

Rel: October 21, 2022

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

1210072

Dennis E. Barnes, Chris Chandler, and Jan B. Chandler

v.

Town Council of Perdido Beach

**Appeal from Baldwin Circuit Court
(CV-17-900963)**

MENDHEIM, Justice.

Dennis E. Barnes, Chris Chandler, and Jan B. Chandler appeal from a judgment entered by the Baldwin Circuit Court after a bench trial

in favor of, among others, the Town Council of Perdido Beach ("the Town Council").¹ The Chandlers and Barnes had sought an injunction to

¹The style of the case listed on the circuit court's initial judgment in this case, which was entered October 18, 2021, listed individual defendants Henry Paul Burkhardt, Judy L. Deel, and Berry Froling, followed by an "et al.," and the judgment itself referred to only the Town Council as a defendant. The notice of appeal filed on November 1, 2021, failed to list any individual defendants. The record indicates that, on April 22, 2019, several individuals filed in the circuit court a motion to intervene as necessary parties on the basis that they own real property in the same area where the Chandlers and Barnes own real property, which property ownership, the Chandlers and Barnes alleged, gave them a right to challenge the public boat-launch project at issue in this case, but the individuals who sought to intervene favored the project. Those individuals are: Henry Paul Burkhardt, Larry Lane Chapman, Oliver Guilford, Beverly Guilford, Judy L. Deel, Carol J. Tindal, Berry A. Froling, Carol D. Froling, Thomas L. Bloxham, Ruth Bloxham, as trustee under the Bloxham Living Trust, Dixie Del Aguila, Gerald Dasch, and Shirley Dasch. On May 1, 2019, the circuit court granted the individuals' motion to intervene and aligned them as defendants. Accordingly, on February 8, 2022, the Chandlers and Barnes filed with this Court a "Motion to Correct Style of the Case and Amend Notice of Appeal," in which they sought to add omitted individual defendants to the style of the case and to the notice of appeal. After receiving that motion, this Court's clerk's office entered an order on March 10, 2022, remanding the case to the circuit court for clarification concerning whether its judgment addressed claims involving the individual defendants in addition to the claims against the Town Council. On March 16, 2022, the circuit court entered a new "Final Order and Judgment" in which it stated:

"This Court's Order and Judgment of October 18, 2021, was intended to dispose of all claims as to all parties. To the extent any claims remain that are not otherwise adjudicated by this Court's Order and Judgment of October 18, 2021, including without limitation those against Defendants Henry

prevent the Town Council from constructing a public boat launch and pier at the end of State Street on the western shore of Soldier's Creek.

We affirm the judgment of the circuit court.

I. Facts

The Town of Perdido Beach ("Perdido Beach") is located in Baldwin County and is surrounded on three sides by bodies of water. The west side of Perdido Beach is flanked by Palmetto Creek and the east side is flanked by Soldier's Creek, both of which flow into Perdido Bay, which borders Perdido Beach to the south. Perdido Beach was incorporated in 2009, and it is governed by a town council and a mayor. The current mayor of Perdido Beach is Susan Kaye Hamilton, who was first elected to the position in 2016 and was reelected in 2020. Although Perdido Beach is a fairly new incorporated entity, people have lived in the area

Paul Burkhardt, Larry Lane Chapman, Oliver Guilford, Beverly Guilford, Judy L. Deel, Carol J. Tindal, Berry A. Froling, Carol D. Froling, Thomas L. Bloxham, Ruth Bloxham, Trustee under the Bloxham Living Trust, Dixie Del Aguila, Gerald Dasch, and Shirley Dasch, the same are hereby denied, based on the same finding of fact and conclusions of law set forth in the Order and Judgment of October 18, 2021."

The case was then returned to this Court. On May 27, 2022, the clerk's office denied the Chandlers and Barnes's motion to correct the style of the case and their notice of appeal.

for much longer. Hamilton, for example, testified that she has lived there since 1979. A 1948 plat of the subdivision where the Town Council proposes to build the public boat launch and pier depicted State Street as well as the property lots south of State Street on the edge of Soldier's Creek that the Town Council proposes to designate as a public park adjacent to the boat launch and pier. A 1954 subdivision plat depicted property both north and south of State Street. In that subdivision plat, the property abutting Soldier's Creek to the north of State Street showed an area of 52 small lots and a beachfront area just to the north of State Street that is now known as the "Parkway Beach Area." Oliver Guilford, a member of the Town Council, testified by video deposition that he owns 4 of those 52 lots and that the lot owners have common ownership of the Parkway Beach Area. The Parkway Beach Area provides private beach access, a private boat launch, and a small pier to the owners of the 52 lots. The Chandlers own 1 of the 52 Parkway Beach Area lots, a lot that fronts the north side of State Street. The Chandlers' residence is on Tuscaloosa Avenue on a lot that is north of State Street.² Barnes owns a residential lot on the shore of Soldier's Creek that is south of the property

²Tuscaloosa Avenue intersects State Street.

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adjacent to State Street that the Town Council proposes to designate as a public park.

Guilford testified that the Town Council originally began discussing the idea of a public park and public boat launch in 2011. Also in 2011, Perdido Beach acquired a \$675,750 grant from a fund created as a result of the 2010 BP Deepwater Horizon oil spill. In late 2011, Perdido Beach received approval from the Alabama Emergency Management Agency to reallocate that grant money for a "Palmetto/Soldier Creek Boat Launch Facility to mitigate the environmental and economic impacts and loss of human use as a result of the Deepwater Horizon Incident." In 2013, the Town Council adopted the "Town of Perdido Beach Master Plan 2030," which offered guidelines for the growth of Perdido Beach. That document specifically recommended that Perdido Beach "[e]nsure that various types of recreational opportunities are available to residents of Perdido Beach by providing adequate parks and facilities, such as a canoe/kayak launch"; "[s]eek funding from Coastal Management Grants to construct small scale boat launches"; and "[e]nsure that public water access is available for the entire community." Vince Lucido, the civil engineer and land surveyor who designed the boat-launch, pier, and public-park

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project ("the boat-launch project") for Perdido Beach, testified that Perdido Beach first began looking for potential locations for the project in 2015. On January 19, 2017, the Town Council passed a resolution authorizing Mayor Hamilton to purchase 4 contiguous lots of real property ("the subject property"), totaling 2.8 acres and situated on the western shore of Soldier's Creek adjacent to the southern side of State Street, "for construction of a community pier and boat launch." Perdido Beach purchased the subject property with the aforementioned grant money for a total purchase price of \$550,000.

Rezoning of the subject property occurred through the Town Council's approval of multiple amendments to the Perdido Beach Land Use and Zoning Ordinance ("the zoning ordinance"). When purchased, the subject property was zoned "R-1, Single Family Residential." That designation allows for "medium density residential development consisting of single family dwellings on medium lots and is limited to one dwelling per lot." On August 17, 2017, the Town Council approved a resolution that changed the zoning of the subject property from R-1 to "OR, Outdoor Recreation District," so that it could be used as a public park. However, the zoning ordinance mandated that OR districts must

have a "minimum lot area" of three acres and that a park, public pier, or public boat launch were "conditional use[s]" that had to be approved by the Perdido Beach Planning Commission. On March 15, 2018, the Town Council voted to approve changes to the zoning ordinance that would allow the minimum lot size for OR districts to be one acre instead of three acres and to change the designation for using an OR district for a public park, a public pier, or a public boat launch from "conditional uses" to "permitted uses," meaning that such uses would not need approval from the Perdido Beach Planning Commission.³ Those approved amendments to the zoning ordinance applied to the entire town, not just to the subject property. On September 17, 2018, the Town Council approved another amendment to the zoning ordinance, rezoning the subject property from R-1 to OR "to allow for a public pier with parking and to provide access to a proposed public boat launch at the end of the State Street right of way."

³The Perdido Beach Planning Commission approved the initial change in the zoning of the subject property from R-1 to OR. However, the planning commission subsequently refused to recommend approval of the changes to the zoning ordinance that would allow lots in an OR district to be a minimum of one acre and for public parks, public piers, and public boat launches to be "permitted uses" in an OR district.

On August 18, 2017, the Chandlers and Barnes commenced their action against the Town Council, seeking an injunction to prevent the plan to build a public boat launch and pier at the end of State Street and to establish a public park on the subject property. Among other things, the Chandlers and Barnes contended that the Town Council's rezoning of the subject property was "arbitrary and capricious," that the construction of the public boat launch would violate State Street's dedicated public purpose, and that the boat launch and pier would violate the 30-foot wetland-setback requirement in the zoning ordinance.

On September 15, 2017, the Town Council removed the action to the United States District Court for the Southern District of Alabama. On October 2, 2017, the case was remanded to the circuit court after the Chandlers and Barnes voluntarily dismissed their asserted federal claims. The Chandlers and Barnes subsequently filed several amended complaints to add claims challenging the Town Council's amendments to the zoning ordinance related to the boat-launch project.

On March 22, 2019, the Town Council filed a summary-judgment motion. The circuit court denied that motion on May 1, 2019. On May 20, 2020, the Town Council filed a renewed summary-judgment motion. On

July 2, 2020, the Chandlers and Barnes filed their own summary-judgment motion, which also served as opposition to the Town Council's renewed summary-judgment motion.

In their summary-judgment motions, the parties parried about the zoning ordinance's wetland-setback requirement, which is found in the following provision of the zoning ordinance:

"10.1.4 Permit requirements. A U.S. Army Corps of Engineers wetlands jurisdictional determination is required if the proposed planned development contains wetlands or if the Zoning Administrator or his/her designee determines potential wetlands from the Generalized Wetland Map as defined herein, through a site visit by staff or their assigns. The setback for development from a wetland must be a minimum of thirty (30) feet."

In its summary-judgment motion, the Town Council asserted that it was "immune" from the foregoing provision of the zoning ordinance because, it said, constructing the boat-launch project was a governmental function. In contrast, the Chandlers and Barnes contended that the boat-launch project was a proprietary function and that, therefore, the Town Council was not immune from the wetland-setback requirement of the zoning ordinance. Due to the Town Council's assertion of an immunity defense concerning the applicability of the zoning ordinance, the Chandlers and Barnes, on September 24, 2020, filed another amended

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complaint, adding a count alleging that, even if the Town Council was immune from § 10.1.4 of the zoning ordinance, the boat-launch project would still violate § 12.3 of Perdido Beach's Subdivision Regulations ("the subdivision regulations"), which provided in part that "[t]he building setback line from wetlands shall be a minimum of 30 feet."

On July 27, 2020, the circuit court denied the summary-judgment motions of the opposing parties in separate orders. The case ultimately proceeded to a bench trial held in August 2021 before Baldwin Circuit Judge Jody W. Bishop. The circuit court heard testimony from multiple witnesses, and the parties submitted numerous exhibits concerning the boat-launch project.

Witnesses from both sides testified that for many years State Street has been consistently used for public purposes, including for access to Soldier's Creek to swim, to fish, to launch small boats, and to hold church baptisms. The circuit court heard testimony indicating that, despite the consistent public use of State Street, from the time the idea was first discussed in 2011 to the time of trial, the boat-launch project had been a contested issue in Perdido Beach. Guilford testified that it had been a "controversial project" but that successive city councils had been elected

that supported the project. Mayor Hamilton testified that the boat-launch project was "pretty hotly debated in the community" but that she had been reelected as mayor in 2020 while being on record as a strong supporter of the project. Numerous residents submitted written responses supporting or opposing the boat-launch project when zoning changes related to it were first proposed.

Mayor Hamilton testified that the zoning ordinance, which was initially adopted by the Town Council in 2011, was based on Baldwin County's zoning ordinance, and that it was always known that amendments would need to be made to fit Perdido Beach's needs. She further stated that the amendment altering the minimum lot size in an OR district from three acres to one acre was made "to encourage smaller park areas," not just to enable the building of this particular boat-launch project.

Lucido testified about his design for the boat-launch project. Lucido testified that permits from both the Army Corps of Engineers and the Alabama Department of Conservation and Natural Resources ("the ADCNR") had to be applied for to proceed with the boat-launch project and that the required permits had been obtained from those entities.

Lucido explained that the ADCNR requires "a ten-foot setback from the riparian lines within a water body for any type of construction, piers, boat houses, and that type of thing" and that the planned boat launch conformed to that requirement. Specifically, Lucido testified that the boat launch, as designed, would not encroach upon the centerline of State Street because he had taken "a thread of the channel, that's the main center portion of the channel -- in this case it would be Soldier's Creek -- and extended a perpendicular line to the property corner from that thread." Lucido also testified that the Army Corps of Engineers permit required certain steps to be taken with respect to wetlands, such as "to avoid a fill permit we have to elevate the structure above the wetlands ... five feet above the water line, the mean high water line, and certain spacing between the deck boards to allow sunlight to penetrate." But Lucido admitted that the boat launch and pier would be constructed "within the wetlands" or probably within "[a] foot or less" of the wetlands. Lucido testified that, under his design, the park next to the boat launch includes six boat-ramp parking spaces but that the park area has the capacity to add "about twenty more" spaces if the need arose. He also stated that, because of the way the parking spaces were designed, State

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Street would become a one-way street for boat traffic. Lucido admitted that he did not review his project plan to ensure that it complied with the zoning ordinance because, he said, "considering that the Town was my client, if they had an issue with anything they can overrule whatever ordinance they may have. So I just assumed that they were okay with the design." Lucido also stated that he was instructed by Perdido Beach to design the boat ramp to be 10 feet wide because of "restrictions with the setback on the riparian lines and the wetlands."

Baldwin County Sheriff Huey "Hoss" Mack testified on behalf of the Chandlers and Barnes as an expert witness concerning law enforcement. Sheriff Mack began his testimony by explaining that Perdido Beach is one of two municipalities in Baldwin County that does not have its own police force. The other municipality, Magnolia Springs, pays the sheriff's office to have one full-time deputy sheriff on duty. Sheriff Mack testified that Perdido Beach has declined to contract for its own deputy sheriff, citing a lack of municipal funding. Nonetheless, the Baldwin County sheriff's office still provides law-enforcement services to Perdido Beach. Sheriff Mack testified that a new public boat launch was likely to increase the volume of call complaints his office would receive from Perdido Beach

because boat launches are heavily used in Baldwin County. He stated that the "typical complaint" his office receives with respect to boat launches concerns parking issues, particularly illegal parking in boat-launch areas. He testified that limiting the number of parking spaces and placing "No Parking" signs does not deter those parking problems at public boat launches. Other problems at boat launches, he says, include "breaking and entering of vehicles," "sporadic issues with narcotic activity," and "a lot of alcohol issues." Sheriff Mack testified that he expected those same problems to occur at the proposed boat launch at the end of State Street in Perdido Beach. He stated that he believed that the boat-launch project would be a "public safety hazard."

On cross-examination, Sheriff Mack admitted that some parking problems could be curtailed by municipal parking ordinances, which, although his office could not enforce them because they would not be state laws, Perdido Beach could enforce by other means. Indeed, Mayor Hamilton testified that the Town Council had enacted an ordinance in December 2019 to address parking issues in Perdido Beach that provides for fines and for towing of illegally parked vehicles. She further testified that, in August 2020, the Town Council enacted an ordinance that

specifically provided for parking restrictions on State Street in view of the potential increase in traffic the boat-launch project could create. Mayor Hamilton also testified that in 2017, 2018, and 2019 Perdido Beach had hired a private security guard "during the summer months on the weekends" to patrol water-access points, particularly the public boat launch located on Yupon Street.⁴ She stated that reports from the private security guard did not show problems with "overcrowding, with trash, with crime" at the Yupon Street boat launch. Mayor Hamilton also stated that recently Perdido Beach had hired resident and former police officer Tommy Resmondo to provide part-time security in Perdido Beach on a year-round basis.

Sergeant Joseph Kelly of the Marine Patrol Division of the Alabama Law Enforcement Agency ("ALEA") also testified on behalf of the Chandlers and Barnes as an expert in marine water safety.⁵ Sergeant Kelly testified that he is in charge of ALEA officers who patrol the Orange Beach and Perdido Pass marine areas. He stated that, in general, public

⁴The Yupon Street boat launch provides access to Palmetto Creek.

⁵Sergeant Kelly made it clear that he was not testifying on behalf of ALEA or stating an official position of the State with respect to the boat-launch project.

boat launches increase the volume of marine traffic and that a boat launch at the end of State Street would increase boat traffic on Soldier's Creek. Sergeant Kelly further stated that adding the public boat launch had the potential to create a safety hazard on Soldier's Creek because of the increased marine traffic.

The Chandlers and Barnes also offered video-deposition testimony from engineer Robert Kolar as an expert in transportation planning. Kolar testified that, from his perspective, the primary problems with the proposed boat launch were that the launch would be only 10 feet wide, even though the average boat trailer is 8.5 feet wide, and that there would be a 3-foot vertical dropoff from the launch to the water. Kolar stated that such measurements would make it difficult to maneuver a boat trailer to launch a boat and that "the consequences of leaving the boat launch [would be] severe." He added that, because the design situated the pier next to the boat launch, the difficulty in maneuvering would be increased because "drivers are generally not comfortable driving very close to an obstruction," and so, he opined, the pier was likely to cause drivers not to center their boat trailers on the launch. Kolar also testified that in his opinion State Street was not wide enough to handle

the traffic that the boat-launch project would produce. He stated that "an appropriate traffic infrastructure would be 12-foot lanes with maybe a two-foot shoulder" but that none of the roads leading to State Street, nor State Street itself, met those requirements. Specifically, Kolar testified that several of the streets were not wide enough to allow vehicles with boat trailers to proceed in opposite directions and pass each other without one vehicle "encroaching into the opposing lane or going off the edge of the pavement or both, and that's for straight-ahead traffic. That doesn't even consider the turning movement." With respect to State Street, Kolar testified that two vehicles cannot pass in opposite directions without "going off the improved area" of the road, and, he said, if that happens on a regular basis, it will "cause deterioration of the shoulder along State Street." Kolar further stated that most of the roads near the proposed boat launch did not allow for an adequate turning radius.

In response to Kolar's testimony, Mayor Hamilton testified that Perdido Beach has "approximately three hundred" boats and trailers and that the town had not experienced the types of traffic problems on its roads that Kolar described. Guilford also testified that he was not aware of any accidents, injuries, or property damage caused by anyone towing

boats on State Street, even though many boat trailers already pass that way either to access the private boat launch in the Parkway Beach Area or to launch a boat at the end of State Street without a launch. In fact, Chris Chandler testified that he uses State Street to access the private boat launch located in the Parkway Beach Area and has not experienced any traffic problems in doing so.

On October 18, 2021, the circuit court entered a final "Order and Judgment" that included specific findings of fact and conclusions of law. The judgment ruled in favor of the Town Council on all issues. In its introduction, the circuit court's order summarized the court's view of the case:

"This case provides a classic illustration of the distinct and separate roles assigned to courts exercising judicial functions and municipalities in their executive and legislative roles. [The Chandlers and Barnes] ask the Court to venture beyond its judicial role and assume a legislative function in voiding and enjoining actions by the Town Council. Established case law allows this only in exceptional circumstances and [the Chandlers and Barnes] have failed to carry their burden of showing that the Town[Council's] actions were arbitrary and capricious and not fairly debatable. While this Court questions the wisdom of the plan to construct a public boat launch adjacent to the public park in [Perdido Beach], Alabama law prohibits this Court from substituting its judgment for that of the elected Town Council."

The circuit court concluded that the Town Council's decisions to rezone the subject property from R-1 to OR and to modify the "minimum lot area" of OR districts from three acres to one acre were "fairly debatable and not arbitrary and capricious." The circuit court noted that evidence introduced by the parties on both sides as to the wisdom and feasibility of the boat-launch project "underscore the fact that the matter was fairly debatable and the actions of the Town [Council] were not arbitrary and capricious." It concluded that the Town Council was immune from the requirements in both the zoning ordinance and the subdivision regulations that development projects must have a 30-foot setback from wetlands. It reached that conclusion after determining that the Town Council was exercising a governmental function, rather than a proprietary function, because the boat launch, the pier, and the park would be recreational facilities available to all citizens of Perdido Beach rather than commercial transactions for the benefit of a particular government agency. The circuit court concluded that the boat-launch project did not violate the requirement that the project be set back 10 feet from the riparian line at the center of State Street because

"[i]t is undisputed that [Perdido Beach] owns all of the property abutting the south side of State Street up to its

terminus at water's edge. It is also undisputed that all of the infrastructure consisting of a boat ramp, raised walkway and pier to be constructed by [Perdido Beach] lies south of the midline of State Street. To the extent that infrastructure is constructed in the water (the pier and the boat ramp), all of this construction is set back ten feet from the riparian line in Soldier Creek, thus protecting the interest of any opposing property owners claiming to the midline of State Street."

The circuit court also concluded that the boat-launch project did not violate State Street's dedication as a public road because "State Street is a public street which can be used for the purposes intended by [Perdido Beach] to support the boat ramp and the adjacent park."

The Chandlers and Barnes appeal the circuit court's October 18, 2021, judgment.

II. Standard of Review

"'Because the trial court heard ore tenus evidence during the bench trial, the ore tenus standard of review applies. Our ore tenus standard of review is well settled. "'When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error.'" Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)).

""...."

"... However, "that presumption [of correctness] has no application when the trial court is shown to have improperly applied the law to the facts." Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994).'

"Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67-68 (Ala. 2010)."

Mitchell v. K & B Fabricators, Inc., 274 So. 3d 251, 260 (Ala. 2018).

III. Analysis

The Chandlers and Barnes present several arguments challenging the circuit court's judgment in favor of the Town Council. Some of those arguments challenge the circuit court's application of the law to the facts in this case, while other arguments directly challenge the circuit court's findings of fact as being against the great weight of the evidence. We address each of the arguments in turn.

A. Does the Boat-Launch Project Violate State Street's Public Dedication?

The Chandlers and Barnes do not dispute the circuit court's conclusion that "State Street is a public street." This is unsurprising given that several witnesses, including Chris Chandler, testified that State Street is used by the citizens of Perdido Beach for all sorts of purposes, including picnics and access to Soldier's Creek for swimming, fishing, launching small boats, and even holding church baptisms. The

Chandlers and Barnes contend, however, that the boat-launch project will "encroach" on State Street's character as a public street because the proposed boat launch will be three feet higher than State Street itself, to make placing boats in the water easier, and the project will render State Street a one-way street for boat traffic, "further rendering State Street less commodious." Appellants' brief, pp. 51, 52. In support of their contention that the boat-launch project alters State Street's public character and that the Town Council lacks the power to make such an alteration, the Chandlers and Barnes cite two cases. First, they rely on Lybrand v. Town of Pell City, 260 Ala. 534, 538, 71 So. 2d 797, 801 (1954), in which this Court stated:

"When lands have been so dedicated as streets and avenues, the municipality has no power, unless specially authorized by the legislature, to divert them in any manner from the uses to which they were originally dedicated. State ex rel. Attorney General v. Louisville & Nashville R. Co., 158 Ala. 208, 48 So. 391 [(1908)]. ... Any encroachment thereon or use thereof which is inconsistent with such purpose will constitute a nuisance which may be enjoined. City of Troy v. Watkins, 201 Ala. 274, 78 So. 50 [(1918)]. The obstruction or encroachment may consist in anything which renders the roadway less commodious. City of Troy v. Watkins, *supra*."

Second, they rely on Douglass v. City Council of Montgomery, 118 Ala. 599, 611-12, 24 So. 745, 747-48 (1898), in which this Court observed:

"There is a marked difference between the uses and trusts as ordinarily imposed in the dedication of streets or highways in a city, and those imposed in the dedication of public squares or commons, and in the uses and enjoyments of the people therein. The municipality may allow uses in the one that it can not in the other. The uses of each are distinct, and the rights of abutting proprietors on each are different. It is allowed, generally, that such a proprietor as to a street owns to its centre, but there is no such right, or anything accruing from it, in an abutter on a park. The street must be kept open, as long as used, but the park may be enclosed, improved and ornamented for pleasure grounds and amusements for health and recreation. 17 Am. & Eng. Enc. Law, 416. In speaking of this difference between the rights of property owners adjoining to a street and a public common, dedicated to public uses, this court, in [Sheffield & Tusculumbia R.R.] Co. v. Rand, 83 Ala. 294[3 So. 686 (1888)], said the rule of law was entirely different when applied to the two; that 'the purpose to which such dedication is made, the use or changing uses to which it may be applied, and many other distinguishing characteristics, demonstrate that neither the rule nor the reason of the rule, on which the law of the street or highway rests, can be made applicable to a public common. The differences will naturally suggest themselves, and we need not attempt their enumeration.'

"In respect to the remedy for the misuse or diversion of such property, it has been said: 'If dedicated property be put to use foreign to that contemplated by the intention and purpose of the dedication, then not only the dedicator, but any property owner, will have his remedy in equity to enforce the proper use, and inhibit an improper one.' 5 Am. & Eng. Enc. Law, 416, and authorities there cited."

Although, at first blush, the general language used in both Lybrand and Douglass with respect to the dedication of streets for public use may appear to support the position of the Chandlers and Barnes, the details of the challenges in those cases demonstrate otherwise. The facts in Douglass are wholly inapposite to the situation presented in this case. Douglass concerned a conveyance of private property to the City of Montgomery on the condition that the property be dedicated for public use as a park. The property was developed and used as a public park, known as Gilmer Park, for 20 years. After the conveyer's death, the Montgomery City Council passed ordinances that would permit a railroad company to place a railway line through Gilmer Park. An owner of property near Gilmer Park sought to enjoin the construction of the railway line as contrary to the original conditions of the conveyance of the property to the city. The Douglass Court upheld the plaintiff's right to seek the injunction as "an adjacent proprietor to the said park." 118 Ala. at 613, 24 So. at 748. In short, Douglass concerned the destruction of a publicly dedicated park for the commercial interest of a railroad company.

In Lybrand, the plaintiffs challenged the Town of Pell City's "'construction of a municipal swimming pool upon a part of Railroad Avenue and upon a part of Connecticut Avenue,'" two public streets in the subdivision in which the plaintiffs lived. 260 Ala. at 536, 71 So. 2d at 799 (quoting the plaintiffs' brief).

"The encroachment into Railroad Avenue lies, along the side thereof immediately in front of Plaintiffs' property abutting upon said Railroad Avenue on the East side of said "Wye." The city has started or will start to build a fence around this Avenue of meshed wire of 8 to 10 feet high and include a bath house there, and so as to enclose further an additional space of, to-wit, 15 feet surrounding said pool on all sides which will be, to-wit, 15 feet closer to Plaintiffs' property along Railroad Avenue leaving a very small space for passage between said fence and Plaintiffs' property on Railroad Avenue. All, except a small fraction, of said pool and fence and bath house will be in the streets of Pell City."

Id. In short, Lybrand concerned the construction of a pool in the midst of public streets and literally up against the plaintiffs' private property.

In contrast to Douglass and Lybrand, the proposed boat launch will be placed where State Street ends at the edge of Soldier's Creek. The boat launch will not destroy or inhibit the use of State Street as a public road. In fact, the boat-launch project would enhance State Street's use as an area of public recreation, rendering it easier for citizens to launch boats, to fish at the pier, and to picnic in the adjacent designated public park.

Thus, the project plainly does not divert State Street from its dedicated public purpose.

B. Is the Town Council Immune from the Wetland-Setback Provision in the Zoning Ordinance?

As we noted in the rendition of the facts, § 10.1.4 of the zoning ordinance provides that "[t]he setback for development from a wetland must be a minimum of thirty (30) feet." Testimony at the trial indicated that the boat launch would be constructed within one foot of wetlands. However, the circuit court concluded that "under Alabama law a municipality's zoning ordinance does not apply to that municipality in the operation of a governmental function" and that "no credible argument can be made that this public park and water access project can be said to be a propriety function of [Perdido Beach] as providing recreational facilities to citizens is clearly a governmental function." The Chandlers and Barnes contend that the circuit court erred because, they say, "providing a boat launch is a proprietary and not governmental function as a matter of law. And even if not as a matter of law, then the great weight of the evidence demonstrated that operating the boat launch at issue here is a proprietary function." Appellants' brief, p. 54.

"It was once 'well settled that city zoning ordinances [did] not apply to the operation of a governmental function by a governing body, as opposed to a proprietary function.' Lane v. Zoning Bd. of Talladega, 669 So. 2d 958, 959 (Ala. Civ. App. 1995) (emphasis added). See City of Birmingham v. Scogin, 269 Ala. 679, 690, 115 So. 2d 505, 514 (1959) ('The Alabama cases have long held that zoning does not apply to the operation of a governmental function by a municipality.');

Lauderdale County Bd. of Educ. v. Alexander, 269 Ala. 79, 86, 110 So. 2d 911, 918 (1959) ('If a city engaged in a governmental function is not subject to its own zoning regulations, certainly a county engaged in a governmental function is not subject to a city's zoning regulations.');

Water Works Bd. of Birmingham v. Stephens, 262 Ala. 203, 78 So. 2d 267 (1955); Alabama Alcoholic Beverage Control Bd. v. City of Birmingham, 253 Ala. 402, 44 So. 2d 593 (1950). "'This distinction is of ancient vintage'" Cunningham v. City of Attalla, 918 So. 2d 119, 125 (Ala. Civ. App. 2005) (quoting 2 Kenneth H. Young, Anderson's American Law of Zoning § 12.03 (4th ed.1996))."

City of Selma v. Dallas Cnty., 964 So. 2d 12, 16 (Ala. 2007).

In City of Selma, this Court addressed the contention that the Court in Jackson v. City of Florence, 294 Ala. 592, 320 So. 2d 68 (1975), had abolished the distinction between governmental functions and proprietary functions with regard to actions performed by municipalities and, thus, that a municipality was no longer immune from zoning ordinances even if that municipality was engaged in a governmental function. The City of Selma Court rejected that contention, concluding that the Jackson Court had "'abolished the judicial doctrine of municipal

immunity' from tort liability, Neighbors v. City of Birmingham, 384 So. 2d 113, 113 (Ala. 1980) (discussing Jackson), which traditionally rested on the distinction between governmental and proprietary functions," and thus gave "effect to the intent of the legislature evident in Ala. Code 1940, Tit. 37, § 502, now codified at Ala. Code 1975, § 11-47-190."⁶ 964 So. 2d at 17. The City of Selma Court noted that there was "no legislation suggesting that the legislature has acted similarly with respect to immunity from zoning regulations" and stated that "[i]t is evident, therefore, that neither the judiciary nor the legislature has heretofore manifested an intent to abrogate the immunity from zoning ordinances that has long been afforded to political subdivisions in the operation of their governmental functions." Id. at 17, 19. After concluding that municipalities still were immune from zoning ordinances when

⁶Section 11-47-190, Ala. Code 1975, provides, in part:

"No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless said injury or wrong was done or suffered through the neglect, carelessness or unskillfulness of some agent, officer, or employee of the municipality engaged in work therefor and while acting in the line of his or her duty"

(Emphasis added.)

performing a governmental function, the City of Selma Court proceeded to elucidate the distinction between governmental and proprietary functions.

"The governmental functions of a municipal corporation include the promotion of the public peace, health, safety, and morals, as well as the expenditure of money for public improvements, the expense of which ultimately is borne by the property owners.' 56 Am. Jur. 2d Municipal Corporations § 183 (2000) (emphasis added). 'A function is a governmental function if it is the means by which the governing entity exercises the sovereign power for the benefit of all citizens.' Lane [v. Zoning Bd. of Adjustment of City of Talladega], 669 So. 2d [958] at 959-60 [(Ala. Civ. App. 1995)]. It is 'done by authority of law [a]nd ... not ... for profit It is not of a proprietary nature, but under the police power to promote the health and well-being of the people.' Downey v. Jackson, 259 Ala. 189, 193, 65 So. 2d 825, 827 (1953). 'The police powers of a city are among its major governmental functions. Broadly speaking, they extend to all appropriate ordinances for the protection of the peace, safety, health, and good morals of the people affected thereby. The general "welfare" is a generic term often employed in this connection.' City of Homewood v. Wofford Oil Co., 232 Ala. 634, 636, 169 So. 288, 290 (1936).

"'Proprietary ... functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency. Whereas in its sovereign role, the government carries out unique governmental functions for the benefit of the whole public, in its proprietary capacity the government's activities are analogous to those of a private concern.'

"Federal Deposit Ins. Corp. v. Harrison, 735 F.2d 408, 411 (11th Cir. 1984) (emphasis added).

"Examples of governmental functions in cases challenging the entity's operating authority include a 'sanitary landfill garbage disposal' expressly authorized by statute, operated by a municipality, [City of Birmingham v. Scogin, [269 Ala. 679, 115 So. 2d 505 (1959)]; the operation, expressly authorized by statute, of a baseball diamond by the 'Park and Recreation Board of the City of Birmingham,' Downey, supra; the location, construction, and operation by a county board of education of a facility in which to store, repair, and maintain school property, such as school buses and supplies, [Lauderdale Cnty. Bd. of Educ. v. Alexander, [269 Ala. 79, 110 So. 2d 911 (1959)]; the operation, expressly authorized by statute, of a garbage incinerator by the City of Bessemer, City of Bessemer v. Abbott, 212 Ala. 472, 103 So. 446 (1925); the construction and operation of a jail by the county, Lane, supra; the use by a municipality of a building as a warehouse, Cunningham[v. City of Attalla, 918 So. 2d 119 (Ala. Civ. App. 2005)]; and the choice of a location for a new school building by a city board of education, Alves[v. Board of Education for Guntersville, 922 So. 2d 129 (Ala. Civ. App. 2005)]. Cf. State ex rel. Hyland v. Baumhauer, 244 Ala. 1, 8, 12 So. 2d 326, 330 (1942) ('A fire department, when organized and functioning, is performing a governmental rather than a proprietary function.').

"On the other hand, 'when a city is engaged in the business of supplying for compensation water service to the people, within its lawful power, it is engaged in a proprietary business.' [Water Works Bd. of Birmingham v. Stephens, 262 Ala. [203,] 209, 78 So. 2d [267,] 272 [(1955)] (emphasis added). Similarly, the operation of a sewage-disposal plant is, for zoning purposes, a proprietary function. Jefferson County v. City of Birmingham, [256 Ala. 436, 55 So. 2d 196 (1951)]."

City of Selma, 964 So. 2d at 19-20 (some emphasis added).

The Chandlers and Barnes correctly note that "[c]ourts in Alabama have never expressly stated whether operation of a boat launch and pier is governmental or proprietary." Appellants' brief, p. 55. In contending that the boat-launch project is proprietary, the Chandlers and Barnes rely on a few cases from other jurisdictions. They particularly highlight Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947), noting that the Heitman court contrasted the harbor for mooring boats at issue in that case with a public park that may be used by all citizens.

"In the instant case, it is clear that the boat harbor was of primary service only to those inhabitants who owned boats and elected to moor them in this port for convenience and safety, and not to the public as a whole, as in the case of a public park. It was for the protection of their private property. Aside from the substantial charges made for the use of the floating dock, it is obvious that the enterprise as a whole involved an element of special corporate benefit, in that the harbor was used in part as a device for attracting to the city nonresident boat owners, who by their patronage of local business institutions contributed to the financial prosperity of the community. Gorsuch v. City of Springfield, Ohio App., 61 N.E.2d 898 [(1945)]. As in the Storti [v. Town of Fayal], 194 Minn. 628, 261 N.W. 463 (1935),⁷ case, ... we here have an

⁷Storti v. Town of Fayal, 194 Minn. 628, 261 N.W. 463 (1935), concerned a plaintiff's action against a municipality for the municipality's alleged negligence when stringing and maintaining a telephone wire across a state highway. The Storti court concluded that the municipality's operation of a telephone utility benefited only certain members of the community and was operated for a profit. "In the present case apparently only those inhabitants of the town who had telephones

enterprise that was not equally for the common good of all without special corporate benefit."

Heitman, 225 Minn. at 120, 30 N.W.2d at 21. The Chandlers and Barnes argue that, similar to the situation in Heitman, "the public boat launch would not benefit all citizens. Rather it would benefit only those citizens owning boats. It is not the same as a park which can be used by all citizens." Appellants' brief, p. 57.

However, in Heitman the municipality was charging fees for mooring boats in the harbor, and it was undisputed that the municipality hoped the harbor would attract visitors from other municipalities who would frequent the municipality's businesses. In contrast, in this case, no evidence was introduced indicating that the Town Council would charge a fee for use of the boat launch, the pier, or the park, and the evidence indicated that the boat-launch project is primarily intended to benefit residents of Perdido Beach. Moreover, the boat-launch project does not necessarily benefit only those who own a boat. Citizens who do not own boats could rent them and use the launch, or they could even simply

installed and paid the prescribed rates had the full benefit of the telephone system. The system was not equally for the common good of all without special corporate benefit." Storti, 194 Minn. at 633, 261 N.W. at 465.

travel with a person who does own a boat in order to receive the benefit of the launch.⁸ The Chandlers and Barnes also ignore the fact that part

⁸The other cases cited by the Chandlers and Barnes are even less persuasive than Heitman in establishing that the boat-launch project should be considered a proprietary function. It is true that in Dendy v. City of Pascagoula, 193 So. 2d 559, 562 (Miss. 1967), the Mississippi Supreme Court stated: "The park and pier were maintained by the City in its proprietary capacity for purposes of recreation for its citizens and as a tourist attraction." But that statement was part of the accepted facts in the case, not a declaration of law. Moreover, the City of Pascagoula never argued that it was immune from suit in Dendy. The quote from Warner v. City of Bay St. Louis, 408 F. Supp. 375, 381-82 (S.D. Miss. 1975), that the Chandlers and Barnes rely upon is even less applicable, as neither immunity nor the distinction between governmental and proprietary functions was at issue in Warner. The test for whether the dock at issue in Town of Peru v. State, 35 A.D.2d 875, 875-76, 315 N.Y.S.2d 775 (1970), was proprietary in nature concerned whether it was open to nonresidents, not whether it was maintained for the town's profit. Moreover, that decision was strictly based on the facts of the case. With respect to City of Shawnee v. Faulkner, 205 Okla. 647, 240 P.2d 100 (1952), it is true that one of the four points in "Syllabus by the Court" states:

"Where a city maintains a boat dock at its lake for the convenience of boat owners, and permits the general public to go upon the dock, it is the duty of the city to use reasonable care to maintain the premises in reasonably safe condition. The city, under the circumstances, is acting in a proprietary capacity and not in a governmental capacity."

205 Okla. at 648, 240 P.2d at 101. However, there is no such holding in the text of that opinion. Moreover, the undisputed facts of the case provided that the City of Shawnee owned the lake and the dock at which the injury occurred, that the city charged fees at the dock for "boating, fishing and hunting permits," and that "[t]he city has established 247

of the boat-launch project includes a pier and a park, both of which indisputably would benefit the public as a whole.⁹

In addition to the weakness of the authorities from other jurisdictions that the Chandlers and Barnes rely upon, Alabama law is clear that municipalities have delegated authority to provide recreational facilities for the well-being of their citizens. The legislature has granted municipalities "the power to acquire, operate, manage, and control parks, playgrounds, and other recreational or athletic facilities."¹⁰ § 11-47-

building sites around the lake, and various citizens have constructed approximately 130 cabins on said sites for which the city collects an annual fee of \$5. All of these license permits are deposited to the credit of the city in its general fund account." 205 Okla. at 649, 240 P.2d at 101-02. Under those facts, it is entirely understandable if the Oklahoma Supreme Court did conclude that the city was acting in a proprietary capacity. We also note that there is at least one authority from another jurisdiction finding that providing a boat launch is a governmental function. See Peterman v. State Dep't of Nat. Res., 446 Mich. 177, 203-04, 521 N.W.2d 499, 512-13 (1994).

⁹The Chandlers and Barnes repeatedly ignore the pier and public-park aspects of the boat-launch project in their arguments contending that the project thwarts State Street's public dedication, that the project is not a governmental function, and that the amendments to the zoning ordinance are arbitrary and capricious.

¹⁰Such "project[s]" are specifically defined to include "docks and marinas, boating facilities, [and] areas and facilities for fishing" § 11-47-210(16), Ala. Code 1975.

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210.1(1), Ala. Code 1975; see generally Ala. Code 1975, §§ 11-47-210 through 11-47-221. Municipalities are empowered to create recreation boards "to promote public interest and participation in sports, athletics, and recreational activities and to provide or improve public parks in this state, including all buildings, facilities, and improvements incident thereto or useful in connection therewith."¹¹ § 11-60-2, Ala. Code 1975; see generally Ala. Code 1975, §§ 11-60-1 through 11-60-20. Moreover, the "Town of Perdido Beach Master Plan 2030" adopted in 2013 contained several references to providing public water access and boat launches to the community in the years to come for the benefit of Perdido Beach's citizens.

The foregoing supports the circuit court's conclusion that the boat-launch project is a governmental function, not a proprietary one, and, thus, that the Town Council is immune from the zoning ordinance's wetland-setback provision.

¹¹Again, the "project[s]" such recreation boards may promote include "boating facilities [and] areas and facilities for fishing" § 11-60-1(3), Ala. Code 1975.

C. Does Municipal Immunity Extend to the Wetland-Setback Provision in the Subdivision Regulations?

As we observed in the rendition of the facts, § 12.3 of the subdivision regulations provides in part that "[t]he building setback line from wetlands shall be a minimum of 30 feet." The Chandlers and Barnes contend that even if the boat-launch project constitutes a governmental function that is immune from the zoning ordinance, such immunity does not extend to a municipality's subdivision regulations.

The problem with this argument is that, in promulgating subdivision regulations, municipalities employ powers almost identical to those involved in enacting zoning ordinances.

"The legislature has given the City the authority to regulate the development of subdivisions through its planning commission. § 11-52-31, Ala. Code 1975. "Subdivision legislation is part of planning legislation, as is zoning; they are all predicated on the police power of the state." City of Mobile v. Waldon, 429 So. 2d 945, 947 (Ala. 1983).¹ City of Dothan v. Eighty-Four West, Inc., 822 So. 2d 1227, 1236 (Ala. Civ. App. 2001)."

Beachcroft Props., LLP v. City of Alabaster, 949 So. 2d 899, 904 (Ala. 2006) (emphasis omitted and emphasis added). If a municipality is performing a governmental function -- as we concluded is the case with

the boat-launch project¹² -- there is no logical reason why such a function would be immune from an existing zoning ordinance but not be immune from an existing subdivision regulation. Unsurprisingly, the Chandlers and Barnes offer no rational justification for such a distinction.

It is true that this Court has observed that planning commissions must follow subdivision regulations when parties come before such commissions for plat approvals.

"Although Alabama's subdivision control statute, Code 1975, § 11-52-30, et seq., has but infrequently been the subject of litigation, it has been held that 'The authority of the Planning Commission to exercise control over subdivision of lands within the municipality is derived from the legislature. [Citation Omitted] It is authorized to adopt regulations not inconsistent with the statutes. ...' Boulder Corp. v. Vann, 345 So. 2d 272, 275 (Ala. 1977).

"Since the Planning Commission's power to regulate subdivisions is derived from the statute, it follows that it cannot use that power to further goals not designated by that statute. ...

"Once a planning commission has properly exercised its authority in drafting ordinances regulating subdivision development, it is bound by those ordinances. In Boulder Corp. v. Vann, supra at 275, this court held that '... In exercising its function approving or disapproving any particular subdivision plat, the Commission acts in an

¹²See Part B, supra.

administrative capacity, and is bound by any limitations on its authority contained in the legislation authorizing it to act, as well as any restrictions contained in its own regulations.'"

Smith v. City of Mobile, 374 So. 2d 305, 307 (Ala. 1979). But Smith itself indicates the reason for the distinction in such cases. In approving or disapproving a plat, a planning commission is "'act[ing] in an administrative capacity.'" Id. (emphasis added); see also Providence Park, Inc. v. Mobile City Plan. Comm'n, 824 So. 2d 769, 772 (Ala. Civ. App. 2001) ("[T]his case involves the city's administrative decision to approve or disapprove a particular land use under its zoning ordinances. ... The Planning Commission has no discretion but to approve a subdivision plan that conforms to those ordinances" (emphasis added)). However, as the Court observed in City of Selma, "'[t]he police powers of a city are among its major governmental functions. Broadly speaking, they extend to all appropriate ordinances for the protection of the peace, safety, health, and good morals of the people affected thereby. The general "welfare" is a generic term often employed in this connection.'" 964 So. 2d at 19 (quoting City of Homewood v. Wofford Oil Co., 232 Ala. 634, 636, 169 So. 288, 290 (1936)) (emphasis added). In other words, when a municipality performs a governmental function, it

exercises its police powers, not its administrative powers, and that is why a municipality is not bound by its own ordinances or regulations in the former context, but it is bound by them in the latter context. In the administrative context, a municipality must treat all who seek a ruling in an equal and uniform way, necessitating that the municipality strictly follow the ordinances and regulations previously promulgated to the community. In the context of carrying out a governmental function, a municipality is presumed to be acting for the health, safety, and welfare of the public as a whole, and such actions are deemed to take precedence over the ordinance or regulation at issue. In short, because the Town Council is performing a governmental function in undertaking the boat-launch project, it is not bound by the wetland-setback provision in the subdivision regulations anymore than it is bound by the wetland-setback provision in the zoning ordinance.¹³

¹³In its brief to this Court, the Town Council contends that the wetland-setback provision in the subdivision regulations does not apply to the boat-launch project. Section 12.3 of the subdivision regulations states that "[t]he building setback line from wetlands shall be a minimum of 30 feet." (Emphasis added.) The Town Council notes that the term "building" is defined in § 5 of the subdivision regulations as "[a]ny structure attached to the ground and intended for shelter, housing or enclosure for persons, animals, or chattels." The Town Council argues that "[t]he pier and boat launch, while 'attached to the ground,' are

D. Are the Town Council's Amendments to the Zoning Ordinance Arbitrary and Capricious?

The Chandlers and Barnes's remaining arguments boil down to contending that the circuit court should have declared the Town Council's

clearly not 'intended for shelter housing or enclosure of persons, animals or chattles.' Thus, the prohibition in the 'building setback line' as far as the word 'building' is concerned clearly is not applicable here." Town Council's brief, p. 29.

We find the Town Council's interpretation of § 12.3 to be problematic for a few reasons. First, § 6 of the subdivision regulations states that "[t]he words building and structure are mutually inclusive." The boat launch and pier unquestionably are "structures," even if they are not "buildings," and so the building-setback restriction in the wetland-setback provision would still apply to them if the restriction is read as a "structure setback line." That reading coincides with § 5, providing that the definition of a "building line" is synonymous with a "setback line" and defining a "setback line" as "[a] line defining the limits of a yard in which no building or structure, other than an accessory structure, may be located." (Emphasis added.) Second, the introductory sentence to the paragraph in § 12.3 that contains the wetland-setback requirement proclaims that "[a]ny development within a jurisdictional wetland is highly discouraged." (Emphasis added.) "Development" is defined in § 5 as "[a]ny man made change to improved or unimproved real estate including but not limited to buildings or other structures, digging, dredging, filling, grading, paving, excavating, or drilling operations." Those provisions lend yet more credence to the conclusion that a boat launch and a pier would be subject to the wetland-setback requirement. Third, as the Chandlers and Barnes note, the phrase "building setback line" may be read as referring to "the activity of building rather than a thing, i.e., 'building setback line' rather than 'setback from a Building.'" Appellants' reply brief, p. 19. If that is the case, then the 30-foot wetland-setback requirement clearly would apply to the boat launch and pier.

amendments to certain provisions of the zoning ordinance ("the zoning amendments") invalid because, they say, the zoning amendments were arbitrary and capricious and enabled the creation of a public safety hazard, i.e., the public boat launch at the end of State Street. As we recounted in the rendition of the facts, the Chandlers and Barnes essentially challenged three changes in the zoning ordinance: (1) rezoning the subject property from R-1 to OR; (2) changing the minimum lot size for OR districts from three acres to one acre; and (3) changing the designation for using an OR district for a public park, a public pier, or a public boat launch from "conditional uses" to "permitted uses," meaning that such uses would not need approval from the Perdido Beach Planning Commission.

"When a municipal body acts either to adopt or to amend a zoning ordinance, it acts in a legislative capacity and the scope of judicial review of such action is quite restricted. Woodard v. City of Decatur, 431 So. 2d 1173 (Ala. 1983); City of Gadsden v. Downs, 412 So. 2d 267 (Ala. 1982). The restricted role in reviewing the validity of a zoning ordinance or regulation has been stated as follows:

"Zoning is a legislative matter, and, as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary. In enacting or amending zoning legislation, the local

authorities are vested with broad discretion, and, in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority. If there is a rational and justifiable basis for the enactment and it does not violate any state statute or positive constitutional guaranty, the wisdom of the zoning regulation is a matter exclusively for legislative determination.

"In accordance with these principles, it has been stated that the courts should not interfere with the exercise of the zoning power and hold a zoning enactment invalid, unless the enactment, in whole or in relation to any particular property, is shown to be clearly arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety, or welfare, or is plainly contrary to the zoning laws.'

"82 Am. Jur. 2d Zoning and Planning § 338 (1976) at 913-14.

"The standard of review used to determine whether a zoning ordinance is arbitrary and capricious was stated by this Court in City of Tuscaloosa v. Bryan, 505 So. 2d 330, 336 (Ala. 1987):

"If the adoption of the ordinance raises questions upon which reasonable differences may exist in view of all the circumstances, and the wisdom of the ordinance is fairly debatable, then the action of a municipal governing body in adopting the ordinance will not be deemed arbitrary, a court being unwilling under such circumstances to substitute its judgment for that of the municipal

governing body acting in a legislative capacity.
Cudd v. City of Homewood, 284 Ala. 268, 224
So. 2d 625 (1969).'

"The burden is upon the party seeking relief from an ordinance to show that the ordinance was not a fairly debatable issue before the municipal governing body. Northwest Builders, Inc. v. Moore, 475 So. 2d 153 (Miss. 1985)."

Homewood Citizens Ass'n v. City of Homewood, 548 So. 2d 142, 143-44 (Ala. 1989).

The Chandlers and Barnes contend that the great weight of the evidence demonstrated that the zoning amendments would create a public safety hazard, i.e., the public boat launch, and that the zoning amendments were arbitrary and capricious because they were enacted solely to accommodate the boat launch rather than for the benefit of Perdido Beach as a whole. They assert that the circuit court clearly erred in concluding otherwise.

Before we specifically address those arguments, we note that the Chandlers and Barnes's arguments conflate the decision to construct and the act of constructing the boat-launch project with the decisions to amend the zoning ordinance. Although it is true that the zoning amendments at issue help to facilitate the construction of the boat-launch

project, they are not synonymous with the project. Because of our determination that construction of the boat-launch project is a governmental function, even if this Court was to hold the zoning amendments to be arbitrary and capricious, the original zoning provisions would not prevent construction of the boat-launch project because municipal governmental functions are immune from existing zoning ordinances. See Part B, *supra*.

Furthermore, as the Chandlers and Barnes tacitly acknowledge in arguing that the circuit court's conclusion with respect to this issue is contrary to the great weight of the evidence, whether the boat-launch project is a public safety hazard is a factual determination, not a legal one. "[N]o ground for reversal is more carefully scrutinized or rigidly limited than one charging that the verdict is against the great weight of the evidence" Wood v. City of Huntsville, 384 So. 2d 1081, 1085 (Ala. 1980). Thus, although the Chandlers and Barnes introduced testimony from Sheriff Mack about the potential for increased parking disputes and crime from construction of a public boat launch and testimony from Sgt. Kelly about the potential for increased marine traffic on Soldier's Creek, the circuit court was free as the fact-finder to conclude that the

testimony was insufficient to establish that the boat-launch project would be a public safety hazard. Indeed, the Town Council introduced evidence indicating that there had not been such problems at the public Yupon boat launch, that the Town Council had enacted parking ordinances to prepare for any potential parking disputes produced from the new boat launch on State Street, and that the public park potentially could accommodate an additional 20 boat-trailer parking spaces next to State Street should the need arise. Likewise, although the Chandlers and Barnes introduced testimony from civil engineer Kolar criticizing Perdido Beach's existing road infrastructure as well as the design of the proposed boat launch, the circuit court was free as the fact-finder to conclude that those issues were just problems Perdido Beach would have to manage rather than issues so dire that the court should enjoin the project. As the circuit court observed, the Town Council also introduced evidence indicating that "there existed at least 200 residents in [Perdido Beach] who use the streets to find a way to launch outside of [Perdido Beach]. The Town [Council] presented testimony that none of the problems anticipated by [Kolar] had occurred in terms of safety and accidents associated with this movement." In short, as the circuit court concluded,

the conflicting evidence "underscore[s] the fact that the matter was fairly debatable and the actions of the Town [Council] were not arbitrary and capricious."

Moreover, the Chandlers and Barnes's assertion that, because at least some of the zoning amendments were enacted to accommodate this particular boat launch, they are, by definition, arbitrary and capricious amendments does not hold up to close scrutiny. For support, they observe that this Court has stated:

"A "decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles.'" Mississippi Dep't of Human Servs. v. McNeel, 869 So. 2d 1013, 1018 (Miss. 2004) (quoting Miss. State Dep't of Health v. Natchez, 743 So. 2d 973, 977 (Miss. 1999))."

Alabama State Bar v. Hallett, 26 So. 3d 1127, 1140 (Ala. 2009). The Chandlers and Barnes argue that the Town Council ignored the safety considerations they presented at trial.

However, the fact that the Town Council favored increased public access to the water over potential increases in congestion on State Street or a potential increase in parking disputes does not mean that the decision to construct the boat launch lacked any reason. Evidence

indicated that Perdido Beach has always intended to increase public water access and that for years many residents have been asking for more water-access points. Evidence also showed that State Street already has been used for several years to access Soldier's Creek. The boat-launch project seeks to make that water access easier for residents who -- unlike the Chandlers -- do not have access to the private boat launch in the Parkway Beach Area. As the Hallett Court also observed: "'Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.'" Id. (quoting Heinmiller v. Department of Health, 127 Wash. 2d 595, 609, 903 P.2d 433, 440 (1995)). The evidence indicated that the issue of placing a public boat launch at the end of State Street had been publicly debated for years in Perdido Beach and that residents had elected a mayor and a Town Council that would move forward with the project. It is understandable that the Chandlers and Barnes, who already have water access to Soldier's Creek, would not want a public boat launch placed near their water-access points, but their objections do not render the Town Council's decisions arbitrary and capricious.

In sum, the circuit court did not err in declining to invalidate the zoning amendments on the basis that the amendments made the boat-launch project easier to achieve. The Town Council determined that the project would benefit the community as a whole, and conflicting evidence was presented at trial concerning that determination.

"[L]ocal governing authorities are presumed to have a superior opportunity to know and consider the varied and conflicting interests involved, to balance the burdens and benefits and to consider the general welfare of the area involved. ... They, therefore, must of necessity be accorded considerable freedom to exercise discretion not diminished by judicial intrusion."

City of Birmingham v. Morris, 396 So. 2d 53, 55 (Ala. 1981). The circuit court properly recognized the discretion that should be afforded to the Town Council. Because "the adoption of the [zoning amendments] raises questions upon which reasonable differences may exist in view of all the circumstances, and the wisdom of the [amendments] is fairly debatable, then the action of a municipal governing body in adopting the [amendments] will not be deemed arbitrary.'" Homewood Citizens Ass'n, 548 So. 2d at 143-44 (quoting Bryan, 505 So. 2d at 336).

IV. Conclusion

None of the objections raised by the Chandlers and Barnes in this appeal warrant reversal of the circuit court's judgment in favor of the Town Council. The boat-launch project furthers, rather than thwarts, State Street's dedication as a public street in Perdido Beach. In undertaking the boat-launch project, the Town Council is performing a governmental function, not a proprietary function, and therefore the Town Council is immune from the wetland-setback provisions in the zoning ordinance and in the subdivision regulations. Conflicting evidence was introduced with respect to the wisdom of the zoning amendments that were enacted to help in proceeding with the boat-launch project, and thus the validity of those zoning amendments was fairly debatable and not arbitrary and capricious. Consequently, the circuit court's judgment following the bench trial is due to be affirmed.

AFFIRMED.

Parker, C.J., and Shaw, Bryan, and Mitchell, JJ., concur.