Rel: October 16, 2026

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2026-2027

SC-2025-0803

Ex parte City of Fairhope Planning Commission and City of Fairhope

PETITION FOR WRIT OF MANDAMUS

(In re: 68V BTR Holdings, LLC

v.

City of Fairhope Planning Commission and City of Fairhope)

(Baldwin Circuit Court: CV-24-900981)

PARKER, Justice.

68V BTR Holdings, LLC, wanted to develop two pieces of property in the City of Fairhope, but Fairhope's Planning Commission denied 68V's project applications. 68V has challenged those denials on various grounds, some of which are currently pending in the circuit court. For now, though, only one of those grounds matters -- a claim for money damages against the City and the Planning Commission premised on the alleged negligence of the Planning Commission and City employees in denying the applications.

Below, the City and the Planning Commission sought summary judgment on this claim based on a combination of three different species of immunity. But the circuit court denied that request. The City and the Planning Commission now petition this Court for a writ of mandamus directing the circuit court to enter judgment for the City and the Planning Commission on 68V's negligence claim. Because both the City and the Planning Commission are immune with respect to the negligence claim, we grant the petition and issue the writ.

I.

The City created the Planning Commission and tasked it with making decisions concerning the approval of subdivisions in accordance

with the City's subdivision regulations. Cf. Ala. Code 1975, § 11-52-1 et seq. The Commission consists of nine members who serve on a volunteer basis. To assist the planning commissioners in fulfilling their duties, the City employs planning staff; the Commission has no staff of its own.

68V filed applications with the Planning Commission seeking to develop two townhome apartment complexes, one named "Skyline Village" and the other named "Gables on Lawrence." Ultimately, the Planning Commission denied those applications. According to meeting minutes, the Planning Commission denied the Gables application because of "adverse drainage effects," because certain "greenspace" requirements were not met, because it failed to meet the Planning Commission's "Comprehensive Plan," and because of "traffic problems." According to the Commission meeting's minutes, it denied the Skyline application because of "drainage issues" as well as issues concerning "traffic," "health, safety and general welfare."

Dissatisfied by the denials, 68V sued the City and the Planning Commission. 68V did not initially seek mandamus review in state court to compel compliance with the relevant statutes. Cf. T Invs., LLC v. City of Montgomery Plan. Comm'n, 393 So. 3d 55, 63 (Ala. 2023). Instead, 68V

initially sued the City and the Planning Commission in federal district court. After the federal court resolved all the federal claims against 68V and declined to exercise supplemental jurisdiction over 68V's state-law claims, 68V then refiled in state court. There, it sought damages against the City and the Planning Commission based on their (or their employees') alleged negligence "in the consideration and/or denial of [the] applications." 68V's operative state-court complaint also asserted two other claims -- one for equitable relief invalidating the denials based on an alleged "arbitrary and capricious" denial of 68V's applications and another for damages based on an alleged deprivation of 68V's property "without substantive due process of law" under the Alabama Constitution.

The City and the Planning Commission answered the amended complaint and moved for summary judgment on all three of 68V's claims. With respect to the negligence claim, the City and the Planning Commission argued that the claim was barred by municipal immunity, see § 11-47-190, Ala. Code 1975; volunteer immunity, see § 6-5-336(d), Ala. Code 1975; and substantive immunity. The circuit court denied the

summary-judgment motion, and this petition followed. This petition seeks mandamus relief regarding only 68V's claim of negligence.

II.

As always, this Court will grant mandamus relief only when the petitioner shows (1) a clear legal right to the order sought; (2) the trial court's refusal to perform some "imperative duty"; (3) the lack of another adequate remedy (such as an appeal); and (4) that it has properly invoked the Court's jurisdiction. Ex parte Runnels, 364 So. 3d 979, 982 (Ala. 2022) (citation modified).

Most of these prerequisites are not in dispute here. The circuit court issued a written order denying the City and the Planning Commission's immunity-based request for summary judgment, and this Court has held that there is no viable alternative remedy for the wrongful denial of such a request. See Ex parte Butts, 775 So. 2d 173, 176 (Ala. 2000). We also perceive no jurisdictional problem in reviewing the City and the Planning Commission's petition. For these reasons, the dispositive question boils down to whether the City and the Planning Commission have shown a clear legal right to such an order.

III.

The City and the Planning Commission have carried this burden. 68V's claims against the City and the Planning Commission rely on a theory of respondeat superior -- the notion that the City and the Planning Commission should be held responsible for the on-the-job acts and omissions of their agents. The converse of this principle is also true: If the City and Planning Commission's agents are not liable, because of immunity or otherwise, then the City and the Planning Commission also cannot be liable based on those agents' actions. See Murey v. City of Chickasaw, 385 So. 3d 903, 917-18 (Ala. 2023); Hollis v. City of Brighton, 885 So. 2d 135, 141-42 (Ala. 2004). Here, 68V has asserted that the City and the Planning Commission should be held responsible for the negligence of two categories of agents: the members of the Planning Commission, on one hand, and certain city employees, on the other. For the reasons that follow, both categories of agents are immune from 68V's negligence claim. The City and the Planning Commission are thus also immune.

A.

The members of the Planning Commission are entitled to "volunteer immunity" under Alabama's Volunteer Service Act, Ala. Code 1975, § 6-5-336. 68V alleged that these commissioners acted "negligently, neglectfully, carelessly or unskillfully" in considering or denying 68V's applications. But as the City and the Planning Commission point out, the Volunteer Service Act provides immunity for municipal volunteers if they (1) were acting in "good faith" within the scope of their official "functions and duties" and (2) were not engaged in "willful or wanton misconduct." § 6-5-336(d). Under Alabama law, "[a]ll members of [a city planning] commission shall serve without compensation," Ala. Code 1975, § 11-52-3(b), so the commissioners unquestionably qualify as volunteers for a "governmental entity," § 6-5-336(d). Their consideration and denial of 68V's applications is likewise "within the scope of [their] official functions and duties." Id.; see Ala. Code 1975, § 11-52-32(a) (authorizing municipal planning commissions to "approve or disapprove" proposed plats). And 68V does not claim that the commissioners were acting willfully or wantonly. As a result, the planning commissioners are

immune from any alleged negligence in declining to approve 68V's applications.

68V attempts to bring the planning commissioners' actions outside the scope of volunteer immunity by asserting that the commissioners acted in bad faith. But Alabama's municipal-immunity statute "limits a municipality's liability for the acts of its agents to those acts that are negligent, careless, or unskillful." Ex parte City of Tuskegee, 932 So. 2d 895, 910 (Ala. 2005) (applying Ala. Code 1975, § 11-47-190). The upshot, as this Court has explained, is that the municipal-immunity statute also immunizes "the acts of [municipal] agents that are carried out in bad faith …." Id.[1]

[1]There does not appear to be any dispute between the parties that the Planning Commission is entitled to municipal immunity in the same way that the City is. Indeed, because the Planning Commission was created by the City and acted as an administrative body of the City, it is entitled to the protections of municipal immunity. See Hilliard v. City of Huntsville Elec. Util. Bd., 599 So. 2d 1108, 1110 n.2 (Ala. 1992) (recognizing that an entity is entitled to municipal immunity if it is created by a city to serve as "'a department or administrative arm'" of that city (quoting C. Keating and J. Perkowitz-Solheim, McQuillin's Law of Municipal Corporations § 53.05b (3d ed., 1984 & 1991 Cum. Supp.)); and Mobile City Plan. Comm'n v. Stanely, 775 So. 2d 226, 228 (Ala. Civ. App. 2000) ("When a planning commission exercises control over subdivision lands within a municipality it acts in an administrative capacity.").

68V argues that conduct can be in bad faith while still counting as negligence, thus sliding between the volunteer-immunity statute and the municipal-immunity statute. This argument, however, is squarely foreclosed by our cases holding that the municipal-immunity statute precludes claims arising out of alleged bad-faith conduct. See, e.g., Rogers v. Cedar Bluff Volunteer Fire Dep't, [Ms. SC-2025-0055, Aug. 29, 2025] __ So. 3d __, ___ n.10 (Ala. 2025); see also Ex parte City of Tuskegee, 932 So. 2d at 910. If the planning commissioners acted negligently, then volunteer immunity prevents this suit. If the planning commissioners acted in bad faith, then municipal immunity prevents this suit. Either way, 68V's suit against the City and the Planning Commission for negligence cannot proceed based on the actions or inactions of the planning commissioners.

B.

68V also contends that the City and the Planning Commission are liable for negligence by certain nonvolunteer City employees. Although these paid City employees are ineligible for volunteer immunity under the Volunteer Service Act, they are immune for a different reason: the doctrine of substantive immunity. This doctrine does not foreclose

traditional means of compelling governmental compliance with state law, such as a writ of mandamus. Cf. T Invs., 393 So. 3d at 63. But it does provide immunity from tort liability for those governmental activities "so laden with the public interest as to outweigh the incidental duty to individual citizens." See Ex parte City of Muscle Shoals, 384 So. 3d 37, 41 (Ala. 2023) (citation modified). The idea is that, when government actors are discharging some generalized duty owed to the public at large, accountability should come at the ballot box rather than from judges usurping the roles of elected local officials.

Here, 68V argues that three city employees were all negligent for various roles they played in providing staff support to the Planning Commission:

- The City Planning Director. According to 68V, the City's Planning Director relied on improper factors such as the City's "greenspace" requirements and the Planning Commission's comprehensive plan to recommend denial of the Gables application. 68V also argues that the City Planning Director failed to properly advise the Planning Commission to disregard comments by a citizen-lawyer at a public hearing suggesting (erroneously, in 68V's view) that the Commission possessed discretion to deny the Skyline Village application.

- The City Attorney. According to 68V, the City Attorney failed to instruct the Commission that the comprehensive plan could not properly be used as a factor in denying the Gables application. 68V complains that the City Attorney, like the City Planning

Director, failed to properly advise the Planning Commission about the validity of a citizen-lawyer's comments at the Skyline Village public hearing.

- The Mayor. Finally, the Mayor, in receipt of complaints from 68V about the application process, assured 68V that, "if it followed the Department's utility plan, 'there should not be a problem,'" but "[s]he did 'nothing else'" and did "nothing to prevent or rectify any of the illegitimate and bad faith conduct by the Commission members, the [City Planning] Director, and the City Attorney." 68V's answer p. 36.

But even if these employees acted negligently as described by 68V, their activity in question is the discharge of a generalized duty to the public, carrying at most only an incidental duty to any individual citizen.

1.

Ample precedent supports this conclusion. The Court of Civil Appeals has explained that a governmental body's exercise of zoning powers is a "public-service activity to be exercised for the benefit of the governmental entity and for the well-being of the governed." Payne v. Shelby Cnty. Comm'n, 12 So. 3d 71, 78 (Ala. Civ. App. 2008). As a necessary corollary, such powers "may not be exercised for the benefit of individual landowners to the exclusion of the interests and well-being of all citizens of a county of municipality." Id. Similarly, this Court has observed that enactment of a zoning plan and enforcement of existing

ordinances regarding zoning are "public-policy decisions made in connection with the City's responsibility to provide for the public's safety, health, and general welfare." Ex parte City of Muscle Shoals, 384 So. 3d at 44. Substantive immunity applies to such decisions. See id.

68V argues that consideration of development applications is a "ministerial act" and therefore beyond the scope of substantive immunity. But Alabama statutory law says otherwise, expressly "deem[ing]" the approval of a proposed plat to be "an amendment of … the municipal plan and a part thereof." § 11-52-32(b). The power to amend the municipal plan, like the passage of any zoning ordinance, is a legislative act. See Ex parte Baldwin Cnty. Plan. & Zoning Comm'n, 68 So. 3d 133, 138 (Ala. 2010) (quoting Ex parte Nathan Rodgers Constr., Inc., 1 So. 3d 41, 49 (Ala. 2008)). And again, substantive immunity applies to local legislative actions in the zoning context, just as it applies to the enforcement of zoning ordinances. See, e.g., Ex parte City of Muscle Shoals, 384 So. 3d at 42; Payne, 12 So. 3d at 80.

2.

In resisting this conclusion, 68V mistakenly relies on a nonbinding opinion in Lee v. Houser, 148 So. 3d 406 (Ala. 2013). In Lee, a three-

justice plurality of this Court, joined by two members who concurred only in the result, allowed a tort lawsuit to proceed after municipal employees actively sought to exercise "extraterritorial jurisdiction" over the property in question -- before the planning commission even enacted zoning regulations -- to delay consideration of a citizen's plat application and prevent development of the property. Id. at 415. On those unique facts, the plurality opinion reasoned that the municipal employees "seemingly lacked a public-interest reason" for their actions. Id. at 419.

In the present case, by contrast, the City's nonvolunteer employees acted (1) through its established Planning Commission, (2) without delay, (3) without an ulterior motive, and (4) in accordance with the City's established subdivision regulations. Although 68V asserts that certain employees improperly considered the Comprehensive Plan in their recommendation, the Planning Commission referenced other, independently valid reasons to deny the applications, making that allegedly invalid reason "irrelevant." Ex parte Baldwin Cnty. Plan. & Zoning Comm'n, 68 So. 3d at 146 n.4. Lee is thus distinguishable from this case, even if it were binding. Lee thus does not undermine our conclusion that the City employees' conduct here amounted to "a public-

service activity" protected under substantive immunity. Payne, 12 So. 3d at 78.

IV.

Our holding today does not leave municipal planning commissions free to grant or deny development applications arbitrarily. It does not address 68V's claims that are still pending in the circuit court. Nor does it foreclose a remedy via a mandamus petition like the one 68V chose to forgo previously. Cf. T Invs., 393 So. 3d at 63. Indeed, even today, 68V and its amici may work through the political process to influence the Planning Commission or to seek legislative change.

Instead, our holding today is narrow: Under the circumstances present in this case, the City and the Planning Commission have shown a clear legal right to immunity from 68V's negligence claim for money damages. For this reason, we grant the petition and issue a writ of mandamus directing the circuit court to enter summary judgment in favor of the City and the Planning Commission on that claim.

PETITION GRANTED; WRIT ISSUED.

Wise, Sellers, and Cook, JJ., concur.

Stewart, C.J., concurs in the result, with opinion, which McCool, J., joins.

Shaw and Bryan, JJ., concur in the result.

Mendheim, J., concurs in the result, with opinion.

STEWART, Chief Justice (concurring in the result).

I generally agree with the view expressed by Justice Mendheim, and, therefore, I concur only in the result.

McCool, J., concurs.

MENDHEIM, Justice (concurring in the result).

In my view, it is unfortunate that the concept of immunity must be broached at all in this dispute between 68V BTR Holdings, LLC ("68V"), and the City of Fairhope ("the City") and the City of Fairhope Planning Commission ("the Planning Commission"). The gravamen of the dispute is 68V's belief that the Planning Commission arbitrarily and capriciously denied 68V's development applications for the Skyline and Gables properties. Relief from such decisions by a planning commission is overwhelmingly sought by filing a petition for a writ of mandamus in a circuit court.[2]

In Boulder Corp. v. Vann, 345 So. 2d 272 (Ala. 1977), the developer plaintiff filed a declaratory-judgment complaint against the Planning Commission of the City of Mountain Brook, asking the trial court to declare that a proposed plat should have been approved. In response, the defendant members of the planning commission "asserted that

[2]See, e.g., T Invs., LLC v. City of Montgomery Plan. Comm'n, 393 So. 3d 55 (Ala. 2023); Chandler v. City of Vestavia Hills Plan. & Zoning Comm'n, 959 So. 2d 1124 (Ala. Civ. App. 2006); Mobile City Plan. Comm'n v. Stanley, 775 So. 2d 226 (Ala. Civ. App. 2000); Mobile City Plan. Comm'n v. Southern Region Devs., Inc., 628 So. 2d 739 (Ala. Civ. App. 1993); Sadie v. Tyson, 539 So. 2d 1066 (Ala. Civ. App. 1988); Noojin v. Mobile City Plan. Comm'n, 480 So. 2d 587, 590 (Ala. Civ. App. 1985).

mandamus was the exclusive remedy, [and so] the plaintiff [developer] amended its complaint and sought relief by way of mandamus." Id. at 273. On appeal, this Court held that the developer had "shown a clear legal right to the approval of its plat." Id. at 276. See, e.g., C & G Dev. v. Planning Comm'n of Homewood, 548 So. 2d 451, 453 (Ala. 1989) ("'[M]andamus will lie to compel the approval of a subdivision plan where a council, vested with the authority to approve, gives reasons for its refusal to approve that are unrelated to the question of conformance of the plan with applicable ordinances.'" (quoting Smith v. City of Mobile, 374 So. 2d 305, 308 (Ala. 1979))).

The reason relief is sought through a petition for a writ of mandamus in a circuit court is that

> "[a] planning commission's authority to regulate the subdivision of land is derived from legislative act. Smith v. City of Mobile, 374 So. 2d 305, 307 (Ala. 1979). '"In exercising its function approving or disapproving any particular subdivision plat, [a planning commission] acts in an 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."' Id. (quoting Boulder Corp. v. Vann, 345 So. 2d 272, 274 (Ala. 1977))."

T Invs., LLC v. City of Montgomery Plan. Comm'n, 393 So. 3d 55, 62-63 (Ala. 2023). In other words, a planning commission acts in an administrative capacity under legislative authority with respect to regulating the subdivision of land.[3] See § 11-52-1 et seq., Ala. Code 1975. For this reason,

> "[j]udicial review of a city planning commission's action is limited. Noojin v. Mobile City Planning Comm'n, 480 So. 2d 587 (Ala. Civ. App. 1985). ... A planning commission's decision should not be invalidated 'unless it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' Noojin, 480 So. 2d at 588."

Mobile City Plan. Comm'n v. Stanley, 775 So. 2d 226, 228 (Ala. Civ. App. 2000).

However, instead of availing itself of the relief afforded by a petition for a writ of mandamus in the circuit court, 68V first decided to commence an action in the United States District Court for the Southern District of Alabama for alleged violations of due process. After two years

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[3]This Court also has explained that "'"[s]ubdivision legislation is part of planning legislation, as is zoning; they are all predicated on the police power of the state."'" Beachcroft Props., LLP v. City of Alabastar, 949 So. 2d 899, 904 (Ala. 2006) (quoting City of Dothan v. Eighty-Four West, Inc., 822 So. 2d 1227, 1236 (Ala. Civ. App. 2001), quoting in turn City of Mobile v. Waldon, 429 So. 2d 945, 947 (Ala. 1983)).

of litigation in federal court that yielded no favorable result for 68V because the federal district court entered a summary judgment for the defendants as to all of 68V's federal claims (and declined to assert supplemental jurisdiction over 68V's state-law claims), 68V commenced the current action in the Baldwin Circuit Court.

The circuit-court action includes a claim for the alleged denial of "substantive due process" under the Alabama Constitution even though a similar claim under the United States Constitution was denied by the federal district court. The action also includes a claim that looks suspiciously like a petition for a writ of mandamus, asserting that "[t]he City and [the Planning] Commission's actions and/or inactions in denying 68V BTR's applications for the Skyline and Gables plats were arbitrary and capricious, unreasonable, not in accordance with law, and an abuse of power" and asking the circuit court to "order and declare [that] the [Planning] Commission's denials of the development plats for the Skyline and Gables properties are invalid and/or void [and] order and declare the development plats for those properties are approved."[4] The third claim

[4]In the circuit court, 68V defended its filing of a claim seeking invalidation of the Planning Commission's denials of 68V's plat

applications by citing Lee v. Houser, 148 So. 3d 406, 423 (Ala. 2013), a plurality of this Court stated:

> "The Town of Magnolia Springs and its planning commission maintain that the proper remedy was not an action seeking damages for tortious conduct but a writ of mandamus directing the planning commission to consider the application. Mandamus is an extraordinary remedy. Regardless of whether such a writ was appropriate here, Lee did nothing wrong by suing in tort. One need not seek an extraordinary remedy before seeking the ordinary remedy."

But 68V ignored the unique litigation context for the Lee Court's comments. The relevant plaintiff in Lee with respect to the above-quoted passage, Deidre Lee, had purchased property that originally was within the planning jurisdiction of Baldwin County, not the Town of Magnolia Springs. The Baldwin County Planning Commission tabled Lee's application for a subdivision plat. Shortly thereafter, jurisdiction over Lee's property switched to the newly formed planning commission of Magnolia Springs. The Magnolia Springs Planning Commission placed a moratorium on subdivisions. Lee then initiated an action against the Baldwin County Planning Commission by filing a petition for a writ of mandamus directing Baldwin County to approve her application and to enjoin Magnolia Springs from exercising jurisdiction over her property. Subsequently, the trial court allowed Lee "to add two causes of action against the Town of Magnolia Springs and its planning commission for negligent and wanton failure to consider or to approve Lee's subdivision-plat application." 148 So. 3d at 413. Those claims against Magnolia Springs were submitted to a jury, and the jury ruled in Lee's favor, awarding Lee $735,000. Thus, as the Lee Court observed, initially "Lee did first seek mandamus relief as to Baldwin County in the Baldwin Circuit Court." 148 So. 3d at 423 n.3.

alleges that "[t]he City and/or the [Planning] Commission negligently, neglectfully, carelessly, or unskillfully failed to properly consider or grant 68V BTR's application for the Skyline and Gables projects."

It is with respect to that third claim that the City and the Planning Commission seek immunity. The main opinion finds that all the defendants are entitled to immunity through a convoluted combination of volunteer immunity under § 6-5-336, Ala. Code 1975, municipal immunity derived from § 11-47-190, Ala. Code 1975, and substantive immunity that ultimately arises from this Court's decision in Rich v. City of Mobile, 410 So. 2d 385 (Ala. 1982).

In my view, there is no need to proceed beyond a proper understanding of § 11-47-190, which is the basis of 68V's negligence claim. Section 11-47-190 provides, in relevant part:

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

(Emphasis added.)

That statute clearly has in mind action or inaction by a municipal employee, not an administrative decision derived from legislative action under the imprimatur of police powers.[5]

> "For many years that section of the code [§ 11-47-190] was judicially misinterpreted, for the same section was held by this court to limit the liability of municipalities to injury suffered through 'neglect, carelessness or unskillfulness.' To construe that language to include an action for damages for errors made in quasi judicial decisions would be to expand the words beyond their normal meaning. It does not permit an action to lie against a municipality for malicious prosecution. Neighbors v. City of Birmingham, 384 So. 2d 113 (Ala. 1980). Until the legislature chooses to expand the liability of municipalities to include damages for wrongful decision making, this court will continue to limit such liability to only those injuries caused by 'neglect, carelessness or unskillfulness.'"

Ott v. Everett, 420 So. 2d 258, 260 (Ala. 1982) (emphasis added). See, e.g., Lee v. Houser, 148 So. 3d 406, 419 (Ala. 2013) (plurality opinion) ("To prevail on a claim of negligence, a party must show that another party's negligence is more than mere 'wrongful decision making.' Ott v. Everett, 420 So. 2d 258, 260 (Ala. 1982). Municipal immunity does not apply when a town's agents act negligently ....").

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[5]The main opinion itself notes that the "power to amend the municipal plan ... is a legislative act." __ So. 3d at __.

The fact that § 11-47-190 refers to actions or inactions of municipal employees or agents and not to judgments of municipal decision-making bodies is precisely why a petition for the writ of mandamus is the appropriate remedy for correcting a planning commission's approval or disapproval of subdivision application. That remedy limits the scope of review and recognizes the discretion that must be afforded to such bodies. See, e.g., Russell v. Lee, 282 Ala. 504, 508, 213 So. 2d 236, 239 (1968) (recognizing the writ of mandamus as "a special remedy" that "command[s] the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station"); Alabama State Tenure Comm'n v. Mountain Brook Bd. of Educ., 343 So. 2d 522, 524-25 (Ala. 1976) (noting that "[a] fundamental concept of judicial review of administrative action is that it is a limited review" and that mandamus is "an extraordinary remedy which, traditionally, will not lie for the purpose of review, nor to revise or control, the exercise of discretion reposed in administrative or other governmental bodies").

In short, 68V's allegation that the Planning Commission wrongly denied its applications for the Skyline and Gables plats is not a cognizable claim of "neglect, carelessness, or unskillfulness of some

agent, officer, or employee of the municipality" under § 11-47-190. Moreover, to the extent that 68V accuses some planning commissioners of acting in bad faith, § 11-47-190 immunizes those actions, as the main opinion notes. Consequently, I see no need to discuss volunteer immunity or substantive immunity in this case.

I am particularly leery of the main opinion's willingness to extend substantive immunity to the City and the Planning Commission. As I have noted, because I do not believe that a cognizable negligence claim exists against the Planning Commission under § 11-47-190, I see no need to discuss whether substantive immunity would apply in this case. However, even if someone disagrees with my interpretation of § 11-47-190, I believe the application of substantive immunity to the Planning Commission in this instance sends that doctrine down the wrong path, and I am not alone in that assessment. Indeed, the main opinion neglects to mention that the federal district court examined at length whether substantive immunity should apply in this case and, unlike the main opinion, found the arguments in favor of its application to be lacking. Because I find the federal district court's reasoning persuasive, I quote it at length here.

"'A municipality ... is generally chargeable with the negligence of its employees acting within the line and scope of their employment.' Rich v. City of Mobile, 410 So. 2d 385, 387 (Ala. 1982). The Rich Court carved out an exception to this general rule, which it termed 'substantive immunity.' Id. The doctrine, which is based on public policy considerations, 'prevent[s] the imposition of a legal duty, the breach of which imposes liability, in those narrow areas of governmental activities essential to the well-being of the governed, where the imposition of liability can be reasonably calculated to materially thwart the City's legitimate efforts to provide such public services.' Id. '[T]he substantive immunity rule of this case must be given operative effect only in the context of those public service activities of governmental entities ... so laden with the public interest as to outweigh the incidental duty to individual citizens.' Id. at 387-88. The exception must be given 'the narrowest of constructions,' and its amorphous parameters must be fleshed out 'on a case by case basis.' Id. at 387.

"The movants cite no case applying substantive immunity in the context of the enforcement of subdivision regulations. Instead, they stress that the regulations were adopted to promote the public welfare and not to benefit any individual landowner. Because that fact is presumably true of any ordinance or regulation enacted by any municipality or organ thereof, it is inadequate to demonstrate that subdivision regulations fall within the 'narrow' subset of governmental activities to which substantive immunity may attach.

"The movants point to two cases applying substantive immunity in what they contend is the analogous context of zoning ordinances. In Payne v. Shelby County Commission, 112 So. 3d 71 (Ala. Civ. App. 2008), the defendant county planning commission adopted a resolution conditionally rezoning a certain parcel from residential to office. Id. at 74. After the property was developed, a neighbor sued the county

and the planning commission for negligently 'failing to enforce [the conditions in] the rezoning resolution.' Id. at 76-77. The Payne Court ruled that substantive immunity applied. Id. at 80-81. The Court in Bordelon v. Baldwin County, [No. 20-0057-C, Oct. 28, 2022] (S.D. Ala. 2022) [(not reported in Federal Supplement)], relied on Payne without further analysis in ruling that substantive immunity extended to the issuance of a stop work order allowed under a zoning ordinance. Id. ...

"When, as here, the highest state court has not already decided the issue, a federal court sitting in diversity 'must predict how the highest court would decide th[e] case.' Molinos Valle del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1348 (11th Cir. 2011). 'Decisions of the intermediate appellate courts ... provide data for this prediction.' Id. When an intermediate appellate court has decided the issue under consideration, the federal court generally must follow its guidance, but it may decline to do so 'if persuasive evidence demonstrates that the highest court would conclude otherwise.' Id. Because it did not involve a challenge to a municipality's enforcement of subdivision regulations outside its corporate limits against a landowner attempting to subdivide its own property, Payne did not decide the issue presented here. The Court therefore is not required to follow Payne absent a persuasive showing that the Alabama Supreme Court would disagree with it. Nevertheless, the Court has reason to question whether Payne accurately reflects the Supreme Court's jurisprudence.

"The Payne Court noted that the defendant planning commission was created pursuant to state statute to provide for the public welfare, such that the exercise of zoning powers is a public service activity exercised for the benefit of the government and the governed and not for the primary benefit of individual landowners. 12 So. 3d at 78-79. The Payne Court leapt directly from this unremarkable proposition to the conclusion that neither the adoption of the rezoning resolution nor the enforcement of it supported an actionable

duty in favor of the adjacent landowner plaintiffs. Id. at 79, 80.

"The Court respectfully suggests that Rich requires a more nuanced approach. As has been said with respect to the movants' similar analysis, presumably any municipal ordinance or regulation is designed to serve the public welfare and not, in the first instance, the interests of an individual citizen. Making that the test of substantive immunity would seemingly transform this 'narrow exception[,]' [Long v. Jefferson Cnty., 623 So. 2d 1130, 1135 (Ala. 1993),] into the general rule and do to the general rule of municipal liability for negligence precisely the 'violence' that Rich forbids. 410 So. 2d at 387.

"Substantive immunity applies only to that 'narrow' subset of governmental activities that: (1) are 'essential to the well-being of the governed'; and (2) as to which 'the imposition of liability can be reasonably calculated to materially thwart the City's legitimate efforts to provide such public services.' Rich, 410 So. 2d at 387. It is only when these conditions are met that the activity under attack may be said to be 'so laden with the public interest as to outweigh the incidental duty to individual citizens.' Id. at 387-88. The Payne Court quoted these portions of Rich, 12 So. 3d at 78, but it made no discernible ruling as to either of the enumerated essential requirements for substantive immunity.

"The Payne Court relied on Hilliard v. City of Huntsville, 585 So. 2d 889 (Ala. 1991), for the proposition that, while individual citizens may benefit from a governmental activity, such individual benefit '"is merely incidental to the benefit derived by the citizens in general."' 12 So. 3d at 79 (quoting Hilliard, 585 So. 2d at 891). That proposition may satisfy the 'incidental duty' portion of Rich, but to satisfy the 'so laden' requirement, it must be further shown that the governmental activity at issue is essential to the well-being of the governed and that imposing tort liability

will predictably thwart the municipality's provision of such services.

"The Hilliard Court, unlike Payne, made these necessary determinations. The Alabama Supreme Court concluded that electrical inspections to ensure that the building code is satisfied 'are essential to the well-being of the governed.' 585 So. 2d at 892. The Court then concluded that, because cities are not compelled by law to perform such inspections, recognizing a tort duty in this area would 'ten[d] to increase the probability that the imposition of tort liability in this area would serve only to destroy the municipality's motivation or financial ability to support this important service.' Id.

"The movants have provided no guidance as to how to determine what constitutes an 'essential' governmental activity, and the Court declines to assume on their behalf that a municipality's regulation of the development of subdivisions, especially outside its corporate limits, falls within that category. Nor have the movants attempted to show that allowing a negligence claim against municipalities and their planning commissions for negligent enforcement of such regulations can reasonably be expected to 'materially thwart' their efforts to provide such services.

"The only case cited by either side that involves subdivision regulations is Lee v. Houser, 148 So. 3d 406 (Ala. 2013), on which the plaintiff heavily relies. In Lee, the lead plaintiff owned property in an unincorporated area of Baldwin County ('the County'). When the newly incorporated Town of Magnolia Springs ('the Town') learned that the plaintiff had submitted to the county planning commission an application for preliminary subdivision plat approval, it informed the County of its intention to extend its planning jurisdiction to include the plaintiff's property, prompting the County to table the plaintiff's application. The Town established a planning commission which, at its first meeting, adopted a moratorium

on subdivisions, at a time it had no rules or regulations in place with which to regulate subdivisions. The plaintiff submitted an application to the Town, which it never ruled on. After several months, while the moratorium was still pending, the plaintiff filed suit. As ultimately amended, the complaint included a claim against the Town and its planning commission for 'negligent ... failure to consider or to approve [the plaintiff's] subdivision-plat application.' The claim proceeded to trial and resulted in a verdict for the plaintiffs. 148 So. 3d at 411-13.

"On appeal, the defendants argued they were protected by substantive immunity. The Alabama Supreme Court acknowledged the Rich requirements for invoking the doctrine but focused on the defendants' tactics and motive. The Court noted that the Town 'seemingly lacked a public-interest reason for delaying the consideration of the plaintiff's plat application and for thereby thwarting the development of her private property.' Substantive immunity, the Court said, 'cannot extend to protect a municipality for the actions of its agents who sought extraterritorial jurisdiction over the private property of a citizen so that the municipality could prevent development of that property.' Because the jury 'could infer that the activities of [the defendants] were neither legitimate nor aimed at the public welfare but were meant to prevent a private citizen from developing her private property for her economic benefit as well as for the economic and social benefit of the community,' substantive immunity was unavailable. 148 So. 3d at 419-20.

"While the exact parameters of Lee may be uncertain, it appears to stand for the general proposition that a municipal defendant may not invoke successfully substantive immunity when, although it acted within a legitimate sphere of governmental activity, it did not do so by neutrally following, or attempting to follow, the applicable rules and accepting the outcome they dictated but instead bent or ignored the rules in order to achieve its desired result in a particular case. The

plaintiff argues that Lee compels the denial of the movants' motion to dismiss Count III. The movants offer several reasons to avoid this result, but none of them hit the mark.

"First, the movants discount Lee as a mere 'plurality opinion.' Lee was decided, pursuant to Alabama Rule of Appellate Procedure 16, by a panel of five Justices, out of nine on the Alabama Supreme Court. All five concurred in the result, but only three joined the opinion. 148 So. 3d at 425. This may prevent the opinion from being binding precedent, but the movants have not explained how it prevents the opinion from being indicative of how the Supreme Court would rule.

"Second, the movants argue that Lee must be limited to its peculiar facts, which included (unlike in this case) an abrupt assertion of planning jurisdiction beyond the Town's corporate limits and a failure to consider an application at all (rather than a failure to consider it fairly). That is not how judicial reasoning works. A precedent extends beyond its precise facts unless there is reason to conclude that the court's ruling was dependent on those precise facts. The movants offer no such reason, and the Court discerns none. The Lee Court expressed its reasoning three times, in the three passages quoted above, and in none of them did the Court restrict its ruling to the precise facts of the case. On the contrary, Lee emphasized that the defendants acted not in the public interest but for the purpose of preventing an individual landowner from developing her property. That is a principle extending beyond the precise methodology employed by a municipal defendant in pursuit of its illegitimate object. Given the breadth of its statements, and its failure to include a 'peculiar facts qualifier, the Court cannot conclude that Lee is limited to its precise factual scenario.

"Third, the movants argue that the amended complaint contains insufficient allegations to implicate Lee. The movants acknowledge that the amended complaint alleges

that the denials of the plaintiff's applications 'were neither legitimate nor aimed at the public welfare,' but they dismiss these allegations as mere legal conclusions. The movants assert that the amended complaint fails to allege that they acted 'for the purpose of restricting [the plaintiff's] development' and that it alleges only that they 'reached the wrong result.' The movants greatly understate the relevant allegations.

"The amended complaint expressly alleges that members of the Commission admitted on tape that there was no legitimate reason to deny the applications but that it could be done anyway, 'because they did not want Plaintiff's multi-occupancy complexes built.' The amended complaint alleges that another Commissioner admitted that the Commission denied the applications for pretextual reasons, and that the real reason for denial was that the Commission did not want lower-rent complexes like the ones the applications envisioned. The amended complaint further alleges that this Commissioner predicted the plaintiff's principal would not bring suit to challenge the denials because the Commission could retaliate by denying future applications from the principal's businesses concerning other projects. Opposition to lower-rent complexes and the clientele they would attract led the Commission to engage in a coordinated effort to deny the applications (including by adding vague, inconsistent, and unprecedented demands) 'without regard to legitimacy.' All of these allegations are incorporated in Count III.

"It is difficult to imagine that these statements fail to allege 'that the activities of [the defendants] were neither legitimate nor aimed at the public welfare but were meant to prevent a private citizen from developing [its] private property for [its] economic benefit as well as for the economic and social benefit of the community.' Lee, 148 So. 3d at 419. The cited excerpts -- which the movants ignore -- appear patently to allege that the defendants acted for the purpose of restricting the plaintiff's development and that they

manipulated and violated the rules to achieve their desired result rather than that they merely reached the wrong result. The movants' failure to address these allegations obviates further consideration of their argument.

"As with defendants generally, 'before liability for negligence can be imposed upon a governmental entity, there must first be a breach of a legal duty owed by that entity.' Hilliard, 585 So. 2d at 890. The duty alleged by the plaintiff in Count III is a duty 'to consider its application fairly.' The movants argue that there is no such duty under Alabama law, either at all or of such force as to withstand substantive immunity.

"The movants identify no Alabama authority rejecting the existence of a duty to consider a subdivision application fairly. Instead, they argue only that Lee did not affirmatively recognize such a duty, on the grounds that Lee involved a failure to consider an application at all. For reasons discussed above, it would seem difficult to distinguish an unfair non-consideration from an unfair consideration, but in any event the movants misapprehend their burden on motion to dismiss. Their task is not merely to show that a particular case did not recognize such a duty but to show either that Alabama has affirmatively rejected such a duty or that this Court, using a proper Erie[R.R. v. Tompkins, 304 U.S. 64 (1938),] analysis, should predict that the Alabama Supreme Court would reject such a duty were the question presented. Having attempted neither, the movants cannot sustain their burden.

"The movants insist that 'any duty owed regarding administration and enforcement of the Subdivision Regulations is owed to the public[,] not specifically to [the plaintiff] or any other applicant' and that only a duty 'uniquely owed' to the plaintiff can survive substantive immunity. Thus, even if there is a duty to fairly consider subdivision applications, it is owed to the public at large and either not at all to the plaintiff or not 'uniquely' to the

> plaintiff. In either event, because the duty to the plaintiff is at best 'incidental,' substantive immunity bars any claim based on a breach of the duty. However, to the extent that Lee supports a duty to fairly consider a subdivision application, it also supports a denial of substantive immunity based on a breach of that duty, since it held that substantive immunity did not apply where the jury could find a breach of duty."

68V BTR Holdings, LLC v. City of Fairhope, Civil Action No. 22-0430-WS-B, Oct. 5, 2023 (S.D. Ala. 2023) (not reported in Federal Supplement) (footnotes and record citations omitted; emphasis added).

I grant that the federal district court reached its conclusion within the confines of a motion to dismiss rather than a motion for a summary judgment and that, therefore, its view of the facts could differ from our assessment. But the main opinion's discussion of the facts is so lacking that I find that difference to be no impediment to agreeing with the central observations made by the federal district court. Application of the substantive-immunity doctrine deserves more caution and scrutiny than the main opinion provides, and, therefore, I cannot agree with its conclusion on that front.