such application and approve or disapprove the application; approval may establish conditions and limitations with respect to the site plan. The application, together with the planning commission's approval or disapproval, shall be filed in the office of the planning commission, and the zoning administrator shall notify the applicant of the action of the planning commission on the application. Should any person be aggrieved by the decision of the planning commission on the application for planning approval, such person may appeal such decision by filing written notice of appeal with the planning commission within fifteen (15) days from the date of such decision, and the planning commission shall, within fifteen (15)

§ 64-9(B)(5) & (6)

B. *Amendment procedure.*

***

5. *Public hearing.* The planning commission shall hold a public hearing on every proposed amendment whether of the text of this chapter or the zoning map.
Following the public hearing, the planning commission shall prepare a record of its proceedings in each case. The record of the proceedings shall be filed in the office of the planning commission and shall be a public record; a certified copy of the record, together with the planning commission's recommendation and the grounds therefor, shall be transmitted to the city council for further action.

6. *Legislative disposition.* The city council shall examine all such applications and reports submitted to it and shall take such further action as it deems necessary and desirable.
The city council in its discretion may determine whether to hold a public hearing on the application, and if the city council determines not to hold a public hearing or takes no action within thirty (30) days after the application and report are received by the city clerk from the planning commission the application shall be deemed denied. If the city council determines to hold a public hearing on the application, the city clerk shall

days after the filing of such notice of appeal, send a transcript of the application and the applicable minutes and record of the action taken by the planning commission to the city council of the City of Mobile, who shall, within fifteen (15) days after receipt of such transcript by the city clerk, hold a hearing on said appeal.

notify the applicant of the time and place and shall give public notice thereof as required by law. No amendment, whether amending the text of the chapter or the zoning map, shall be enacted unless such public hearing has been held.

Based on the above, Plaintiffs' arguments regarding *Karagon* are inapposite.

3. The City Council, not the Planning Commission, made the final, appealable decision.

Regardless, the City Council, not the Planning Commission, made the final, appealable decision to approve CMT's application. Therefore, the ordinance was not unconstitutional as applied in any event. *See Baldwin Co. Planning & Zoning Comm'n*, 68 So. 3d at 139 (an ordinance cannot be struck down as unconstitutional as an unlawful delegation of legislative authority unless it was unconstitutional as applied). Plaintiffs appealed the Planning Commission's decision to the City Council, and the City Council made the final decision to approve the application. The City Council held its own public hearing with notice, heard from both proponents and opponents to the application, discussed the merits of the application, and denied the appeal. Therefore, the decision before this Court on appeal (the only one final and appealable) is the City Council's decision.[7]

Plaintiffs have not alleged that the City Council lacked lawful authority to make the decision. The City Council is the legislative body of the City, and it has authority to create, amend, and apply the zoning ordinances. Moreover, Plaintiffs do not claim that the outcome would have been different had the Planning Commission acted only in an advisory capacity, and there is no causal relationship between the Planning Commission's approval and any alleged injury.

4. Plaintiffs' argument that CMT was engaged in "stevedoring" of coal does not provide any basis for the relief sought by Plaintiffs.

In "Plaintiffs' Response to Defendants' Cross-Motion for Partial Summary Judgment" (Doc. 274), Plaintiffs pivoted from their original arguments and argued – for the first time – that the Planning Commission's approval of CMT's application was improper because "Cooper is engaged in ***stevedoring*** activity at the site in question, not coal ***mining***." (Doc. 274, p. 2)(emphasis added). Plaintiffs argue that "[b]y authorizing 'coal stevedoring' activity pursuant to a zoning regulation that allows 'coal mining' activity the Planning Commission engaged in an unconstitutional, *sub silentio*, amendment of the zoning ordinance." (Doc. 274, p. 2). Plaintiffs also attempted to advance this

argument at the hearing on these motions.

The problem with Plaintiffs' new argument is that the Chart of Permitted Uses provides that "**marine cargo handling; stevedoring**" is an expressly included land use that is **permitted as of right** in the I-2 Heavy Industry district where CMT's facility is located, and it lists no exclusions for coal or any other material. *See* Mobile City Code § 64-12 (Chart of Permitted Uses). In other words, CMT can conduct stevedoring operations as a matter of right, without any required Planning Commission approval.[8] Thus, Plaintiffs' argument that the Planning Commission improperly approved some unconstitutional *de facto* amendment to the zoning ordinance to create a "coal stevedoring" land use category is simply incorrect. Since CMT's land use for stevedoring is expressly permitted as of right – without exception or exclusion – CMT's "stevedoring" of coal cannot provide a basis, in any event, for the relief sought by Plaintiffs.

For all of these additional reasons, Defendants are entitled to summary judgment on Plaintiffs' claims for relief under subparts "a" and "d."

III. CONCLUSION

Based upon the foregoing, the Court GRANTS summary judgment in favor of Defendants on all claims asserted by Plaintiffs. The Court further finds that there is no just reason for delay, and this Order is hereby deemed a FINAL ORDER, with costs taxed as paid.

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CIRCUIT COURT JUDGE BEN BROOKS

[1] It appears that Doc. 66 was later refiled as Doc. 185.

[2] Plaintiffs submitted Amended Affidavits indicating they live in the vicinity of 2-4 miles from CMT's facility. (Docs. 303-304, 307-308, and 322-323). The Amended Affidavits also attempted to establish additional information supporting Plaintiffs' legal standing, but as discussed more fully *infra*, that additional information is due to be stricken. Accordingly, the Court does not include that additional information in its Findings of Fact.

[3]Plaintiff Carol Adams-Davis ("Adams-Davis") did not submit any Amended Affidavit in advance of the summary judgment hearing, but submitted a tardy Amended Affidavit on July 17, 2018. (*See* Docs. 322 & 323). Defendants moved to strike this affidavit as well. (*See* Docs. 328-331). The Court finds that this tardy affidavit is due to be stricken as untimely under Ala. R. Civ. P. 56(c)(2), but also finds that the tardy

affidavit is not materially different in substance than the previous Amended Affidavits of Plaintiffs Bohnenstiehl, Schwartz, and Wagner, and is insufficient to create a material issue of fact for the same reasons as the other Amended Affidavits.

[4]At most, the Amended Affidavits simply establish that some Plaintiffs live in the vicinity of 2-4 miles from CMT's facility. However, Plaintiffs have still failed to present competent evidence that the facility has caused them any distinct and palpable injury that has affected them in a particularized way. *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253 (Ala. 2004).

[5]Although Plaintiffs ask the Court in portions of their filings to declare unconstitutional subsection *(B)(2)(c)*, it is subsection *(C)(2)(c)* that governs the Planning Commission's administrative duties, including the duty to decide planning approval applications. Subsection (B)(2)(c) sets out the Department of Urban Development's administrative duties and role in transmitting planning approval applications to the Planning Commission. In any event, both subsections are contained in § 64-8, and neither governs amendments to the zoning ordinance or rezoning. Therefore, while this Order refers to subsection (C)(2)(c), the grounds for the Court's rulings apply equally to (B)(2)(c).

[6]Although the ordinance in *Shades Mountain* provides that a conditional use application must be reviewed by the planning commission and approved by city council, the appeal dealt with a final decision made solely by the planning commission. The ordinance in issue only required the city council to hear an application if the planning commission first gave it a favorable recommendation. *See* Hoover Municipal Code Art. III § 2.30(D). Because the planning commission denied the application on first review, it was never heard by the city council. *Id*. at 831.

[7]Plaintiffs have relied on inapplicable rezoning cases when making their claim that planning approval is an illegal delegation of legislative authority. Those cases state that a planning commission "cannot pass finally on an application to rezone." *See, e.g., City of Mobile v.Karagan*, 476 So. 2d 60, 62-63 (Ala. 1985). While this clearly is not a rezoning case, it is also clear that the City Council, not the Planning Commission, "passed finally" on CMT's application.

[8]Moreover, even if a requested use is not specifically listed on the Chart of Permitted Uses, the determination of the appropriate category can be "based upon the similarity in nature and character to one or more uses that are listed in the chart." *See* Mobile City Code § 64-12(3).

DONE this[To be filled by the Judge].

/s/[To be filled by the Judge]

CIRCUIT JUDGE