

**Vestavia Hills
City Council Agenda
January 11, 2016
5:00 PM**

1. Call to Order
2. Roll Call
3. Invocation – Mindy Bodenhamer, Library in the Forest Foundation
4. Pledge Of Allegiance
5. Announcements and Guest Recognition
6. City Manager’s Report
7. Councilors’ Reports
8. Approval of Minutes – December 28, 2015 (Regular Meeting)

Old Business

9. Resolution Number 4783 – A Resolution Authorizing The City Manager To Fund \$599,000 For SHAC, Phase II, In Coordination With The Vestavia Hills Park And Recreation Foundation (*Public Hearing*)

New Business

New Business (Requesting Unanimous Consent)

First Reading (No Action Taken At This Meeting)

10. Ordinance Number 2625 - An Ordinance Declaring Certain Real Property As Surplus And Authorizing The City Manager To Execute And Deliver A Purchase And Sale Agreement For Said Property (*Public Hearing, postponed to January 25, 2016*)
11. Resolution Number 4784 - A Resolution Authorizing Application To ADECA For A Land And Water Conservation Fund Grant To Construct A Park At Patchwork Farms (*Public Hearing*)
12. Citizens Comments
13. Motion For Adjournment

CITY OF VESTAVIA HILLS

CITY COUNCIL

MINUTES

DECEMBER 28, 2015

The City Council of Vestavia Hills met in regular session on this date at 5:00 PM. The Mayor called the meeting to order and the City Clerk called the roll with the following:

MEMBERS PRESENT:

Mayor Alberto C. Zaragoza, Jr.
Steve Ammons, Mayor Pro-Tem
George Pierce
John Henley
Jim Sharp

OTHER OFFICIALS PRESENT:

Jeff Downes, City Manager
Patrick H. Boone, City Attorney
Rebecca Leavings, City Clerk
George Sawaya, Deputy Treasurer
Tim Holcomb, Deputy Police Chief
Jim St. John, Fire Chief
Marvin Green, Dep. Fire Chief
Brian Davis, Public Services Director
Christopher Brady, City Engineer

Invocation was given by Jim Sharp followed by the Pledge of Allegiance.

ANNOUNCEMENTS, GUEST RECOGNITION, CANDIDATES

- Mr. Pierce welcomed his 7-year old grandchild, Will Kirkpatrick, to the meeting.
- Mr. Ammons welcomed a former lacrosse player, David Delozier, to the meeting who is now playing with Birmingham,

CITY MANAGER'S REPORT

- Mr. Downes stated that the City will close on the Altadena Country Club property; approximately 70+/- acres with an appraised value of \$1.03 million. The City plans to use this property for eventual recreational development.

COUNCILORS' REPORTS

- None.

FINANCIAL REPORTS

Melvin Turner III, Finance Director, presented the financial reports for month ending November 2015. He read and explained them.

APPROVAL OF MINUTES

The minutes of December 14, 2015 (Work Session) and December 14, 2015 (Regular Meeting) were presented for approval.

MOTION Motion to dispense with the reading of the minutes of December 14, 2015 (Work Session) and December 14, 2015 (Regular Meeting) and approve them as presented was by Mr. Pierce and second by Mr. Henley. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

OLD BUSINESS

ORDINANCE NUMBER 2611

Ordinance Number 2611 – Annexation – 90-Day Final – 3579 Valley Circle, Lot 18, Block 1, Amended Map Of Dolly Ridge Estates, 2nd Addition; P. David Deusner, Owner (*Public Hearing*)

MOTION Motion to approve Ordinance Number 2611 was by Mr. Pierce. Second was by Mr. Ammons.

Mr. Pierce gave the reports for this request and the following 4 annexations. He indicated that these represent the 90-day annexation of properties which were annexed by the overnight method approximately 90 days ago. The final annexation is a follow-up to the previous annexations.

Mr. Ammons asked about Valley Circle which is 50/50 in and out of the City and wanted to ensure that the costs would be shared by Jefferson County if it needs resurfacing.

Mr. Brady stated that they would seek assistance from Jeffco at that time.

The Mayor opened the floor for a public hearing. There being no one to address the Council, the he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

ORDINANCE NUMBER 2612

Ordinance Number 2612 – Rezoning - 3579 Valley Circle, Lot 18, Block 1, Amended Map Of Dolly Ridge Estates, 2nd Addition; Rezone From Jefferson County R-1 To Vestavia Hills, R-2, Compatible Zoning For Annexation; P. David Deusner, Owner (*Public Hearing*)

MOTION Motion to approve Ordinance Number 2612 was by Mr. Pierce. Second was by Mr. Ammons.

The Mayor stated that this is the compatible zoning of the same property and asked the City Clerk to explain the rezoning/annexation process.

Ms. Leavings explained that all of these annexations are requesting rezoning to the closest and most compatible zoning that the property is presently zoned in the County pursuant to the City zoning code. This Ordinance and the ones that follow are the same compatibility requests.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

ORDINANCE NUMBER 2613

Ordinance Number 2613 – Annexation – 90-Day Final – 3527 Valley Circle, Lot 5, Block 1, Amended Map Of Dolly Ridge Estates, Second Sector; Paul and Katie Harbison, Owners (*Public Hearing*)

MOTION Motion to approve Ordinance Number 2613 was by Mr. Pierce. Second was by Mr. Henley.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

ORDINANCE NUMBER 2614

Ordinance Number 2614 – Rezoning - 3527 Valley Circle, Lot 5, Block 1, Amended Map Of Dolly Ridge Estates, Second Sector; Rezone From Jefferson County R-1 To Vestavia Hills, R-2, Compatible Zoning For Annexation; Paul and Katie Harbison, Owners (*Public Hearing*)

MOTION Motion to approve Ordinance Number 2614 was by Mr. Pierce. Second was by Mr. Henley.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

ORDINANCE NUMBER 2615

Ordinance Number 2615 – Annexation – 90-Day Final – 2615 Alta Vista Circle; Lot 6, Altadena Valley Country Club Sector; Bradley and Kelly Belew, Owners (*Public Hearing*)

MOTION Motion to approve Ordinance Number 2615 was by Mr. Pierce. Second was by Mr. Henley.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

ORDINANCE NUMBER 2616

Ordinance Number 2616 – Rezoning - 2615 Alta Vista Circle; Lot 6, Altadena Valley Country Club Sector; Rezone From Shelby County E-1 To Vestavia Hills E-2; Compatible Zoning For Annexation; Bradley And Kelly Belew, Owners (Public Hearing)

MOTION Motion to approve Ordinance Number 2616 was by Mr. Pierce. Second was by Mr. Sharp.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes Mr. Henley – yes
Mr. Ammons – yes Mr. Sharp – yes
Mayor Zaragoza –yes Motion carried.

ORDINANCE NUMBER 2617

Ordinance Number 2617 – Annexation – 90-Day Final – 2720 Alta View Drive; Brad and Molly Ainsworth, Owners (Public Hearing)

MOTION Motion to approve Ordinance Number 2617 was by Mr. Pierce. Second was by Mr. Henley.

Discussion ensued as to the correct address of the property which was 2720 Alta View and not 2700 as listed on the agenda.

Brad Ainsworth was present in regard to this request.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes Mr. Henley – yes
Mr. Ammons – yes Mr. Sharp – yes
Mayor Zaragoza –yes Motion carried.

ORDINANCE NUMBER 2618

Ordinance Number 2618 – Rezoning – 2720 Alta View Drive; Rezone From Jefferson County E-1 To Vestavia Hills E-2; Compatible Zoning For Annexation; Brad And Molly Ainsworth, Owners (Public Hearing)

MOTION Motion to approve Ordinance Number 2618 was by Mr. Pierce. Second was by Mr. Henley.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes Mr. Henley – yes
Mr. Ammons – yes Mr. Sharp – yes
Mayor Zaragoza –yes Motion carried.

ORDINANCE NUMBER 2619

Ordinance Number 2619 – Annexation – 90-Day Final – 4670 Caldwell Mill Road; Brooks and Elisabeth Souders, Owners (Public Hearing)

MOTION Motion to approve Ordinance Number 2619 was by Mr. Pierce. Second was by Mr. Sharp.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes Mr. Henley – yes
Mr. Ammons – yes Mr. Sharp – yes
Mayor Zaragoza –yes Motion carried.

ORDINANCE NUMBER 2620

Ordinance Number 2620 – Rezoning – 4670 Caldwell Mill Road; Rezone From Jefferson County E-2 To Vestavia Hills R-1; Compatible Zoning For Annexation; Brooks and Elisabeth Souders, Owners (Public Hearing)

MOTION Motion to approve Ordinance Number 2620 was by Mr. Pierce. Second was by Mr. Sharp.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes Mr. Henley – yes
Mr. Ammons – yes Mr. Sharp – yes
Mayor Zaragoza –yes Motion carried.

ORDINANCE NUMBER 2621

Ordinance Number 2621 – Rezoning – 3112 Blue Lake Drive, Lot 5, Topfield Subdivision; Rezone From Vestavia Hills R-1 (Residential) To Vestavia Hills O-1 (Office District); HD Holdings, LLC, Owner (Public Hearing)

MOTION Motion to approve Ordinance Number 2621 was by Mr. Sharp. Second was by Mr. Henley.

Mr. Downes explained that this is a request to rezone a property from residential to office for construction of an office building. He explained the transition of this particular roadway. P&Z has given it a positive recommendation with conditions to allow shared parking between the properties and is conditional upon the recordation of a map to that effect.

Mr. Sharp concurred that the Planning and Zoning Commission recommended this request with those conditions.

Brooks Harris was present in regard to the request.

Mr. Henley asked about the size of the building and indicated that the backup staff report says it is 28,000 SF. Discussion ensued into the true size of the building and that the report contained a typographical error.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

- | | |
|---------------------|------------------|
| Mr. Pierce – yes | Mr. Henley – yes |
| Mr. Ammons – yes | Mr. Sharp – yes |
| Mayor Zaragoza –yes | Motion carried. |

ORDINANCE NUMBER 2622

Ordinance Number 2622 – Conditional Use Approval – 2565 Mountain Woods Drive; Lot 16, Mountain Woods Park, 2nd Addition; Conditional Use For The Housing And Raising Of Six (6) Urban Hens With Conditions; April And Ginger Aaron-Brush, Owners (Public Hearing)

MOTION Motion to approve Ordinance Number 2622 was by Mr. Sharp. Second was by Mr. Henley.

Mr. Downes explained that this is a request for 6 urban hens. This request was recommended for approval by P&Z with conditions. He read them, including a

maximum of 6 hens; the coop shall be permanently located; no roosters; hens and/or eggs shall not be used for commercial purposes; the approval is location and resident specific; if the owner vacates the use for a year, then it is null and void; and if the owner experiences problems with predators, the owners shall contact the Police Department.

The owner was not present in regard to the request. Ms. Leavings explained that the owner had to comply with her private covenants and obtained enough signatures to file a waiver from her covenants to allow these hens. She stated that she spoke to the owner this afternoon and knew that she intended to make this meeting, but there had been a drainage problem in her yard from all of the rain of the day and she might have met with an emergency.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

ORDINANCE NUMBER 2623

Ordinance Number 2623 – Conditional Use Approval – 1793 Shades Crest Road; Conditional Use Approval For Construction Of A Guest House On Said Property With Conditions; David B. Delozier, Owner (*Public Hearing*)

MOTION Motion to approve Ordinance Number 2623 was by Mr. Sharp. Second was by Mr. Ammons.

Mr. Downes explained that this is a request for construction of a guest house in the back of this property. He stated that the property once had a guest house but it fell into disrepair and had to be torn down. The owner wants to rebuild it on the same foundation. He had it approved by the BZA years ago but didn't begin construction and now a conditional use from the approval of the new code in 2010 is required. He stated that the Planning and Zoning Commission recommended this for approval with the condition that the guest house is not leased or rented to someone who is not a member of the immediate family and if the house is again torn down, new approval would need to be obtained.

David Delozier was present in regard to the request.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
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Mr. Ammons – yes Mr. Sharp – yes
Mayor Zaragoza –yes Motion carried.

ORDINANCE NUMBER 2624

Ordinance Number 2624 – Conditional Use Approval – 1836 And 1842 Shades Crest Road; Lots 1 & 2, Bradshaw Addition To Vestavia; Conditional Use Approval To Construct Front Security Fence/Gates; Phylis And John Smith, Owners (*Public Hearing*)

MOTION Motion to approve Ordinance Number 2624 was by Mr. Pierce. Second was by Mr. Henley.

Mr. Downes explained that this is a request for construction of front security fences and gates for two new homes on Shades Crest Road. He stated that the Planning and Zoning Commission recommended approval for these with the same conditions as those homes that can install these by right, including distance from the front property line.

Mr. Ammons asked if these would be subject to DRB review. Ms. Leavings stated that they are not subject to DRB review. That’s why the Ordinance requires them to be metal and/or masonry, open and decorative in nature.

Mr. Pierce stated that these were always scrutinized by the BZA when these requests came before them.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes Mr. Henley – yes
Mr. Ammons – yes Mr. Sharp – yes
Mayor Zaragoza –yes Motion carried.

RESOLUTION NUMBER 4778

Resolution Number 4778 - A Resolution Authorizing The City Manager To Authorize Repairs To The Wald Park Swimming Pool (*Public Hearing*)

MOTION Motion to approve Resolution Number 4778 was by Mr. Ammons. Second was by Mr. Henley.

Mr. Downes explained that these repairs were bid with no responses and the City then negotiated with some vendors to negotiate a price for repair. He stated that the

Public Services Director recommended this proposal by Clearwater Pools at a cost of \$116,400. This Resolution is requesting funding from capital reserve funds.

Mr. Henley asked why no bids were submitted.

Jason Burnett, Public Services Department, stated that there was not much time allowed in the bid to get the job done before the pool would open to the public. He admitted they were late in pulling the bids together.

Mr. Ammons pointed out that these repairs are moving to diamond bright surface which is much more durable and was discussed at Park Board meeting earlier.

Andy Lockhart, Clearwater Pools, explained the surface proposed and the process to do the pool which hasn't been done is to strip it of several layers to allow a better enduring surface.

Mr. Pierce asked if there are penalties if the work isn't done on time. Mr. Downes stated that there's nothing in the proposed contract.

Mr. Pierce asked about the pool facilities and if they would wait to do first repairs to the pool house facilities first. Mr. Ammon explained the reasons to wait and do the pool now.

Tommy Coggin, Park Board member, stated that they are in 100% agreement that the pool needs to be repaired at this time.

Discussion ensued about how much would be involved to change the pool to competitive length/depth.

Mr. Pierce asked Mr. Lockhart to communicate with the City should they find any delays in the project.

The Mayor asked about the vendors on the bid list for this project.

Ms. Leavings indicated that this was a Public Works bid and was advertised, posted and published pursuant to Alabama law.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes

Mr. Ammons – yes

Mayor Zaragoza –yes

Mr. Henley – yes

Mr. Sharp – yes

Motion carried.

RESOLUTION NUMBER 4779

Resolution Number 4779 – A Resolution For Project Number STPBH-3715() [Proj. Ref. No. 100063244] Roadway And Intersection Improvements On Cahaba River Road From SR-38 (US-280) To Key Drive In Vestavia Hills For Preliminary Engineering (*Public Hearing*)

MOTION Motion to approve Resolution Number 4779 was by Mr. Ammons. Second was by Mr. Henley.

Mr. Downes explained the next 4 items on the agenda which includes several ALDOT agreements to improve Cahaba River Road with the assistance of Birmingham, Mountain Brook and Jefferson County. He explained the multi-jurisdictional project, the cost estimates, and each of the 4 proposed resolutions/contracts. He explained that Goowyn Mills and Cawood submitted proposals to do the design and engineering for the project and was approved by ALDOT. Mr. Downes stated that these agreements are conditional upon approvals by all jurisdictions.

Mr. Henley stated that the City will manage the project.

Keith Strickland, GMC, stated that the City is the driving sponsor of the project and ALDOT will have full review authority of the design. He stated that ALDOT will bid the project and hold the contract.

Mr. Boone acknowledged his opinion and review of the agreement.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

RESOLUTION NUMBER 4780

A Resolution Authorizing The Mayor And City Manager To Execute And Deliver An Agreement With Alabama Department Of Transportation For Right-Of-Way Acquisition Program For Project STPBH-3715(), Project Reference Number 100063245 For Roadway And Intersection Improvements On Cahaba River Road From SR-38 (US-280) To Key Drive In City Of Vestavia Hills (*Public Hearing*)

MOTION Motion to approve Resolution Number 4780 was by Mr. Pierce. Second was by Mr. Ammons.

Mr. Downes stated that this is the 2nd of the 4 agreements.

Discussion ensued and it was determined that the agenda had a typographical error and the project number was Proj. Ref. No. 100063245; however the Resolution was correct.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

RESOLUTION NUMBER 4781

Resolution Number 4781 – A Resolution Authorizing The Mayor And City Manager To Execute And Deliver An Agreement With Alabama Department Of Transportation For Utility And Construction Agreement For Project STPBH-3715(), Project Reference Number 100063246 And 100063247 For Roadway And Intersection Improvements On Cahaba River Road From SR-38 (US-280) To Key Drive In The City Of Vestavia Hills (*Public Hearing*)

MOTION Motion to approve Resolution Number 4781 was by Mr. Henley. Second was by Mr. Sharp.

Mr. Downes stated that this is the 3rd of the 4 agreements, which allows the utility relocations.

The Mayor opened the floor for a public hearing.

Donald Harwell, 1357 Willoughby Road, asked about the total cost of the project.

Mr. Downes explained that's unknown until all of the design is done and each jurisdiction's part is broken down. He indicated estimates show the project at \$7.2 million which will be funded at 80% by the Federal Government.

There being no one else to address the Council, the Mayor closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

RESOLUTION NUMBER 4782

Resolution Number 4782 – A Resolution Authorizing The City Manager To Execute And Deliver Multijurisdictional Agreements With The Cities Of Mountain Brook, Birmingham And Jefferson County For Project Number STPBH-3715() Cahaba River Road From SR-38 (US 280) To Key Drive (Public Hearing)

MOTION Motion to approve Resolution Number 4782 was by Mr. Pierce. Second was by Mr. Ammons.

Mr. Downes stated that this is the 4th of the 4 agreements. This agreement will bind all the jurisdictions together on this project.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

ORDINANCE NUMBER 2626

Ordinance Number 2626 – An Ordinance Authorizing The Mayor And City Manager To Execute And Deliver A General Sales Contract For The Purchase Of 0.42 Acres Of Property To Be Used As A Part Of A Proposed Alternate Access To The Recreational Fields To Be Constructed At The Former Altadena Valley Country Club (Public Hearing)

MOTION Motion to approve Ordinance Number 2626 was by Mr. Sharp. Second was by Mr. Ammons.

Mr. Downes explained that execution of this agreement will be the first leg of securing an alternate entrance to the recreational fields proposed at the Altadena Valley Country Club. He stated that this has been discussed previously and is a small part of securing the access.

The Mayor opened the floor for a public hearing. There being no one to address the Council, he closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

ORDINANCE NUMBER 2627

Ordinance Number 2627 – An Ordinance Authorizing The Operation Of Transportation Network Companies (TNCs) In The City Of Vestavia Hills, Alabama To Provide For The Permitting, Rules And Regulations For Said TNCs And To Provide Penalties For Violation Thereof (*Public Hearing*)

MOTION Motion to approve Ordinance Number 2627 was by Mr. Pierce. Second was by Mr. Henley.

Mr. Downes explained that there have been many requests for Uber to operate in the City.

Mr. Boone stated that he modeled the first draft of this proposed Ordinance after the City of Mobile and upon research, it was found that the City inspects the vehicles and charges a permit fee for their operation. He indicated that the City doesn't have the ability to do these inspections so there have been some amendments to tie this into the Business License Code and make this a business license.

The Mayor opened the floor for an amendment.

MOTION Motion to amend the Ordinance to change all references in the Ordinance to a business license and add a new NAICS code for TNCs was by Mr. Ammons. Second was by Mr. Pierce. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

Mr. Ammons expressed concerns over background checks that are conducted. He stated that the Ordinance calls for a background check to include multi-state database with validation. He stated that there is no such thing as a national background check. He requested that an Alabama statewide criminal check be done on these drivers. The Mayor opened the floor for a motion.

MOTION Motion to amend the Ordinance to change the background check to include those in the by-laws of the Park and Recreation Board was by Mr. Ammons. Second was by Mr. Pierce. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

Mr. Henley stated that this is a TNC ordinance. He stated that anyone wanting to be an Uber driver or any other TNC that personal insurance doesn't covered once a paying passenger is picked up.

Mr. Pierce stated that he is concerned that the City is not doing the inspections and wants to ensure that all TNCs are doing inspections like Uber does to ensure safety.

Mr. Henley stated the license will be Uber, not the individual drivers and that the Ordinance provides that the TNC ensures that the driver is insured.

The Mayor opened the floor for a public hearing.

Donald Harwell, 1357 Willoughby Road, stated that it should be a business license and he was glad to see the amendment. He indicated that the insurance should be commercial insurance, not personal. He also indicated the City could require an inspection by the traffic department.

Mr. Ammons stated that he knows of several persons who have used Uber with good results. All trips are rated and if a vehicle or driver gets poor ratings, they'll probably not be utilized.

There being no one else to address the Council, the Mayor closed the public hearing and called for the question. Roll call vote as follows:

Mr. Pierce – yes	Mr. Henley – yes
Mr. Ammons – yes	Mr. Sharp – yes
Mayor Zaragoza –yes	Motion carried.

FIRST READING (NO ACTION TO BE TAKEN AT THIS MEETING)

The Mayor stated that the following Resolutions and/or Ordinances will be presented at a public hearing at the Council's next regularly scheduled meeting on January 11, 2016 at 5 PM.

- Ordinance Number 2625 - An Ordinance Declaring Certain Real Property As Surplus And Authorizing The City Manager To Execute And Deliver A Purchase And Sale Agreement For Said Property (*Public Hearing, postponed to January 11, 2016*)
- Resolution Number 4783 – A Resolution Authorizing The City Manager To Fund \$599,000 For SHAC, Phase II, In Coordination With The Vestavia Hills Park And Recreation Foundation

CITIZENS COMMENTS

The Mayor opened the floor for citizen comments.

- Patrick Boone explained the public works bidding procedure and the process of advertising the project pursuant to Alabama law.

MOTION Motion to adjourn was by Mr. Ammons and second was by Mr. Henley.
Meeting adjourned at 6:52 PM.

Alberto C. Zaragoza, Jr.
Mayor

ATTESTED BY:

Rebecca Leavings
City Clerk

RESOLUTION NUMBER 4783

A RESOLUTION AUTHORIZING THE CITY MANAGER TO FUND \$599,000 FOR SHAC, PHASE II IN COORDINATION WITH THE VESTAVIA HILLS PARK AND RECREATION FOUNDATION

WHEREAS, the Vestavia Hills Park and Recreation Foundation has worked collaboratively with the Vestavia Hills Park and Recreation Board to plan and design the second phase of the Sicard Hollow Park (SHAC); and

WHEREAS, this Phase II includes trails, exercise equipment, pavilions, a splash pad and other park amenities at an estimated cost of \$1,702,000; and

WHEREAS, the Foundation has agreed to fund most of the expense and requests that the City funds an amount not to exceed \$599,000; and

WHEREAS, the City has funded said expense within the current fiscal year budget totaling \$100,000 and the City Manager has recommended the remaining \$499,000 to be funded from the City's Capital Reserve Fund; and

WHEREAS, the Mayor and City Council have reviewed the request and feel it is in the best public interest to accept the recommendation of the City Manager.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:

1. The City Manager is hereby authorized to fund the City's portion of the second phase of the SHAC park improvements in an amount not to exceed \$599,000 (\$100,000 funded from the current fiscal year budget and the remaining \$499,000 funding from the City's Capital Reserve fund); and
2. This Resolution Number 4783 shall become effective immediately upon adoption and approval.

ADOPTED and APPROVED this the 11th day of January, 2016.

Alberto C. Zaragoza, Jr.
Mayor

ATTESTED BY:

Rebecca Leavings
City Clerk

Sicard Hollow Park	BUDGET	CITY	Foundation
General Conditions	\$46,000	\$46,000	\$0
Parking (Handicap Only)	\$16,000	\$16,000	\$0
Pavilion, Plaza, Restrooms, Paving	\$382,000	\$210,000	\$172,000
Trails (6-ft wide)	\$235,000	\$0	\$235,000
Playground, Fitness	\$200,000	\$0	\$200,000
Splash Pad	\$127,000	\$0	\$127,000
Landscape, Irrigation	\$195,000	\$75,000	\$120,000
Utilitiles, Electric	\$216,000	\$216,000	\$0
Contingency, Design, Phase 2	\$285,000	\$36,000	\$249,000
TOTALS	\$1,702,000	\$599,000	\$1,103,000

<100,000> current budget
499,000

ORDINANCE NUMBER 2625

AN ORDINANCE AUTHORIZING AND DIRECTING THE SALE OF REAL ESTATE, MORE PARTICULARLY DESCRIBED AS 1280 MONTGOMERY HIGHWAY, VESTAVIA HILLS, ALABAMA.

THIS ORDINANCE NUMBER 2625 is approved and adopted by the City Council of the City of Vestavia Hills, Alabama on this the 28th day of December, 2015.

WITNESSETH THESE RECITALS:

WHEREAS, Title 11-40-1, *Code of Alabama, 1975*, declares municipalities corporate and gives them the power to contract and be contracted with; and

WHEREAS, Title 11-43-56, *Code of Alabama, 1975*, provides that the City Council shall have the management and control of the finances and all of the property, real and personal, belonging to the City; and

WHEREAS, Title 11-47-20, *Code of Alabama, 1975*, provides that the City Council may, by ordinance to be entered in its minutes, direct the disposal of any real property not needed for public or municipal purposes and direct the Mayor to make title thereto, and a conveyance made by the Mayor in accordance with such ordinance invests the grantee with the title of the municipality; and

WHEREAS, Title 11-43A-28, *Code of Alabama, 1975*, provides that the City Manager shall be the head of the administrative branch of the government of the City of Vestavia Hills and shall be responsible to the City Council for the proper administration of all municipal affairs; and

WHEREAS, Title 11-43A-48, *Code of Alabama, 1975*, provides that all contracts for the City of Vestavia Hills shall be made and approved by ordinance and signed in the name of the City of Vestavia Hills by the mayor and countersigned by the city manager; and

WHEREAS, Title 11-45-8(b), *Code of Alabama, 1975*, provides that if an ordinance is published by posting, then in such event said ordinance shall take effect five days thereafter; and

WHEREAS, the City of Vestavia Hills, Alabama (“City”) is the owner of real property situated in the City of Vestavia Hills, Jefferson County, Alabama, which said

real estate shall hereinafter be referred to as the “subject property” and is more particularly described as follows:

Public Works/City Shop Facility located at 1280 Montgomery Highway;
2.34 acres, more or less; and

WHEREAS, BAMA Custard, LLC, organized in the State of Kansas and qualified to do business in the State of Alabama (“Purchaser”), has requested that the City declare said property as surplus and offer for sale to the Purchaser; and

WHEREAS, the City finds and determines that it is willing to accept the offer by BAMA Custard, LLC; for an amount equivalent to One Million, Two-Hundred Thousand Dollars (\$1,200,000) pursuant to the terms and conditions detailed in an Agreement for Purchase and Sale of Real Estate (“Agreement”); a copy of which is marked as Exhibit A, attached to and incorporated into this Ordinance Number 2625 as though written fully therein; and

WHEREAS, the City Council of the City of Vestavia Hills, Alabama finds and determines that the subject property is not needed for municipal or public purposes; and

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:

1. The subject property is found and determined to not be needed for public or municipal purposes by the City of Vestavia Hills and is hereby declared as surplus property all in accordance with the requirements of Title 11-47-20, *Code of Alabama, 1975*.

2. The Mayor and City Manager are hereby authorized and directed to execute and deliver all documents required to close said sale for and on behalf of the City of Vestavia Hills, Alabama pursuant to the terms and conditions as detailed in the attached Exhibit A; and

3. A copy of said real estate closing documents, along with said payment, will be submitted upon closing and kept on file in the office of the City Clerk of the City of Vestavia Hills, Alabama for inspection by members of the general public.

4. Upon approval, adoption and enactment of this Ordinance Number 2625 the Mayor and City Manager are hereby authorized and directed to take any and all legal

action necessary to close the sale of the subject property all in accordance with the terms, provisions and conditions previously described.

5. This Ordinance shall become effective upon its approval, adoption, enactment and publication by posting as set forth in Title 11-45-8(b), *Code of Alabama, 1975*.

6. If any part, section or subdivision of this Ordinance shall be held unconstitutional or invalid for any reason, such holding shall not be construed to invalidate or impair the remainder of this Ordinance which shall continue in full force and effect notwithstanding such holding.

DONE, ORDERED, APPROVED and ADOPTED this the 11th day of January, 2016.

CITY OF VESTAVIA HILLS, ALABAMA

By _____
Alberto C. Zaragoza, Jr.
Mayor

ATTESTED BY:

Rebecca Leavings
City Clerk

CERTIFICATION:

I, Rebecca Leavings, as City Clerk of the City of Vestavia Hills, Alabama, hereby certify that the above and foregoing copy of 1 (one) Ordinance # 2625 is a true and correct copy of such Ordinance that was duly adopted by the City Council of the City of Vestavia Hills on the 28th day of December, 2015 as same appears in the official records of said City.

Posted at Vestavia Hills City Hall, Vestavia Hills New Merkle House, Vestavia Hills Civic Center and Vestavia Hills Library in the Forest this the _____ day of _____, 2015.

Rebecca Leavings
City Clerk

STATE OF ALABAMA

JEFFERSON COUNTY

AGREEMENT FOR PURCHASE AND SALE OF REAL ESTATE

THIS AGREEMENT FOR PURCHASE AND SALE OF REAL ESTATE (“the Agreement”), is hereby made and entered into as of the ___ day of December, 2015 by and between the City of Vestavia Hills, Alabama, an Alabama municipal corporation (hereinafter referred to as “Seller”), and BAMA Custard, LLC, organized in the State of Kansas and qualified to do business in the State of Alabama (hereinafter referred to as “Purchaser”).

WITNESS THESE RECITALS:

WHEREAS, the Seller owns a tract of land consisting of approximately 2.34 acres, more or less, situated at 1280 Montgomery Highway in the City of Vestavia Hills, Jefferson County, Alabama, more particularly described in Section 2 below (hereinafter referred to as “Property”); and

WHEREAS, Purchaser has made an offer to purchase the Property for the purchase price set forth in Section 3 below; and

WHEREAS, Title 11-47-20, *Code of Alabama, 1975*, provides that the City Council may, by ordinance to be entered on its minutes, direct the disposal of any real property not needed for public or municipal purposes and direct the Mayor to make title thereto, and a conveyance made by the Mayor in accordance with such ordinance invests the grantee with the title of the municipality; and

WHEREAS, Title 11-43A-28, *Code of Alabama, 1975*, provides that the City Manager shall be the head of the administrative branch of the government of the City of Vestavia Hills and shall be responsible to the City Council for the proper administration of all municipal affairs; and

WHEREAS, Title 11-43A-48, *Code of Alabama, 1975*, provides that all contracts for the City of Vestavia Hills shall be made and approved by ordinance and signed in the name of the City of Vestavia Hills by the Mayor and countersigned by the City Manager; and

WHEREAS, Title 11-45-8(b), *Code of Alabama, 1975*, provides that if an ordinance is published by posting, then in such event said ordinance shall take effect five days thereafter; and

WHEREAS, on the _____ day of December, 2015, the City Council of the City of Vestavia Hills, Alabama enacted Ordinance Number _____ finding and determining that the Property is not needed for public or municipal purposes and that the Mayor and City Manager are authorized and directed to execute and deliver this Agreement for Purchase and Sale of Real Estate and any and all other legal documents necessary to close the sale pursuant to the terms, provisions and conditions of said Agreement.

Agreement for Purchase and Sale of Real Estate
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NOW, THEREFORE, in consideration of the premises, the mutual covenants hereinafter contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties hereto, Seller and Purchaser hereby mutually covenant and agree as follows:

1. **PURCHASE AND SALE.** For and in consideration of One and No/100 Dollars (\$1.00) in hand paid by Purchaser to Seller and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Seller, Seller agrees to sell and Purchaser agrees to purchase all (and not less than all) of the Property for the Purchase Price (as defined below) and on the terms and conditions hereinafter set forth.

2. **PROPERTY.** The Property is situated at 1280 Montgomery Highway in the City of Vestavia Hills, Jefferson County, Alabama and consists of approximately 2.34 acres more or less. The Property is presently used by the Seller as a public works facility and is commonly referred to as the "City Shop" property. The legal description of the Property to be conveyed by Seller to Purchaser shall be determined by the survey as required by Section 7 of this Agreement.

3. **PURCHASE PRICE.** The purchase price for all of the Property shall be One Million Two Hundred Thousand and No/100 Dollars (\$1,200,000.00) (the "Purchase Price").

4. **PAYMENT OF PURCHASE PRICE.** The payment of the Purchase Price shall be paid by the Purchaser to the Seller as follows:

A. **EARNEST MONEY ("THE EARNEST MONEY"):** Earnest Money in the amount of Twenty Thousand Dollars (\$20,000.00) shall be paid by Purchaser concurrently with the execution and delivery of this Agreement. The Earnest Money shall be paid to Land Title Company of Alabama, Inc. ("title company"), 600 – 20th Street North in the City of Birmingham, Alabama 35203.

The title company shall deposit said earnest money in an interest-bearing account and pay the same to the Seller at closing.

B. **CASH ON CLOSING THIS SALE:** The entire remaining balance of the Purchase Price shall be paid to Seller by Purchaser in cash or immediately available funds at closing.

5. **CLOSING AND CLOSING DATE.** Subject to the terms, provisions and conditions of this Agreement, the closing of the sale and purchase of the Property (the "Closing") shall occur on or before the date that is fifteen (15) days after the expiration of the Approval Period or earlier at Purchaser's election, as hereinafter defined (the "Closing Date").

6. **CONVEYANCE.** Seller agrees to convey the Property to Purchaser by statutory warranty deed (the "Deed") at the Closing, subject to the Permitted Exceptions (as herein defined).

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7. **SURVEY.** Within thirty (30) days after the Effective Date, Seller, at Seller's expense, shall cause to be prepared by a surveyor selected by Seller (the "Surveyor") a boundary survey of the Property (the "Survey") and shall provide a copy of the Survey to Purchaser. The legal description as prepared by the Surveyor shall be the legal description of the Property used in the Deed described in paragraph 6 above and the Title Policy described in paragraph 8 hereof.

8. **TITLE INSURANCE.** Seller shall, within thirty (30) days after the Effective Date, secure a title commitment (the "Title Commitment") naming Purchaser as the proposed insured on a Chicago Title Insurance Company Standard Form Owners Policy issued by Land Title Company of Alabama, Inc. as agent for Chicago Title Insurance Company (the "Title Agent") for the Property described in Section 2 hereof in the amount of the Purchase Price (the "Title Policy") subject to the following permitted exceptions (a) easements, covenants and other encumbrances of record, (b) mineral and mining rights not owned by Seller, (c) matters that would be disclosed by a current survey of the Property.

9. **SELLER'S RESPONSIBILITIES.**

A. **ZONING AND ZONING CLASSIFICATION:**

1. **Contract Zoning:** Contract zoning is prohibited in Alabama. In *Haas v. City of Mobile*, 265 So.2d 564 (Ala.1972), the Supreme Court adopted the definition of contract zoning from an article entitled "Zoning by Contract with Property Owner" by Ralph W. Crolley and C. McKim Norton, 133 New York Law Journal 4 (1955), as follows:

"The principal involved may be simply stated. A municipality has no power to make any agreement or deal which will in any way control or embarrass its legislative powers and duties. Neither the police power of the state itself nor that delegated by it to a municipality is subject to limitation by private contract; nor is the exercise of such power to be alienated, surrendered or limited by any agreement or choice. Zoning of property by a municipality being legislative in character cannot be bargained or sold. The rezoning of a parcel of property by a municipality based in any way upon an offer or agreement by an owner of property is inconsistent with, and disruptive of, a comprehensive zoning plan."

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B. PURCHASER'S INTENDED USE OF PROPERTY: The Purchaser intends to use the Property for a 10,100 square foot ± multi-tenant building, which will include a 3,700 square foot Freddy's Frozen Custard & Steakburgers with drive-through, along with space for additional restaurant and other retail shops to be approved by Seller in writing.

C. PRESENT ZONING CLASSIFICATION: The Property is presently zoned Institutional pursuant to the *City of Vestavia Hills Zoning Code*, which does not permit the Property to be used for restaurants and retail shops.

D. B-2 GENERAL BUSINESS DISTRICT: The City of Vestavia Hills Zoning Ordinance Number 2331 in Section 6.4.1 (Table 6) permits the operation of a restaurant and retail shops in a district zoned B-2 (General Business District).

E. REZONING APPLICATION: The Seller shall, within ten (10) days after the Effective Date of this Agreement, apply for a B-2 zoning classification, which will allow the Property to be used for a restaurant and retail shops.

F. APPLICATION FOR GENERAL BUSINESS B-2 DISTRICT ZONING CLASSIFICATION: Purchaser covenants and agrees, if requested by Seller, to join with Seller in the execution of a B-2 Zoning Application and Development Plan for the Property subjecting the same to a B-2 zoning classification so long as such zoning will allow the Property to be used for Purchaser's intended uses of a 3,700 square foot Freddy's Frozen Custard & Steakburgers with drive-through along with space (approximately 6,400 square feet for additional restaurant/retail shops).

G. AUTOMATIC CANCELLATION AND TERMINATION: If the City has not zoned or rezoned the Property so as to permit said Property to be used for a restaurant use within ninety (90) days of the effective date of this Agreement, then in such event this Agreement shall automatically be cancelled and terminated and the Earnest Money heretofore paid by Purchaser and accrued interest shall be refunded in full.

H. NO CONTRACT ZONING: Nothing contained herein shall be construed as contract zoning by and between the City of Vestavia Hills, Alabama, as Seller, and Bama Custard, LLC, as Purchaser.

I. RESURVEY AND FINAL PLAT MAP: This sale is subject to and contingent upon the Vestavia Hills Planning and Zoning Commission approving a resurvey and final plat map of the Property prior to the expiration of the Inspection Period. The plat shall be designed by Purchaser. Both Seller and Purchaser expressly agree:

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(i) that the Vestavia Hills Planning and Zoning Commission shall approve or disapprove the requested plat within thirty (30) days after submission and a public hearing on the matter as required by Title 11-52-32, *Code of Alabama, 1975*; and

(ii) that the Supreme Court of Alabama decided the case of *Smith v. City of Mobile*, 374 So.2d 305, in 1979 and held that a Planning and Zoning Commission must approve a plat if the plat meets all of the requirements of the City Subdivision Regulations.

The cost of said resurvey shall be paid by Seller. If the Vestavia Hills Planning and Zoning Commission fails or refuses to approve a resurvey and final plat map by said deadline, then in such event this Agreement shall automatically terminate and the Earnest Money and any accrued interest shall be refunded in its entirety to Purchaser.

J. RESTRICTIVE COVENANTS LIMITING USE OF PROPERTY TO PUBLIC PURPOSES: Seller shall provide to Purchaser within ninety (90) days following the Effective Date a written legal opinion from the City Attorney, that the restrictive covenants appearing in the Deed, dated December 29, 1960, which said Deed was filed in the office of the Judge of Probate of Jefferson County, Alabama on April 10, 1961 and recorded at Deed 6590, Page 182, limiting the use of the Property to only public purposes has now expired and is no longer in full force and effect. If the City Attorney has not written such opinion and delivered a copy thereof to Purchaser within ninety (90) days following the effective date of this Agreement, then in such event this Agreement shall automatically be cancelled and terminated and the Earnest Money and any accrued interest shall be returned to Purchaser.

K. NOTICE OF LIMITATION OF USE: Seller shall use its best efforts to cause the limitation of use of the Property to public outdoor recreation uses as described in that Notice of Limitation of Use filed in the office of the Judge of Probate of Jefferson County, Alabama on August 27, 1979 and recorded at Real 1806, Page 437, be neutralized and released from the Property so that the said Property may be developed by the Purchaser for its intended use described above. If the Seller is unsuccessful in neutralizing and having said limitation of use released from the Property within ninety (90) days from the Effective Date of this Agreement, then in such event this Agreement shall be cancelled, terminated and the Earnest Money and any accrued interest shall be refunded in its entirety to the Purchaser.

L. NEW PUBLIC WORKS FACILITY: As of the date of the execution and delivery of this Agreement, the Seller is in the process of seeking those approvals necessary to relocate the Public Works and City Shop Facilities to a location in the Liberty Park community section of the City of Vestavia Hills. If the Seller is unable to obtain any and all approvals necessary to relocate said Public Works and City Shop Facilities within ninety (90) days following the effective date of this Agreement, then in such event the Seller shall have the right to cancel and terminate this Agreement and the Earnest Money and any accrued interest shall be returned to the Purchaser.

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10. **INSPECTIONS:** Purchaser, or Purchaser's representatives, shall have the right to enter the Property for the purpose of inspection of the same, and/or making boundary line and topographical surveys of the same, and/or making soil tests thereon, and/or in general observing and investigating the condition of the Property. Purchaser agrees to indemnify Seller from and against any liability that results from Purchaser performing any of its inspections as provided herein, and such indemnity shall survive any termination of this Agreement.

11. **INSPECTION PERIOD:** Purchaser shall have a period of forty-five (45) days following the rezoning of the Property to a B-2 (General Business District) ("Inspection Period") to determine, either personally or through or with a representative of Purchaser's choosing, any and all conditions of the Property (including without limitation the condition of all improvements thereon) material to Purchaser's decision to purchase the Property. The determination shall include, without limitation, Purchaser satisfying itself as to title matters, soil testing, survey matters, structural matters, zoning matters, subdivision regulations, engineering and site planning, environmental matters, specifically including, but not limited to Phase I ESA, existing contracts and financial matters affecting the Property, all soil, landscaping and other physical conditions of the Property, availability and sufficient quantities of all utilities, and all additional matters that Purchaser believes relevant, in its sole and absolute discretion, in determining whether or not to purchase the Property. Purchaser, at Purchaser's sole discretion, for any reason or no reason, shall have the right and option to cancel this Agreement by giving written notice of termination to Seller no later than the last day of the Inspection Period, in which the right and option to cancel this Agreement by giving written notice of termination to Seller no later than the last day of the Inspection Period, in which event this Agreement shall be of no further force or effect except for any indemnity or other obligations that expressly survive, and the Earnest Money shall be refunded to Purchaser. If Purchaser cancels and terminates this Agreement prior to the expiration of the Inspection Period, then in such event the Earnest Money shall be refunded by the Seller to Purchaser in full.

12. **APPROVAL PERIOD:** Purchaser shall have up to one hundred twenty (120) days following the Inspection Period to obtain governmental site plan approval for Purchaser's intended use of the Property, including drive-through facility, and to obtain appraisal satisfactory to Purchaser and its lender. Purchaser shall have one thirty (30) day extension during which Purchaser shall have the right to terminate the Agreement with full refund of Earnest Money and accrued interest to Purchaser. Purchaser shall regularly inform Seller as to the progress of such approvals. If site does not appraise for the contract amount, then Purchaser may either terminate the Purchase Agreement and recover the Earnest Money deposit, re-negotiate the Sales Price or waive this condition and proceed with closing.

13. **ENVIRONMENTAL CONCERNS:** Seller has no actual knowledge that the Property has in the past been used or is presently used for the handling, storage, manufacturing, refining, transportation or disposal of "toxic material", "hazardous substances" or "hazardous waste". The terms "hazardous waste", "hazardous substances" and "toxic material" include, without limitation, any flammable explosives, radioactive materials, hazardous materials, hazardous wastes,

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hazardous or toxic substances or related materials defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 USC §960, et seq.), the Hazardous Materials Transportation Act, as amended (42 USC §1801, et seq.), the Resource Conservation and Recovery Act, as amended (42 USC §9601, et seq.), the regulations adopted and publications promulgated pursuant to the foregoing and any other federal, state or local environmental law, ordinance, rule or regulation. Furthermore, Seller has not received a summons, citation, directive, letter or other communication, written or oral, from any governmental authority as to any of the above environmental concerns. Notwithstanding the above, Purchaser acknowledges that the Seller has used the Property for the operation of the City of Vestavia Hills, Alabama Public Works and City Shop facilities.

14. CONDITION OF PROPERTY: Purchaser acknowledges and agrees that:

A. Seller has not made and does not make any covenant, representation of warranty, either expressed or implied, regarding the physical condition of the Property or any portion thereof, the suitability of the Property for any particular purpose or use whatsoever, utility availability for the Property, whether the Property is subject to surface or subsurface contamination by toxic or hazardous waste or with respect to any other matters affecting the Property or Purchaser's contemplated use thereof;

B. Purchaser has been given the absolute and unfettered right during the Inspection Period to conduct such Inspections of the Property as Purchaser, in its sole discretion, may determine necessary in order to satisfy itself of all conditions and other aspects of the Property; and

C. Purchaser has available to it such resources, expertise, consultants and advisors so that it can make a sound and reasonable judgment as to the condition of the Property as well as to all economic conditions, suitability requirements and all other matters affecting the use, development and ownership of the Property. Purchaser acknowledges and agrees that the Property is to be sold and conveyed to, and accepted by, Purchaser in its present condition, "AS IS, WHERE IS AND WITH ALL FAULTS," and Purchaser hereby assumes the risk that adverse physical characteristics and existing conditions may have not been revealed by the Inspections.

15. EXISTING DOCUMENTS, SURVEY AND TITLE INSURANCE: Within ten (10) days following the Effective Date of this Agreement, the Seller agrees to provide Purchaser, at Seller's expense, and no later than 5:00 p.m. (Birmingham, Alabama time) on said date copies of all existing surveys, existing title insurance policies, existing environmental reports, and other documentation in any way relating to the Property that are in the possession of the Seller or the Seller's agents.

16. CLOSING COSTS: The Closing shall be held at the City of Vestavia Hills Municipal Center. The closing attorney shall be Patrick H. Boone.

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A. **CLOSING COSTS FOR SELLER:** The Seller shall pay the following costs:

- (1) Title insurance premium.
- (2) Real estate broker's fee described in Section 20 below.
- (3) Legal fee to Seller's attorney.
- (4) Cost of surveying the Property.

B. **CLOSING COSTS FOR PURCHASER:** The Purchaser shall pay the following closing costs:

- (1) The fee for recording the deed.
- (2) Legal fee to Purchaser's attorney.
- (3) Cost of due diligence.
- (4) Financing costs.
- (5) Cost incurred for site plan approval.

17. **TAXES:** The Property is exempt from ad valorem taxes and there shall be no proration of ad valorem taxes for the Property at the Closing.

18. **ASSIGNMENT:** Purchaser may not assign this Agreement or any of its rights hereunder without the express written consent of Seller. Any assignment in violation of the restriction on assignment in this Section 18 shall be void and of no force and effect. Notwithstanding the foregoing, Purchaser may assign all of its rights hereunder to a wholly owned subsidiary of Purchaser. In no event shall Purchaser be released from its duties and obligations hereunder unless expressly released in writing by Seller.

19. **POSSESSION:** Possession of the Property shall be given on the Closing Date.

20. **BROKER:**

A. **PURCHASER:** The Purchaser is represented in this contemplated transaction by SRS Real Estate Partners and Seller shall be responsible for paying the real estate broker/agent commission to said SRS Real Estate Partners in the amount of five percent (5%) of the Purchase Price.

B. **SELLER:** The Seller is represented in this contemplated transaction by Retail Specialists, LLC and Seller shall be responsible for paying said Retail Specialists, LLC pursuant to the Listing Agreement, dated April 6, 2015, by and between Seller and Retail Specialists, LLC.

21. **NOTICES:** All notices and demands to be given or made hereunder shall be in writing and shall be given by (i) personal or hand delivery, (ii) nationally recognized express overnight delivery service (with charges therefor prepaid, or (iii) certified or registered mail, return receipt requested (with postage therefor prepaid). Notices shall be deemed received upon (a) receipt,

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if hand or personally delivered, (b) the next business day after the notice has been deposited with a nationally recognized express overnight delivery service, or (the third business day after the notice has been deposited with the United States Postal Service. Notices shall be provided to the parties at the follow addresses:

IF TO SELLER:

City of Vestavia Hills, Alabama
1032 Montgomery Highway
Vestavia Hills, Alabama 35216
Attention: Alberto C. Zaragoza, Jr., Mayor
Fax (205) 978-0189
Email: bzaragoza@vhal.org

and

City of Vestavia Hills, Alabama
1032 Montgomery Highway
Vestavia Hills, AL 35216
Attention Mr. Jeff Downes, City Manager
Fax (205) 978-0189
Email: jdownes@vhal.org

With copies to:

Patrick H. Boone
215 Richard Arrington Jr., Blvd. N., Suite 705
Birmingham, Alabama 35203-3720
Fax (205) 324-2295
Email: patrickboone@bellsouth.net

IF TO PURCHASER:

BAMA Custard, LLC
916 North Maxwell Street
McPherson, Kansas 67640
Attention:
Fax: (205)
Email:

With a copy to:

Fax:
Email:

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IF TO TITLE COMPANY: Land Title Company of Alabama
600 North 20th Street, Suite 100
Birmingham, Alabama 35203
Attention:
Fax: (205) 226-9280
Email:

Either party hereto may change the address to which it is to receive notice or the representative to whom notice is to be given by written notice to the other part in the manner set forth above.

22. DEFAULT AND REMEDIES:

A. In the event that Seller shall fail to consummate the transaction as contemplated herein for any reason other than Purchaser's default, then Purchaser may, as its sole and exclusive remedy, either (i) enforce this Agreement and the purchase and sale transaction contemplated herein by specific performance or (ii) terminate this Agreement, whereupon the Earnest Money paid to Seller and accrued interest shall be promptly returned to Purchaser, this Agreement shall be deemed cancelled and terminated and, except for the indemnification obligations of Purchaser set forth in Section 10 above, neither party shall have any further obligation or liability to the other hereunder. Purchaser hereby expressly waives any right to seek or obtain any monetary judgment or damages against Seller in the event of any default hereunder by Seller and acknowledges and agrees that no other damages, rights or remedies shall be collectible, enforceable or available to Purchaser.

B. If, at any time after the expiration of the Inspection Period, Purchaser shall fail to perform its obligation to close the transaction contemplated herein for any reason other than Seller's default, then the Earnest Money shall be delivered to Seller as liquidated damages in which event this Agreement shall automatically be deemed terminated and cancelled and, except for the indemnification obligations of Purchaser set forth in Section 10 above, neither party shall have any further obligation or liability to the other hereunder. Because of the difficulty, inconvenience and uncertainty of ascertaining actual damages, no other damages, rights or remedies shall in any case be collectible, enforceable or available to Seller and Seller agrees to accept and retain the Earnest Money as its total damages and relief hereunder in the event Purchaser fails to close the purchase and sale transaction contemplated herein.

C. Both Seller and Purchaser contemplate that Purchaser will incur due diligence expenses for permitting and/or site plan approval (the "costs") during the Inspection Period set forth in Section 11 hereof and the approval period as set forth in Section 12 hereof. If this Agreement is cancelled and terminated by Seller for any of the following reasons, then in such event Seller shall not be liable to Purchaser for the reimbursement of any portion or all of said costs:

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(i) The failure of Seller, within ninety (90) days following the effective date, to have the limitation of use filed in the office of the Judge of Probate of Jefferson County, Alabama on August 27, 1979 and recorded at Real 1806, Page 437 be removed, released and/or neutralized so as to enable Purchaser to use the Property for restaurant and other retail businesses; or

(ii) If the Property is not rezoned, within ninety (90) days following the effective date, to a zoning classification that will allow Purchaser to use the Property for development and operation of a restaurant and/or other retail businesses; or

(iii) If the Vestavia Hills Planning and Zoning Commission finds and determines that the Application for Resurvey and plat map does not meet the requirements of the Rules and Regulations of the City of Vestavia Hills Zoning Regulations and, within ninety (90) days following the effective date, denies the said Application for Resurvey and plat map as designed by Purchaser; or

(iv) If the Seller, within ninety (90) days following the effective date, fails for any reason whatsoever to obtain any and all approvals necessary for the relocation, construction and operation of a Public Works and City Shop Facility in a location situated in the Liberty Park community of the City of Vestavia Hills, Alabama.

Should any of the events described in this Section 22-C(i), (ii), (iii) and (iv) occur, then in such event this Agreement shall automatically be cancelled and terminated and any and all Earnest Money plus accrued interest shall be returned to Purchaser.

However, if Seller fails to close the sale of this Property pursuant to this Agreement for any other reason and through no fault of Purchaser, then in such event Seller shall be liable to Purchaser for the payment of said costs up to Seventy-five Thousand Dollars (\$75,000.00); provided, however, that the costs were necessarily incurred and further that the Purchaser provide Seller with evidence of prior payment by Purchaser.

Anything contained in this Agreement to the contrary notwithstanding, the Seller and Purchaser agree that if this sale closes and Seller conveys title to Purchaser pursuant to this Agreement, then in such event Seller shall not be obligated for the payment of any portion or all of said costs.

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23. MISCELLANEOUS

A. GOVERNING LAW: This Agreement and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of Alabama. The jurisdiction and venue for the resolution of any dispute shall be in Jefferson County, Alabama.

B. BINDING AGREEMENT: This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

C. SURVIVAL: All representations and warranties of this Agreement shall survive the Closing, as shall any covenants for performance after Closing.

D. TIME OF THE ESSENCE: Time is of the essence of this Agreement.

E. NO WAIVER: The failure of either party to exercise any rights under this Agreement shall not constitute a waiver of any right, nor excuse the other party's full performance. No express waiver of any matter shall affect any other matter under this Agreement. Express waivers are only effective if in writing.

F. CONSTRUCTION OF TERMS: Descriptive headings are for convenience only and shall not control or affect the meaning or construction of any provision. Any ambiguities of this Agreement shall be construed fairly and equitably regardless of the participation of either party in drafting this Agreement. The reference in terms to gender and number shall be modified as may be appropriate.

G. SEVERABILITY: In case of any of the provisions of this Agreement shall for any reason be held invalid, illegal or unenforceable by any court of competent jurisdiction in any respect, the remaining provisions shall remain in effect and the Agreement be performed in a fair and equitable manner as to any uncertainties arising from the unenforceable provisions.

H. DATES: If any date provided in this Agreement falls on a Saturday, Sunday or holiday, the date shall be the next business day.

I. EXECUTION IN COUNTERPARTS: This Agreement may be executed simultaneously in any number of counterparts, each of which shall be an original, but all of which shall constitute but one and the same instrument.

J. ENTIRE AGREEMENT: This written Agreement contains the entire agreement between the parties, incorporating all prior agreements, and may only be amended in writing executed by both parties.

Agreement for Purchase and Sale of Real Estate
Page 13

K. EFFECTIVE DATE: The effective date of this Agreement is the sixth (6th) day following the posting (in accordance with Title 11-45-8(b), *Code of Alabama, 1975*) of the ordinance authorizing and directing the execution and delivery of this Agreement and the closing of the sale all in accordance with the terms, provisions and conditions thereof.

IN WITNESS WHEREOF, Seller and Purchaser have executed this Agreement to be executed as of the date first above written.

SELLER: THE CITY OF VESTAVIA HILLS, ALABAMA
an Alabama municipal corporation

By _____
Alberto C. Zaragoza, Jr.
Its Mayor

By _____
Jeffrey D. Downes
Its City Manager

ATTESTED:

By _____

PURCHASER: BAMA CUSTARD, LLC
a Kansas limited liability company

By _____
Its _____

ATTESTED:

By _____

Agreement for Purchase and Sale of Real Estate
Page 14

**STATE OF ALABAMA
JEFFERSON COUNTY**

ACKNOWLEDGMENT

I, the undersigned authority, a Notary Public, in and for said County, in said State, hereby certify that Alberto C. Zaragoza, Jr., whose name as Mayor of the City of Vestavia Hills, Alabama, a municipal corporation, is signed to the foregoing Agreement for Purchase and Sale of Real Estate, and who is known to me, acknowledged before me on this day that being informed of the contents of the Agreement, he in his capacity as such and with full authority, executed the same voluntarily for and as the act of said City of Vestavia Hills, Alabama on the day the same bears date.

Given under my hand and official seal, this the _____ day of _____, 2015.

Notary Public

My Commission Expires:

SEAL

**STATE OF ALABAMA
JEFFERSON COUNTY**

ACKNOWLEDGMENT

I, the undersigned authority, a Notary Public, in and for said County, in said State, hereby certify that Jeffrey D. Downes, whose name as City Manager of the City of Vestavia Hills, Alabama, a municipal corporation, is signed to the foregoing Agreement for Purchase and Sale of Real Estate, and who is known to me, acknowledged before me on this day that being informed of the contents of the Agreement, he in his capacity as such and with full authority, executed the same voluntarily for and as the act of said City of Vestavia Hills, Alabama on the day the same bears date.

Given under my hand and official seal, this the _____ day of _____, 2015.

Notary Public

My Commission Expires:

SEAL

Agreement for Purchase and Sale of Real Estate
Page 15

STATE OF ALABAMA
JEFFERSON COUNTY

ACKNOWLEDGMENT

I, the undersigned authority, a Notary Public, in and for said County, in said State, hereby certify that _____, whose name as _____ of BAMA Custard, LLC, a Kansas limited liability, is signed to the foregoing Agreement for Purchase and Sale of Real Estate, and who is known to me, acknowledged before me on this day that being informed of the contents of the Agreement, (s)he in his/her capacity as such and with full authority, executed the same voluntarily for and as the act of said BAMA Custard, LLC on the day the same bears date.

Given under my hand and official seal, this the _____ day of _____, 2015.

Notary Public

My Commission Expires:

SEAL

PATRICK H. BOONE
ATTORNEY AND COUNSELOR AT LAW
NEW SOUTH FEDERAL SAVINGS BUILDING, SUITE 705
215 RICHARD ARRINGTON, JR. BOULEVARD NORTH
BIRMINGHAM, ALABAMA 35203-3720

TELEPHONE (205) 324-2018

FACSIMILE (205) 324-2295

December 1, 2015

By Hand Delivery

City Manager Jeffrey D. Downes
Vestavia Hills Municipal Center
1032 Montgomery Highway
Vestavia Hills, Alabama 35216

In Re: Agreement for Purchase and Sale of City Shop Real Estate

Dear Mr. Downes:

Enclosed is preliminary draft of Agreement by and between the City of Vestavia Hills, Alabama ("Seller") and BAMA Custard, LLC ("Purchaser") regarding the sale and purchase of the City Shop property situated at 1280 Montgomery Highway in the City of Vestavia Hills, Alabama for and in consideration of \$1,200,000.00.

It is my understanding that an ordinance authorizing the execution and delivery of the Agreement will be introduced for first reading at the December 14, 2015 regularly scheduled meeting of the City Council. I recommend that you and I meet after you have had an opportunity to read the Agreement for the purpose of deciding upon any necessary additions, deletions, changes and/or corrections before submitting it for consideration by the City Council.

As you know, certain laws apply to a municipality when it decides to sell real estate that do not apply to a private property owner. I have mentioned some of those laws in the proposed Agreement.

In my opinion, it would be helpful to the attorney representing the Purchaser to have a quick reference to the legal authorities cited in the Agreement. Therefore, I am enclosing copies of the following:

1. Title 11-47-20, *Code of Alabama, 1975.*
2. Title 11-43A-28, *Code of Alabama, 1975.*
3. Title 11-43A-48, *Code of Alabama, 1975.*

December 1, 2015

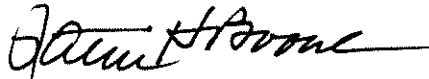
Page 2

4. Title 11-45-8(b), *Code of Alabama, 1975*.
5. The case of *Haas v. City of Mobile*, 265 So.2d 564, decided by the Supreme Court of Alabama in 1972.
6. Table 6 for Section 6.4.1 of Vestavia Hills Zoning Code Ordinance 2331.
7. Title 11-52-32, *Code of Alabama, 1975*.
8. The case of *Smith v. City of Mobile*, 374 So.2d 305 (1979).
9. Deed, dated December 29, 1960, which said deed was filed in the office of the Judge of Probate of Jefferson County, Alabama on April 10, 1961 and recorded at Deed 6590, Page 182.
10. Limitation of Use filed in the office of the Judge of Probate of Jefferson County, Alabama on August 27, 1979 and recorded at Real 1806, Page 437.

I suggest that copies of these legal authorities be submitted to the Purchaser along with the ordinance and Agreement if approved on December 14, 2015.

Please call me if you have any questions regarding this matter.

Sincerely,



Patrick H. Boone
Vestavia Hills City Attorney

PHB:gp
Enclosures

NOTES TO DECISIONS

Liability.

Where plaintiff was injured while in the city art museum, the museum is not liable because the operation of the museum is not for the special benefit or profit of the corporate entity, but is for

the common good of all and is in the exercise of the sovereign power for the benefit of all citizens, and is therefore, in the exercise of a governmental function. *Parr v. Birmingham*, 264 Ala. 224, 85 So. 2d 888, 1955 Ala. LEXIS 749 (1955).

§ 11-47-17. Weights and measures.

The council or other governing body of any town or city may provide public scales and an inspection of weights and measures and may provide punishment for persons, firms and corporations using fraudulent weights and measures.

Cross references. — Weights and measures, generally, § 8-16-1 et seq.

§ 11-47-18. Street lighting, sprinkling and cleaning.

The council or other governing body of any town or city may provide for lighting, sprinkling and cleaning the streets by contract or otherwise.

NOTES TO DECISIONS

Cited in *Cunningham v. City of Attalla*, 918 So. 2d 119, 2005 Ala. Civ. App. LEXIS 364 (Civ. App. 2005).

§ 11-47-19. Public grounds, parks and boulevards.

The council or other governing body of any town or city may establish, lay out and improve public grounds, parks and boulevards and regulate the same and may provide music and other exhibitions for the amusement of the inhabitants.

NOTES TO DECISIONS

Intent.
When applicable.

subsequent cannot be ingrafted on a deed conveying a fee-simple title. *Nearhos v. Mobile*, 257 Ala. 161, 57 So. 2d 819, 1952 Ala. LEXIS 166 (1952).

Intent.

Where a city is granted fee simple title to property subject to condemnation proceedings for the purpose of creating a park, the grantors have no grounds for relief when the city later changes its mind and conveys the fee simple title to a rail road company; in the absence of fraud, a parol condition

When applicable.

The laying of a public road through park property is clearly a general municipal undertaking, or "public purpose," of the city. *Bradley v. Trussville*, 527 So. 2d 1303, 1988 Ala. Civ. App. LEXIS 60 (Civ. App. 1988).

§ 11-47-20. Unneeded real property; disposition.

The governing body of any city or town in this state may, by ordinance to be entered on its minutes, direct the disposal of any real property not needed for public or municipal purposes and direct the mayor to make title thereto, and a conveyance made by the mayor in accordance with such ordinance invests the grantee with the title of the municipality.

NOTES TO DECISIONS

Authority of city.
Authority of municipality.
Requirements.
Illustrative cases.
Miscellaneous.

Cited.

Authority of city.

This section did not confer upon the city power and authority to convey to a private individual or

chapter except that no resolution or ordinance of a general and permanent nature and an ordinance granting a franchise shall be adopted except by a vote of a majority of the whole number elected to the council. No resolution or ordinance granting any franchise, appropriating any money for any purpose, providing for any public improvements, any regulation concerning the public health, or of any other general permanent nature shall be enacted except at a regular public meeting of the council or an adjournment thereof. Every ordinance introduced shall be in writing and read in full unless in accordance with the rules of procedure theretofore adopted before any vote thereon shall be taken and the yeas and nays shall be recorded. A record of the proceedings of every meeting of the council shall be taken and prepared by the municipal clerk and the records of the proceedings of the meeting shall, when approved by the council, be signed by the mayor and the clerk and entered in the journal. The journal shall be kept available for inspection by all persons at all reasonable times. No ordinance of permanent operation shall be passed at the meeting in which it was introduced except by unanimous consent of all members of the council present and such unanimous consent shall be shown by the yeas and nays votes entered upon the minutes of said meeting, provided, however, that if all members of the council present vote for the passage of the ordinance and their names are entered on the record as voting in favor thereof, it shall be construed as giving unanimous consent to the action taken upon such ordinance at the meeting at which it is introduced. Publication of ordinances shall be had as provided in section 11-45-8.

History. Acts 1982, No. 82-517.

§ 11-43A-25. Franchise ordinances.

No ordinance granting to any person, firm or corporation of any franchise, lease of right to use the streets, public highways, thoroughfares or public property of the city shall take effect and be enforced until 30 days after final enactment of same by the council and publication of said ordinance as provided by law which publication shall be made at the expense of the person, firm or corporation applying for said grant.

History. Acts 1982, No. 82-517.

§ 11-43A-26. Codes.

The council may provide for the revision and codification of its ordinances and permanent resolutions or for the adoption of a code or codes.

History. Acts 1982, No. 82-517.

§ 11-43A-27. Accounting.

The council shall each month make available in the office of the city manager a detailed statement of all receipts and expenses of the municipality and a summary of its proceedings during the preceding month and at the end of each year the council shall cause a full and complete examination of all the books and accounts of the municipality to be made by a qualified public accountant and shall cause the results of such examination to be published in pamphlet form, copies of which shall be placed in the office of the city manager, the office of municipal clerk and in the public library to be open for inspection by all persons.

History. Acts 1982, No. 82-517; Acts 1988, No. 88-568.

§ 11-43A-28. City manager; qualifications and duties.

The city manager shall be chosen by the council solely on the basis of his executive and administrative qualifications with special reference to his actual experience in, or his knowledge of, accepted practice in respect to the duties of his office as

hereinafter set forth. At the time of his appointment, he may but need not be a resident of the municipality or state, but during his tenure of office he shall reside within the municipality.

The city manager shall be the head of the administrative branch of the municipal government. He shall be responsible to the council for the proper administration of all affairs of the municipality and, subject to the provisions of any civil service or merit system law applicable to such municipality and except as otherwise provided herein, he shall have power and shall be required to:

(1) Enforce all laws and ordinances;

(2) Appoint and, when necessary for the good of the service, remove all officers and employees of the municipality except as otherwise provided by this chapter and except as he may authorize the head of a department or office to appoint and remove subordinates in such department or office; provided that he shall not appoint or remove officers and employees of:

a. Any library board of the municipality;

b. Any board of the municipality having control over any park, recreation facility, fair or exhibit;

c. Any municipally owned public utility and any municipally owned service enterprise, including inter alia, electric, gas and water boards, agencies, etc.;

d. Any school board of the municipality;

e. Any hospital board of the municipality;

f. Any airport board of the municipality;

g. Any housing authority;

h. Any city plumbers or electricians boards;

i. Any planning board of the municipality;

j. Any zoning board of the municipality;

(3) Exercise administrative supervision and control over all officers, employees, offices, departments, boards and agencies created by this chapter or hereafter created by the council, except those enumerated in paragraphs a. to j. of subdivision (2) inclusive, set out above in this section, and except those otherwise given independent status; and subject to any civil service or merit system law in effect in such municipality;

(4) Keep the council fully advised as to the financial conditions and needs of the municipality; to prepare and submit a budget proposal annually to the council and be responsible for its administration after its adoption; to prepare and submit, as of the end of the fiscal year, a complete report on the financial and administrative activities of the municipality for such year;

(5) Recommend to the council such actions as he may deem desirable;

(6) Prepare and submit to the council such reports as may be required of him;

(7) Perform such other duties as may be prescribed by this chapter or required of him by ordinance or by resolution of the council not inconsistent with this chapter.

To perform his duties during his temporary absence or temporary disability, the manager may designate by letter filed with the city clerk a qualified administrative officer of the municipality. In the event of failure of the manager to make such designation, the council may by resolution appoint a qualified administrative officer of the municipality to perform the duties of the manager until he shall return or his disability shall cease.

History. Acts 1982, No. 82-517.

§ 11-43A-29. Fiscal year — Budgets.

The fiscal year of the municipality shall begin on the first day of each October in each year and shall end on the last day of each September. Such fiscal year shall also constitute the budget and accounting year. As used in this chapter the term "budget year" shall mean the fiscal year for which any particular budget is adopted and in which it is administered.

The city manager, at least 45 days prior to the beginning of each budget year shall submit to the council a budget proposal, with explanations. The council shall adopt

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agencies, etc., and any board, authority, agency, etc., given such independent status, as the same may apply and be in effect at the time when such municipality shall elect to be governed by the provisions of this chapter, shall continue in full force and effect and without interruption or change as to the establishment or conduct of any such authority, board or agency, until otherwise provided by law.

History. Acts 1982, No. 82-517.

§ 11-43A-43. When provisions take effect.

For all purposes the provisions of this chapter shall become applicable to said municipality at the time when the first council of such municipality elected under the provisions hereof takes office and qualifies.

History. Acts 1982, No. 82-517.

§ 11-43A-44. Continuation of ordinances and resolutions.

All ordinances and resolutions of the municipality in effect at the time of adoption by the municipality of the council-manager form of government herein set up shall continue in effect unless and until changed or repealed by the council.

History. Acts 1982, No. 82-517.

§ 11-43A-45. Discrimination prohibited.

No person shall be appointed to or removed from, or in any way favored or discriminated against with respect to any municipal position or appointive municipal administrative office because of race, sex, political or religious opinions or affiliations.

History. Acts 1982, No. 82-517.

§ 11-43A-46. Attendance by officers at council meetings.

The city manager, the heads of all departments, and such other officers of the municipality as may be designated by the council, shall be entitled to attend meetings of the council, but shall have no vote therein. The city manager shall have the right to take part in the discussion of all matters coming before the council, and the directors and other officers shall be entitled to take part in all discussions of the council relating to their respective offices, departments, boards or agencies. The city manager shall be notified of any special or adjourned meetings.

History. Acts 1982, No. 82-517.

§ 11-43A-47. Investigations of municipal affairs.

The council, the city manager, or any person or committee authorized by either of them, shall have the power to inquire into the conduct of any office, department, board or agency or officer of the municipality. Either of them may make investigations of municipal affairs and may compel the production of books, papers and other evidence for that purpose.

History. Acts 1982, No. 82-517.

§ 11-43A-48. Contracts.

No contract involving the payment of money out of the appropriation of more than one year shall be made for a period of more than five years, nor shall any such contract be valid unless made or approved by ordinance, and signed in the name of the municipality by the mayor and countersigned by the manager.

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COUNTIES AND MUNICIPAL CORPORATIONS

§ 11-45-8

§ 11-45-1.1. Handguns. (Repealed)

Repealed: Acts 2013, No. 13-283, § 9, effective August 1, 2013.

§ 11-45-8. Recordation — Publication — Adoption of technical codes by reference.

(a) All ordinances shall as soon as practicable after their passage be recorded in a book kept for that purpose and be authenticated by the signature of the clerk.

(b)(1) All ordinances of a general or permanent nature, except as provided in subdivision (2) and in subsection (d) of this section, shall be published in some newspaper of general circulation published in the municipality, but if no such newspaper is published in the municipality such ordinances may be published by posting a copy of the ordinance in three public places within the municipality, one of which shall be at the mayor's office in the city or town. In the event there is no newspaper published in the municipality and there is a newspaper published in the county in which the municipality is located having general circulation in the municipality, at the option of the governing body of such municipality the ordinance may be published in that newspaper. In towns having a population of less than 2,000 inhabitants as shown by the 1950 federal census, the governing body of such town shall have the option of publication of the ordinance by posting as above provided or in a newspaper published in the town or in the county having a general circulation in the town.

(2) All ordinances of a general and permanent nature relating to planning or zoning or the licensing or franchising of businesses, as an alternative to the publishing requirements of subdivision (1), may be published in a synopsis form in some newspaper of general circulation published in the municipality provided that the synopsis, at a minimum, includes the following information:

- a. A summary of the purpose and effect of the ordinance.
- b. If the ordinance relates to planning or zoning, a general description of the property or properties affected by the ordinance including the common name by which the property or properties are known and the substance of the ordinance.
- c. If the ordinance relates to the licensing of businesses or the granting of a franchise, the categories of businesses affected by the ordinance and the substance of the ordinance.
- d. The date upon which the ordinance was passed and, if different from the date of publication, the effective date of the ordinance.
- e. A statement that a copy of the full ordinance may be obtained from the office of the city or town clerk during normal business hours.

(3) When the ordinance or notice of the substance of an ordinance is published in the newspaper it shall take effect from and after the time it shall first appear therein, and when published by posting it shall take effect five days thereafter. When an ordinance is published by posting, the

§ 11-45-8

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§ 11-45-8

ORDINANCES AND RESOLUTIONS

§ 11-45-8

municipality shall take reasonable steps to maintain the posting for not less than 30 days. In addition, if the municipality maintains an Internet website, the municipality, at a minimum, shall include a copy of the ordinance or notice of the substance of an ordinance on its website for 30 days.

(4) Immediately following the record of any ordinance, the clerk shall append a certificate stating therein the time and manner of publication, which certificate shall be presumptive of the facts stated therein.

(5) All ordinances or notices of the substance of an ordinance granting a franchise shall be published at the expense of the party or parties to whom the franchise is granted.

(c) Ordinances may adopt by reference thereto, without setting the same out at length in the ordinance, rules, and regulations which have been printed as a code in book or pamphlet form for any of the following:

- (1) The construction, erection, alteration, or improvement of buildings.
- (2) Installation of plumbing or plumbing fixtures.
- (3) Installation of electric wiring or lighting fixtures.
- (4) Installation of gas or gas fixtures.
- (5) Fire prevention.
- (6) Health and sanitation.
- (7) Milk and milk products.
- (8) Parks.
- (9) Airports.
- (10) Waterworks and sewers.
- (11) Traffic.
- (12) Mechanical.
- (13) Swimming pools.
- (14) Housing.
- (15) Standard code for elimination and repair of unsafe buildings.
- (16) Other like codes.

If, before adopting the code in book or pamphlet form, the governing body of the city or town shall by resolution hold a public hearing of which there shall be at least 15 days' notice of the time, place, and purpose of the hearing by publication of the resolution once a week for two successive weeks or by posting notices of the hearing for the length of time, as the case may be, under subsection (b) of this section, the resolution shall provide that not less than three copies of the code shall be filed for not less than 15 days prior to the holding of the public meeting for use and examination by the public in the office of the city or town clerk.

Amendments to such rules or regulations adopted as a code thereafter shall be adopted by ordinances published as provided in subsection (b) of this section.

(d) The following shall not be deemed ordinances of a general or permanent nature requiring publication:

- (1) Ordinances authorizing or ratifying contracts with public utilities for utility services for a specified term.
- (2) Ordinances authorizing the issuance or sale or security of bonds, debentures, notes, warrants and other obligations, whether full faith and

§ 11-45-9

COUNTIES AND MUNICIPAL CORPORATIONS

§ 11-45-9

credit obligations or payable from general revenues or special taxes or from revenues of a utility or other property of a municipality.

(e) The provisions of this section shall not apply to the adoption of a code for the revision and codification of the ordinances of a municipality and the adoption of such code by ordinances as provided in Section 11-45-7.

HISTORY:

Acts 1987, No. 87-668; Acts 2011, No. 11-618, § 1, Sept. 1, 2011.

copy of the ordinance" for "copies thereof," and deleted "post office or the" preceding "mayor's office"; added (b)(2); added "or notice of the substance of an ordinance" or variants in (b)(3) and (b)(5); added the last two sentences of (b)(3); added "any of the following" in the introductory language of (c); and made stylistic changes.

2011 amendments.

The 2011 amendment, effective September 1, 2011, added the (b)(1) and (b)(3) through (b)(5) designations; in the first sentence of (b)(1), added "subdivision (2) and in," substituted "a

NOTES TO DECISIONS**Illustrative cases.**

Only county commissions and municipalities have the power to adopt general residential construction and building codes, but the state fire marshal may adopt residential construction and building codes relating to fire prevention and protection applicable statewide that

supersede the municipal and county codes to the extent they are inconsistent with the code adopted by the state fire marshal. *Ridnour v. Brownlow Homebuilders, Inc.*, 100 So. 3d 554, 2012 Ala. Civ. App. LEXIS 69 (Ala. Civ. App. 2012), reh'g denied, 2012 Ala. Civ. App. LEXIS 326 (Ala. Civ. App. Apr. 18, 2012).

§ 11-45-9. Penalties for ordinance violations.

(a) Municipal ordinances may provide penalties of fines, imprisonment, hard labor, or one or more of such penalties for violation of ordinances.

(b) Except as otherwise provided in this section, no fine shall exceed five hundred dollars (\$500), and no sentence of imprisonment or hard labor shall exceed six months.

(c) In the enforcement of the penalties prescribed in Section 32-5A-191, the fine shall not exceed five thousand dollars (\$5,000) and the sentence of imprisonment or hard labor shall not exceed one year.

(d) Notwithstanding any other provision of law, the maximum fine for every person either convicted for violating any of the following misdemeanor offenses adopted as a municipal ordinance violation or adjudicated as a youthful offender shall be one thousand dollars (\$1,000):

- (1) Criminal mischief in the second degree, Section 13A-7-22.
- (2) Criminal mischief in the third degree, Section 13A-7-23.
- (3) Theft of property in the third degree, Section 13A-8-5.
- (4) Theft of lost property in the third degree, Section 13A-8-9.
- (5) Theft of services in the third degree, Section 13A-8-10.3.
- (6) Receiving stolen property in the third degree, Section 13A-8-19.
- (7) Tampering with availability of gas, electricity, or water, Section 13A-8-23.
- (8) Possession of traffic sign; notification; destruction, defacement, etc., of traffic sign or traffic control device; defacement of public building or property, Section 13A-8-71 and Section 13A-8-72.
- (9) Offenses against intellectual property, Section 13A-8-102.

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The foregoing opinion was prepared by Thomas S. Lawson, Supernumerary Associate Justice, and adopted by the Court as its opinion.

Affirmed.

HEFLIN, C. J., and MERRILL, COLEMAN, HARWOOD and MADDOX, JJ., concur.



265 So.2d 564

George A. HAAS et al.

v.

CITY OF MOBILE et al.

1 Div. 699.

Supreme Court of Alabama.

Aug. 10, 1972.

Declaratory judgment proceeding seeking to have declared void and unconstitutional a certain zoning ordinance. The Circuit Court, in Equity, Mobile County, William D. Bolling, J., upheld the ordinance, and appeal was taken. The Supreme Court, Heflin, C. J., upheld, inter alia, that zoning ordinance which provided, inter alia, that the ordinance was subject to reservation of a right-of-way for a parkway, and that a second means of ingress and egress should be provided to the proposed parkway, was not invalid on grounds that such constituted "contract zoning," since such requirements were reasonable measures in light of anticipated traffic considerations.

Affirmed.

Coleman, J., dissented.

1. Zoning ⇨68

A zoning ordinance may place upon a property owner reasonable restrictions and requirements in the use of the zoned property.

2. Zoning ⇨6

Zoning is a legislative act, which rests on the exercise of the police powers of a municipality.

3. Zoning ⇨61

Zoning ordinance which provided, inter alia, that the ordinance was subject to reservation of a right-of-way for a parkway, and that a second means of ingress and egress should be provided to the proposed parkway, was not invalid on grounds that such constituted "contract zoning," since such requirements were reasonable measures in light of anticipated traffic considerations.

4. Zoning ⇨167

Fact that location of access road across tract which was rezoned was undetermined did not invalidate zoning ordinance, where adjoining property owners were not in position to be injured by such vagueness, indefiniteness and uncertainty; only those owning an interest in the tract which was being rezoned could be damaged, since only their lands would be affected by an adverse location of the access road.

5. Zoning ⇨162

Where an existing comprehensive plan is in effect, no amendment thereto can be attacked as being "spot" zoning.

6. Zoning ⇨162

Size of tract involved in rezoning, which totaled 12.25 acres, together with other nonconforming land uses in immediate vicinity, proximity of such land to a mall, and the adjacent proposed parkway, militated against charge that zoning ordinance amounted to "spot" zoning.

7. Zoning ⇨101

Where record was replete with testimony both for and against proposed zoning, enactment of zoning ordinance was fairly debatable and thus was not invalid as being arbitrary.

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HAAS v. CITY OF MOBILE

Cite as 289 Ala. 16

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8. Zoning ⇨131

Requirements of statute stating that every motion, resolution or ordinance introduced at a meeting should be reduced to writing and read before any vote thereon should be taken, were satisfied where zoning ordinance was reduced to writing and read in its entirety on October 6, 1970 meeting, so that parliamentary motion to adopt the ordinance, made at meeting on October 13, 1970, did not have to be reduced to writing and read to fulfill the statutory requirements. Code of Ala., Tit. 37, § 98.

Diamond & Lattof, Mobile, for appellants.

A municipality has no authority to amend a zoning ordinance subject to a collateral deed or agreement to be executed between the city and the property owner. *Hartnett v. Austin*, (Fla.), 93 So.2d 86; *Baylis v. Mayor & City Council of City of Baltimore*, 219 Md. 164, 148 A.2d 429; *Treadway v. City of Rockford*, 24 Ill.2d 488, 182 N.E.2d 219; *Lewis v. City of Jackson, Miss.*, 184 So.2d 384; *Yokley on Zoning Law and Practice*, 3rd Ed., Vol. 1, Sec. 7-8; *The Law of Zoning and Planning by Rathkopf*, (Vol. 3, 74-12, 74-13, 74-15, 74-16). An ordinance amending a zoning ordinance must be clear, precise, definite and certain in its terms and the determination of whether property covered by the amendment has a new zoning classification must not be left to the uncertainty of proof by extrinsic evidence. *Johnson v. City of Huntsville*, 249 Ala. 36, 29 So.2d 342; *Thomas v. Wingard*, 250 Ala. 390, 34 So.2d 606; *Pentecostal Holiness Church v. Dunn*, 248 Ala. 314, 27 So.2d 561; *McQuillen on Municipal Corporations*, Sec. 15.24. An ordinance amending a zoning ordinance is void if the ordinance is clearly arbitrary and unreasonable and amounts to but an arbitrary fiat. *Grayson v. City of Birmingham*, 277 Ala. 522, 173 So.2d 67; *McQuillen on Municipal Corporations*, Sec. 25, 83. Every motion adopted by the City Commission of the City of Mobile must be reduced to writing and read before any vote

thereon shall be taken, and any motion not so adopted is void. Code of Alabama, Re-comp. 1958, Title 37, Sec. 98; *Thompson v. Wingard*, 250 Ala. 390, 34 So.2d 606.

Armbrecht, Jackson & DeMouy and Broox G. Holmes and Thomas M. Ammons, III, Mobile, for appellee, *Baldwin Development Corp.*

John L. Lawler, Mobile, for appellee, *City of Mobile*.

A zoning ordinance may place reasonable restrictions upon the use of zoned property. *Walls v. City of Guntersville*, 253 Ala. 480, 45 So.2d 468; *Southern Rock Prod. Co. v. Bd. of Zoning Adjustment*, 282 Ala. 186, 210 So.2d 419; *Jefferson County v. Birmingham*, 256 Ala. 436, 55 So.2d 196; *Roberson v. City of Montgomery*, 285 Ala. 421, 233 So.2d 69; *Hartnett v. Austin*, (Fla.), 93 So.2d 86; *Baylis v. Mayor & City Council of City of Baltimore*, 219 Md. 164, 148 A.2d 429 (1959); *Treadway v. City of Rockford*, 24 Ill.2d 488, 182 N.E.2d 219 (1962); *Lewis v. City of Jackson*, 184 So.2d 384 (Miss.1966); *Yokley, Zoning Law and Practice*, Vol. I, § 7-8; *Rathkopf, The Law of Zoning and Planning*, Vol. 3, 74-12, 74-13, 74-15, 74-16. A zoning ordinance which vests reasonable discretion in municipal officials as to the requirements of use of zoned property is not invalid as being vague or indefinite. *Walls v. City of Guntersville*, 253 Ala. 480, 45 So.2d 468; 37 Am.Jur., *Municipal Corporations*, § 170, p. 799; *Johnson v. City of Huntsville*, 249 Ala. 36, 29 So.2d 342; *Thompson v. Wingard*, 250 Ala. 390, 34 So.2d 606; *Pentecostal Holiness Church v. Dunn*, 248 Ala. 314, 27 So.2d 561. A zoning ordinance recommended by a planning commission after extensive investigation and hearings, and adopted by the city commission after further hearings cannot be said to be arbitrary or unreasonable when there were substantial factors favoring its adoption. *Episcopal Foundation of Jefferson Co. v. Williams*, 281 Ala. 363, 202 So.2d 726; *Grayson v. City of Birmingham*, 277 Ala. 522, 173 So.2d 67; *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348; *Waters v. City of Birmingham*, 282 Ala.

104, 200 So.2d 388; *Cudd v. City of Home-wood*, 284 Ala. 268, 224 So.2d 626; *Shell Oil Co. v. Edwards*, 263 Ala. 4, 81 So.2d 535. A motion to adopt an ordinance need not be reduced to writing and read before being voted on where the ordinance itself is reduced to writing and read before being voted on. Code of Ala., Tit. 37, § 98; *State v. Calumet & Hecla Consol. Copper Co.*, 259 Ala. 225, 66 So.2d 726. A motion requesting a vote on an ordinance which has been read and reduced to writing at a commission meeting need not be reduced to writing and read before a vote thereon. Code of Alabama, 1940 (Recompiled 1958), Title 37, § 98.

HEFLIN, Chief Justice

Appellants-complainants George A. Haas, Robert E. Finch and Dr. C. Adrien Bodet bring this appeal from an adverse decree to their declaratory judgment action in which appellee-respondents City of Mobile, John K. Collings and Alletta Turner, and appellee-intervenor Baldwin Development Corporation, were parties in the Circuit Court of Mobile County, in Equity. The bill of complaint sought to declare void and unconstitutional Zoning Ordinance No. 80-142, which amended The Zoning Ordinance of the City of Mobile by rezoning a 12.25 acre tract of wooded land within a R-A (Residence-Agriculture) district to a R-3 (Multiple-Family-Residence) district so that luxury type apartment buildings could be built.

Appellants-complainants George A. Haas, Robert E. Finch and Dr. C. Adrien Bodet are owners of residences in the neighborhood of the 12.25 acre tract. Appellee-respondent John K. Collings is the owner of the 12.25 acre tract and appellee-respondent Alletta Turner holds a vendor's lien on that land. Baldwin Development Corporation obtained an option on the 12.25 acre tract from Collings and intervened in the proceeding below. The Attorney General of the State of Alabama was served and filed a waiver as to future notice. Hereinafter the appellants-complainants will be

referred to as appellants, and where the term "appellees" is used it will include John K. Collings, Alletta Turner, Baldwin Development Corporation and the City of Mobile.

The 12.25 acre tract is the middle portion of a rectangularly shaped tract of land, which apparently was approximately 40 acres in size, bounded on the north by Old Grant Street, on the east by Cottage Hill Road, on the south by Eslava Creek and on the west by Sage Avenue. In the neighborhood to this 12.25 acre tract there are residential areas, a private swimming pool, commercial areas, a church and one tract which had been previously rezoned R-3.

Appellants are owners of residential property, located both on the eastern portion of the large rectangularly shaped tract and in the residential sections to the north of Old Grant Street directly across from the 12.25 acre tract. The residences range in value from \$30,000 to \$100,000.

The general area was zoned R-1 (best residential classification), however, the swimming pool had been granted a variance, the commercial buildings had been favored with variances, and some of the property had been rezoned to R-3 on a previous occasion. The 12.25 acre tract originally was zoned R-1 but in 1967 was rezoned to R-A.

Efforts to rezone the 12.25 acre tract from R-A to R-3 began with an application filed with the Zoning Administrator who, based upon studies of the area, location, traffic consideration, etc., recommended to the Planning Commission that the land be rezoned. The Planning Commission held two public meetings where extensive discussion and argument occurred on the proposed rezoning. The Planning Commission's recommendation to the City Commission was in favor of amending the zoning ordinance with a condition that a second means of ingress and egress to the property be made by opening the proposed apartment complex to be built on the 12.25 acre tract to the proposed Eslava Creek

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Parkway. A planning consultant also recommended approval. After hearing considerable debate by persons for and against the proposed rezoning, the Mobile City Commission unanimously approved the rezoning.

According to the "Major Street Plan" of the City of Mobile, the proposed Eslava Creek Parkway will be one of the major highways connecting Airport Boulevard with Cedar Point Road and Mobile Bay Parkway. Some construction of said Eslava Creek Parkway has already begun in close proximity of the 12.25 acre tract.

Ordinance No. 80-142 provided, among other things, the following:

"* * * and further provided, however, that no lot or parcel of land hereinabove described shall be used for any use allowed in a R-3 district until all of the conditions set forth below have been complied with: subject to reservation of the right-of-way for Eslava Creek Parkway and that a second means of ingress and egress to the proposed Eslava Creek Parkway be provided."

The Chancellor decreed that Zoning Ordinance 80-142 was valid and constitutional. From such decree the appellants have perfected their appeal.

The first contention raised by the appellants is that Ordinance No. 80-142 is void because the conditions precedent to the use of the property require a reservation of the right-of-way for Eslava Creek Parkway and a second means of ingress and egress to the proposed Eslava Creek Parkway in the area reclassified. The appellants contend that a municipality has no authority to amend a zoning ordinance subject to a collateral agreement (or a collateral deed) to be executed between the city and the property owner because such constitutes "contract zoning".

In support of their position appellants rely upon Hartnett v. Austin (Fla.), 93 So. 2d 86; Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429; Treadway v. City of

Rockford, 24 Ill.2d 488, 182 N.E.2d 219; and Lewis v. City of Jackson (Miss.), 184 So.2d 384.

In an article entitled, "Zoning by Contract. With Property Owner", by Ralph W. Crolly and C. McKim Norton, 133 New York Law Journal 4 (1955), "contract zoning" is defined as follows:

"The principle involved may be simply stated. A municipality has no power to make any agreement or deal which will in any way control or embarrass its legislative powers and duties. Neither the police power of the state itself nor that delegated by it to a municipality is subject to limitation by private contract; nor is the exercise of such power to be alienated, surrendered or limited by any agreement or device. Zoning of properties by a municipality being legislative in character cannot be bargained or sold. The rezoning of a parcel of property by a municipality based in any way upon an offer or agreement by an owner of property is inconsistent with, and disruptive of, a comprehensive zoning plan."

[1] On the other hand, it is well established that a zoning ordinance may place upon a property owner reasonable restrictions and requirements in the use of the zoned property and this court has expressly approved such restrictions and requirements. Walls v. City of Guntersville, 253 Ala. 480, 45 So.2d 468; Southern Rock Products Co. v. Board of Zoning Adjustment, 282 Ala. 186, 210 So.2d 419. See also Sections 774, 776 and 777 of Title 37 of the Code of Alabama, 1940.

The precise question of the validity of the requirement of landowner dedication for highways, streets and alleys as a prerequisite for zoning applicability has been treated in three jurisdictions: Kansas—Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213; and Hudson Oil Company of Missouri, Inc. v. City of Wichita, 193 Kan. 623, 396 P.2d 271; Washington—State ex rel. Myhre v. City of Spokane, 70 Wash.2d 207, 422 P.2d 790; and California—Scrut-

ton v. County of Sacramento, 275 Cal.App. 2d 412, 79 Cal.Rptr. 872.¹ Each of these jurisdictions holds that imposing the condition of dedication for rights-of-way is a valid exercise of police power where utilized to meet the increase in traffic congestion and minimize this annoyance of the change from single residence to the new land use.

[2] It is well established in our jurisdiction that zoning is a legislative act, *Ball v. Jones*, 272 Ala. 305, 132 So.2d 120, which rests on the exercise of police powers of a municipality, *Fleetwood Development Corp. v. City of Vestavia Hills*, 282 Ala. 439, 212 So.2d 693.

The appellant's position is that "contract zoning" is proved because of a letter from John K. Collings addressed to Commissioner Lambert Mims, dated February 25, 1971 (subsequent to the filing of the action in the court below), which states as follows:

"This will confirm my telegram of February 24, 1971, regarding Zoning Ordinance No. 80-142, adopted October 13, 1970.

"It is clearly understood and intended on my part that the right-of-way for Es-lava Creek Parkway will be dedicated to the City of Mobile as agreed upon at a previous meeting with you."

[3] However, the letter is subject to a different interpretation. It could be inter-

1. Requirements involving dedications in these cases are as follows: *Arkenberg*—"a ten foot right-of-way along Gage Boulevard", 421 P.2d at 218; *Hudson Oil*—"10-foot strip of land along the North edge of the proposed subdivision for an East-West service or access road along the South side of Kellog Avenue", 396 P.2d at 272; *Myhre*—"certain of its land for the widening of the adjacent streets within the city engineer's right-of-way plan for the area . . . to acquire and convey to the city, without cost, additional street area (if any) needed for traffic safety . . . to be constructed at no cost to the City the necessary curbs, sidewalks, drainage, pavement, channelization and street lighting'."

preted as being a written confirmation that this property owner intends to comply with one of the requirements of conditions of the ordinance. Such letter can hardly be determinative of pre-adoption negotiations of "contract zoning" since it is dated more than four months after the adoption of the ordinance and the date of the "previous meeting" between Commissioner Mims and tract-owner Collings mentioned in the letter is not established by any evidence. No other evidence concerning the telegram appears in the record. The trial court heard the evidence ore tenus and is in a better position to make the factual determination of whether these zoning requirements were reasonable measures in light of anticipated traffic considerations or mandatory contractual prerequisites which might control or embarrass the legislative prerogatives of the city.

In the case under review the landowner is agreeable to the land dedication requirements of the ordinance. This court wants it clearly understood that this holding should not be construed as authority for a trial court to uphold unacceptable requirements of a zoning ordinance which attempts to pre-empt condemnation proceedings for that issue is not presented in this case.

Next, the appellants contend that the amending ordinance is vague, indefinite and uncertain in its terms. This attack is directed towards the portion of the ordinance which requires a reservation of

422 P.2d at 795; *Scrutton*—"a 10-foot right-of-way for widening Whitney Avenue and improve it with pavement, sidewalk, curbs and gutters; that on the east edge of her property she dedicate a 27-foot strip to form the west half of Foster Way; that she join an assessment district which would improve the west half of Foster Way with paving, sidewalk, curbs and gutters." 275 Cal.App.2d at 415, 79 Cal.Rptr. at 875.

These cases have been cited to show treatment of this issue in other jurisdictions; however, this court does not approve or disapprove of the holdings of these cases under like factual situations because such is not before this court at this time.

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right-of-way for Eslava Creek Parkway and a means of ingress and egress to said proposed parkway.

The appellants contend since dimensions of the right-of-way for Eslava Creek Parkway are not spelled out with exactness that this constitutes unconstitutional vagueness and uncertainty. There was testimony from James T. Chapman, Assistant City Engineer for the City of Mobile, that the location of a corridor for this parkway had been determined and was shown on maps which were introduced as exhibits. A copy of the city's Major Street Plan, which reflected the general location of said parkway, was introduced as an exhibit. There was evidence that a portion of the parkway had been completed in the vicinity of the subject property. Mr. Chapman stated the present drawing of the right-of-way shows a 90-foot width but the width might vary following a survey and that it could be 80 feet or 100 feet as it crossed the 12.25 acre tract instead of 90 feet.

Next, the appellants contend that the location for the second means of ingress and egress across the 12.25 acre tract is undetermined. There was testimony that the City had not yet determined the exact location, but that it would be of the standard width of 27 feet after the exact location had been determined by surveys.

[4] Assuming arguendo that vagueness, indefiniteness and uncertainty exist as to the actual metes and bounds description of Eslava Creek Parkway, and the location of the ingress and egress road across the 12.25 acre tract to Eslava Creek Parkway, it seems to this court that the appellants are not in a position to be injured by such vagueness, indefiniteness and uncertainty. Only those owning an interest in the 12.25 acre tract could be damaged since only their lands will be affected by an adverse location of the access road or an enlarged dimension of Eslava Creek Parkway's right-of-way. These property owners, obviously, do not object to the terms of the ordinance. The requirement of the reser-

vation of a right-of-way for a second means of ingress and egress to Eslava Creek Parkway benefits the appellants rather than injures them. If such access road to Eslava Creek Parkway was not required, then traffic, obviously, would increase on existing roadways following the occupancy of the proposed apartments. If vagueness, uncertainty and indefiniteness exist, such is related only to locations on the 12.25 acre tract.

[5,6] Appellant's third contention is that the ordinance is void in that it is arbitrary, unreasonable and amounts to an arbitrary fiat. The basic contention is that this ordinance constitutes "spot" zoning. This court has long condemned "spot" or "piece-meal" zoning, where the facts show municipal officials have attempted partial zoning of a municipality. *Chapman v. City of Troy*, 241 Ala. 637, 4 So.2d 1; *Johnson v. City of Huntsville*, 249 Ala. 36, 29 So.2d 342. Recent decisions have limited condemnation of "spot" or "piecemeal" zoning to the situation where there has been no comprehensive plan. See *Shell Oil Company v. Edwards*, 263 Ala. 4, 81 So.2d 535 and *Episcopal Foundation of Jefferson County v. Williams*, 281 Ala. 363, 202 So.2d 726, which recites the proposition that where an existing comprehensive plan is in effect, no amendment thereto can be attacked as being "spot" zoning. These decisions place this jurisdiction in a unique position regarding the issue of "spot" zoning. The majority position is that rezoning of a small tract of land out of harmony and in conflict with a comprehensive plan may constitute "spot" zoning. See 1 E. Yokely, *Zoning Law and Practice*, § 8-3, at 363, (3rd ed. 1965), and cases annotated at note 6. But even if this court followed the majority view, the rezoning of the parcel in question does not amount to "spot" zoning when the comprehensive plan of Mobile is so considered. Its size (12.25 acres), the other nonconforming land uses in the immediate vicinity, the proximity to Bel Air Mall, and the adjacent proposed parkway militate against the charge of "spot" zoning.

The test for whether an ordinance is arbitrary is well established in our jurisdiction in *Waters v. City of Birmingham*, 282 Ala. 104, 108, 209 So.2d 388, 391:

" * * * 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. * * * " (Citations omitted) (Emphasis supplied).

The above selected portion of *Waters* was quoted in *Cudd v. City of Homewood*, 284 Ala. 268, 224 So.2d 625.

[7] The record is replete with testimony both for and against the proposed zoning. In light of the rule restated in *Waters* and followed in *Cudd*, the court finds the enacting of this ordinance was fairly debatable, and as such is not invalid as being arbitrary.

[8] Appellants' fourth contention is that the city did not follow statutory procedure in enacting the ordinance since the motion to adopt the ordinance was not reduced to writing and read before the vote was taken thereon. If such motion had been reduced to writing it would have probably appeared as follows: "I move that Ordinance 80-142 be adopted."

This question involves interpretation of Section 98 of Title 37, Code of Alabama, 1940, which states in salient part:

" * * * Every motion, resolution or ordinance introduced at any and every such meeting shall be reduced to writing and read before any vote thereon shall be taken; and the yeas and nays thereon shall be recorded. * * * "

The record shows that the ordinance was reduced to writing and read in its entirety at the October 6, 1970 meeting. Then

at the October 13, 1970 meeting with the minutes containing the ordinance being before the City Commission, there was debate on the ordinance, and after much discussion Commissioner Mims orally moved the ordinance be adopted. It was seconded and unanimously carried. The vote was then recorded.

Upon these facts this court is convinced that the requirements of the statute were met when the ordinance was reduced to writing and read at the October 6th meeting. The intent of the statute is clearly that substantive matters, whether motions, resolutions or ordinances, should be reduced to writing and read before action is taken on them. Where the substantive matter appears in writing and is read to the city commissioners, the parliamentary motion to adopt need not be reduced to writing and read to fulfill the statutory requirements of § 98 of Title 37, Code of Alabama, 1940.

Affirmed.

MERRILL, HARWOOD, BLOODWORTH, MADDOX, McCALL and SOMERVILLE, JJ., concur.

COLEMAN, J., dissents.



265 So.2d 569

James A. SIMPSON et al.

v.

James L. VAN RYZIN, individually, etc.

3 Div. 499.

Supreme Court of Alabama.

Aug. 10, 1972.

Bill of complaint for declaratory judgment. The Circuit Court of Montgomery County in Equity, Emmet, J., entered de-

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Ordinance Number 2331
Vestavia Hills Zoning Code

Table 6 Use Regulations for Non-Residential Districts								
USES/DISTRICTS	A	B-1	B-1.2	B-2	B-3	O-1	O-2	INST
Gas Station, §7.2			C	Y	Y			
Hardware Store		L	L	Y	Y			
Home Improvement Center				Y	Y			
Kenel, §7.6	Y				C			
Laundromat			Y	Y	Y			
Laundry and Dry Cleaning, Retail		Y	Y	Y	Y	Y	Y	
Laundry, Industrial				C	C			
Liquor Lounge		C	C	C	C			
Maintenance Service				C	C			
Medical Clinic			L	Y	Y	Y	Y	Y
Medical Support Service			L	Y	Y	Y	Y	Y
Personal Service		L	L	Y	Y			
Produce Market	Y	Y	Y	Y	Y			
Restaurant, Fast Food		L	L	Y	Y			
Restaurant, Standard		L	L	Y	Y			
Retail, General, Enclosed				Y	Y			
Retail, General, Unenclosed				C	Y			
Retail, Neighborhood		L	L	L	L			
Services, Neighborhood		L	L	L	L			
Service Station, §7.2			C	Y	Y			
Studio, Artist		Y	Y	Y	Y			
Veterinary Hospital, §7.6				C	C			
OTHER								
Airport					C			
Cemetery	C							C
Construction Service					C			
Country Club	C							
Heliport					C		C	C
Landfill					C			
Manufacturing, Light					C			
Mixed Use, General			L					
Mixed Use, Live-Work			L					
Parks, Gardens, Playgrounds	Y	Y	Y	Y	Y			Y
Recreation, Indoor				Y	Y			
Recreation, Outdoor				C	C			Y
Rehabilitation Facility					C			Y
Research Laboratory					C		C	
Salvage Yard					C		C	
Storage, Mini-warehouse, §7.5				C	C			
Storage, Outdoor					C			
Telecommunications Facilities, §7.9	C	C	C	C	C	C	C	C
Warehousing, Wholesale, Distribution				C	C			

Y – The use is permitted by right.
L – Permitted to limits set by district regulations
SE – Special Exception Use, requires approval by BZA (see §12.3). May also be subject to district limitations.
C – Conditional Use, requires approval by the Council (see §13.3). May also be subject to district limitations.
A use not listed may be requested for approval as a Conditional Use per §13.3.
A use followed by a numeric cross-reference is subject to Use-Specific Regulations in Article 7.
A blank cell indicates that the use is not permitted.

§ 11-52-31

the regulation of a municipal planning subdivision of the proper area for the proper streets and to traffic, utilities, for the avoidance area of lots. The streets and other sewer and other as a condition practice of the approval of the shall be revocable upon the completion of the municipal planning, the municipal to the municipality or utilities advance with the municipality is hereby and equitable publication of thereon. A copy to the probate located.

§ 11-52-30, the municipality shall adopt subdivision of the first paragraph of the first planning commission shall be deemed to constitute or effect an acceptance by the public of any street or other open space shown upon the plat.

regulations, a reasonable jury could find the municipality liable in tort, notwithstanding the terms of the statute. Lee v. Houser, 2013 Ala. LEXIS 125 (Ala. Sept. 27, 2013).

Illustrative cases.

Jury could have found that a town and its officials tortiously acquired jurisdiction over a private property to forestall a subdivision-plat

application and, thus, to prevent the development of the property. If a municipality chooses to regulate land before it has even established its own rules and regulations, a reasonable jury could find the municipality liable in tort, notwithstanding the terms of this provision. Lee v. Houser, 2013 Ala. LEXIS 185 (Ala. Dec. 20, 2013).

§ 11-52-32

PLANNING, ZONING, AND SUBDIVISIONS

§ 11-52-32

§ 11-52-32. Plat approval — Zoning powers of planning commission.

(a) Except where the development of a subdivision within the territorial jurisdiction of a municipal planning commission is regulated by the county commission pursuant to Section 11-52-30, the municipal planning commission shall approve or disapprove a plat within 30 days after the submission thereof to it; otherwise, the plat shall be deemed to have been approved, and a certificate to that effect shall be issued by the municipal planning commission on demand; provided, however, that the applicant for the municipal planning commission's approval may waive this requirement and consent to an extension of such period. The ground of disapproval of any plat shall be stated upon the records of the municipal planning commission. Any plat submitted to the person to whom notice of a hearing shall be sent, and no plat shall be acted on by the municipal planning commission without affording a hearing thereon. Notice shall be sent to the address by registered or certified mail of the time and place of the hearing not less than five days before the date fixed therefor. Similar notice shall be mailed to the owners of land immediately adjoining the platted land as their names appear upon the plat in the county tax assessor's office and their addresses appear in the directory of the municipality or on the tax records of the municipality or county.

(b) Every plat approved by the municipal planning commission shall, by virtue of the approval, be deemed to be an amendment of or an addition to or a detail of the municipal plan and a part thereof. Approval of a plat shall not be deemed to constitute or effect an acceptance by the public of any street or other open space shown upon the plat.

(c) The municipal planning commission, from time to time, may recommend or map or additions thereto to conform to the zoning ordinance or map or recommendations for the zoning regulation of the territory comprised within approved subdivisions. The municipal planning commission shall have the power to agree with the application upon use, height, area, or bulk requirements or restrictions governing buildings and premises within the subdivision, provided the requirements or restrictions do not authorize the violation of the then effective zoning ordinance or restrictions. The requirements or restrictions shall have the same force of law and be enforceable in the same manner and shall have the same sanctions and penalties and subject to the same power of amendment or repeal as though set out as a part of the zoning ordinance or map of the municipality.

§ 11-52-32

COUNTIES AND MUNICIPAL CORPORATIONS

§ 11-52-32

(d) The municipal planning commission of any Class 1 city may elect no fewer than three and no more than five persons who are members of the municipal planning commission to serve while members thereof and at the pleasure of the municipal planning commission as a committee to approve or disapprove in the name of the municipal planning commission any plat presented to the municipal planning commission. Should any committee member so elected by the municipal planning commission be unable for any reason to serve at any time as a member of the committee or should a vacancy occur at any time on the committee, the chair of the municipal planning commission shall appoint another member thereof to serve as a member of the committee until such time as the replaced member of the committee shall resume his or her duties or until the municipal planning commission shall fill the vacancy by electing another of its members to serve on the committee. The committee shall be governed by all the provisions of this article applicable to municipal planning commissions in regard to the approval or disapproval of any plat and to all regulations adopted by the municipal planning commission in regard thereto not inconsistent with the provisions of this article. Any plat submitted to the committee shall be considered as if submitted to the municipal planning commission, and any approval or disapproval of any plat by the committee shall be as if the same were approved or disapproved by the municipal planning commission; provided, however, that any party aggrieved by any decision of the committee, within 15 days thereafter, may appeal therefrom to the full municipal planning commission of the municipality by filing with the municipal planning commission a written notice of appeal specifying the decision from which the appeal is taken. In the case of an appeal, the committee shall cause a transcript of all papers and documents filed with the committee in connection with the matter involved in the appeal to be certified to the municipal planning commission to which the appeal is taken and the municipal planning commission, within 45 days from the taking of the appeal, in accordance with the reasonable regulations as it may from time to time adopt, shall make an investigation as it deems proper and either affirm the decision of the committee or render the decision as in the judgment of the municipal planning commission should have been rendered by the committee.

HISTORY:

Acts 1988, 1st Ex. Sess., No. 88-923; Acts 2012, No. 12-297, § 1, Oct. 1, 2012.

2012 amendments.

The 2012 amendment, effective October 1, 2012, substituted "the municipal planning commission" for "the commission" or variants throughout the section; substituted "Except where the development of a subdivision within the territorial jurisdiction of a municipal planning commission is regulated by the county

commission pursuant to Section 11-52-30, the municipal planning commission" for "The planning commission" in the first sentence of (a); in the first sentence of (c), substituted "The municipal planning commission" for "The planning commission" and "governing body of the municipality" for "council"; in (d), substituted "the municipal planning commission" for "such planning commission" in the third sentence and substituted "full municipal planning commission" for "full planning commission" in the fourth sentence; and made stylistic changes.

§ 11-52-3

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§ 11-52-33.

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§ 11-52-32

§ 11-52-33

PLANNING, ZONING, AND SUBDIVISIONS

§ 11-52-33

NOTES TO DECISIONS

Analysis

Disapproval.
Illustrative cases.

Disapproval.

Planning commission cannot exercise its authority to regulate subdivisions in a way that contravenes other laws; even if a municipal planning commission has the authority to institute a moratorium on subdivision-plat applications, it may not use that authority without regard for the public welfare, to prevent the development of the private property of one individual. *Lee v. Houser*, 2013 Ala. LEXIS 125 (Ala. Sept. 27, 2013).

Illustrative cases.

Trial court did not err in denying a motion for a judgment as a matter of law filed by a town and its planning commission because the com-

mission could not adopt a moratorium on the approval of subdivisions; a town and its planning commission may not institute a moratorium, lawful or otherwise, solely to disregard their statutory duty to evaluate a particular plat application that has no apparent flaws without a reasonable "public welfare" explanation. *Lee v. Houser*, 2013 Ala. LEXIS 125 (Ala. Sept. 27, 2013).

In an action alleging negligent failure to consider or approve a subdivision-plat application, the evidence of tortious activity was sufficient to submit a question to the jury because it supported a finding that the planning commission used this provision as a sword for attacking the application; a town may not institute a moratorium solely to disregard the statutory duty to evaluate a particular plat application that has no apparent flaws, without a reasonable public welfare explanation. *Lee v. Houser*, 2013 Ala. LEXIS 185 (Ala. Dec. 20, 2013).

§ 11-52-33. Transfer or sale of land prior to plat approval.

(a) Where the regulation of a subdivision development is the responsibility of the municipal planning commission, if the owner or agent of the owner of any land located within a subdivision conveys, transfers, or sells any land by reference to or exhibition of or by other use of a plat of a subdivision before the plat has been approved by the appropriate commission, department, or agency of any municipality requiring such approval and recorded or filed in the office of the appropriate county probate office, the owner or agent shall forfeit and pay a penalty of one hundred dollars (\$100) for each lot or parcel so transferred, and the description of the lot or parcel by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from the penalties or from the remedies provided in this section.

(b) The municipality may enjoin the conveyance, transfer, or sale by a civil action for injunction brought in any court of competent jurisdiction or may recover the same penalty provided in this section by a civil action in any court of competent jurisdiction.

(c) Where the county commission is responsible for regulation of subdivision development within the territorial jurisdiction of a municipal planning commission, enforcement of the subdivision regulations of the county shall be as provided in Chapter 24, and any penalties assessed against a developer for failure to comply with the subdivision regulations of the county shall be as provided therein.

(d) Nothing in this section shall impair, impede, or prohibit any person or entity from entering into any otherwise valid and enforceable contract for the purchase or sale of any lot within any proposed subdivision prior to its approval.

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Cite as, Ala., 374 So.2d 305

227, 342 N.E.2d 619 (1976). This standard would allow extension of builder-vendor liability to varying lengths of time, dependent upon the nature of the defect, and whether the implied warranty could be reasonably expected to apply. Alabama has yet to have any case law specifying how long this warranty is to remain in effect after the sale of a new house. The better view is that, in the absence of a statute, the limit of liability is governed by reasonableness. Thus, whether the defect was discovered within a "reasonable" period would be a jury question. In no event, however, would the time limitation within which to file suit for implied warranty extend beyond the period allowed for filing suit on an express warranty (six years). § 6-2-34, Code 1975.

[15-17] For laches to run, the appellants must have failed to do something which equity would have required them to do. *Hinesley v. Davidson*, 335 So.2d 380 (Ala. 1976). The doctrine does not apply in the absence of knowledge or sufficient information to put the party on notice. *Duncan v. Johnson*, 338 So.2d 1243 (Ala. 1976). Additionally, mere delay, in the absence of culpability as shown by special facts, is not sufficient to invoke laches when the action is not barred by the statute of limitations. *Lipscomb v. Tucker*, 294 Ala. 246, 314 So.2d 840 (1975).

[18] In the instant case there is the initial question as to whether the complaint is barred by the statute of limitations; in other words, when did appellants discover the defect, and, hence, the fraud? Until this finding is made, laches would not be apparent from the face of the complaint.

For the reasons stated, the judgment of the court dismissing the complaint as to the counts in implied warranty is reversed and the cause is remanded to allow the appellants to amend their pleadings if they can to show the date they claim they discovered the defect and the fraud, and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

TORBERT, C. J., and BLOODWORTH, FAULKNER, JONES, ALMON, SHORES, EMBRY and BEATTY, JJ., concur.



Arthur SMITH, III

v.

CITY OF MOBILE, a Municipal Corp.
et al.

77-779.

Supreme Court of Alabama.

Aug. 31, 1979.

Property owner filed petition for writ of mandamus asking that city planning commission be compelled to issue certificate of approval for proposed resubdivision of lot. After leave to intervene was granted to adjoining landowner, the Circuit Court, Mobile County, Braxton L. Kittrell, Jr., J., entered order denying the petition and dismissed the case with prejudice, and the property owner appealed. The Supreme Court, Shores, J., held that: (1) action of city planning commission in disapproving proposed resubdivision of lot on grounds that it was "out of character with other lots in the area" was unrelated to conformance of the proposed resubdivision with regulations of the commission, and such disapproval exceeded authority vested in the commission by statutes, and thus such disapproval was improper, and (2) mandamus would issue to require approval by city planning commission of proposed resubdivision.

Reversed and remanded with directions.

1. Zoning and Planning ⇌ 232

Statutes or ordinances which impose restrictions on use of private property are

to be strictly construed and their scope cannot be extended to include limitations not therein included or prescribed.

2. Zoning and Planning ⇨ 234

Once planning commission has properly exercised its authority in drafting ordinances regulating subdivision development, it is bound by such ordinances.

3. Zoning and Planning ⇨ 193

Action of city planning commission in disapproving proposed resubdivision of lot on grounds that it was "out of character with other lots in the area" was unrelated to conformance of the proposed resubdivision with regulations of the commission, and such disapproval exceeded authority vested in the commission by statutes, and thus such disapproval was improper. Code of Ala. 1975, §§ 11-52-30 et seq., 11-52-31.

4. Mandamus ⇨ 87

Mandamus would issue to require approval by city planning commission of proposed resubdivision of lot where the commission denied approval of the proposed resubdivision three times on ground unrelated to conformance of the proposed resubdivision with regulations of the commission and in manner that exceeded authority vested in the commission by statute, and where no contention was made by the commission that the plan was in violation of any other ordinances.

J. H. Fernandez of McFadden, Riley & Parker, Mobile, for appellant.

William R. Lauten, Mobile, for City of Mobile and Mobile City Planning Commission.

John N. Leach, Jr., Mobile, for appellee-intervenor, Ruby D. Twitty.

SHORES, Justice.

This case involves the proposed resubdivision of a lot located in the old Springhill area of Mobile. The lot is owned by Mrs. Tula Fearn; suit was brought by her son-in-law, Arthur Smith, III, who is purchaser of the lot under contract. Mr. Smith proposes to divide the property into three ir-

regular shaped lots on which townhouses would be built. The dimensions of the lots would exceed the minimum area requirements set out in the Planning Commission regulations.

The surrounding neighborhood is an old one, with many large lots, narrow, winding roads, abundant shrubbery and trees. In recent years, some of the original lots have been subdivided, much in the manner here contemplated. The extent to which such development has taken place is a matter of dispute.

The proposed subdivision, named Arden Court, was first presented to the Planning Commission on November 3, 1977. After the statutorily required public hearing was held, approval was denied on the grounds that "the lots would be out of character with the other lots in the area." Minutes of the public hearings reveal substantial neighborhood opposition to the proposed plans. Concern was voiced over the increase in traffic that would result from subdivision and the proximity of the lots to a public grammar school. Neighbors also objected that the proposed lots would be out of character with the neighborhood. Application for approval was twice renewed, the plat having undergone minor revisions in the interim, and each time was denied on the identical grounds.

Following this triple rebuff, Smith filed a petition for a writ of mandamus in the Circuit Court of Mobile County, asking that the Mobile City Planning Commission be compelled to issue a certificate of approval for Arden Court. Leave to intervene was granted Ruby Twitty, an adjoining landowner, and a hearing was held, following which the trial court denied the petition and dismissed the case with prejudice. This appeal followed.

Appellant contends that the criteria utilized by the Planning Commission in turning down his proposal were not within its statutory grant of authority and were contrary to the regulations adopted by the Planning Commission itself; further, that the Commission's action denied him his

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rights under the Due Process and Equal Protection Clauses of the United States Constitution, and his rights under the Constitution of this State. He also alleges a failure on the part of the Commission to act within the time and manner prescribed by law.

The City argues that disapproval of subdivision plans on the grounds that they would be "out of character with other lots in the area" is authorized by Section V(D)(1) of the Planning Commission Subdivision Regulations. That section provides that:

"The size, width, depth, shape and orientation of lots and the minimum building setback lines shall be appropriate to the location of the subdivision and the type of development and use contemplated. Every lot shall contain a suitable building site."

The City also contends that the Planning Commission is granted substantial discretion by the enabling statute in approving or disapproving subdivisions, and may properly take into consideration such factors as neighborhood opinion and aesthetics.

We agree with appellant that the Planning Commission's action in disapproving Arden Court exceeded the authority vested in the Commission by statute.

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).

[1] 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. As the Court of Appeals of Maryland stated in a case similar to this one, ". . . Municipal agencies can exercise only so much of the police power as may be expressly granted or nec-

essarily implied. . . . The power delegated to the Commission to formulate and publish rules and regulations is not a blank check; it cannot make *ad hoc* decisions which deny to a citizen the right to use his land lawfully." *Baltimore Planning Com'n v. Victor Development Co.*, 261 Md. 387, 275 A.2d 478, 481 (1971). Statutes or ordinances which impose restrictions on the use of private property are strictly construed and their scope cannot be extended to include limitations not therein included or prescribed. E. C. Yokley, *The Law of Subdivisions*, § 53 (1963 and Supp.1979), citing *Knutson v. State*, 239 Ind. 656, 157 N.E.2d 469 (1959), affirmed on rehearing, 160 N.E.2d 200 (1959). See, also: *Boxell v. Planning Com'n of City of Maumee*, 10 Ohio App.2d 25, 225 N.E.2d 610 (1967).

[2] 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 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." (Emphasis Added) Yokley, supra, § 52, states that a planning commission has ". . . no discretion or choice but to approve a subdivision which conforms to the regulations." Courts of other jurisdictions have agreed. The Supreme Judicial Court of Massachusetts stated, in interpreting that state's subdivision control law, that there is ". . . no indication that planning boards were to have freedom to disapprove plans which comply with applicable standards merely because the board feels general public considerations make such actions desirable. . . ." *Pieper v. Planning Board of Southborough*, 340 Mass. 157, 163 N.E.2d 14, 18 (1959). Similarly in *Baltimore Planning Com'n v. Victor Development Co.*, supra 275 A.2d at 482, it was noted that ". . . Consistently it has been held that, unless the sub-

mitted plan clearly fails to comply with the appropriate legislative regulations, the board in question must grant its approval. . . .” Further, “. . . Mandamus 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.” Yokley, *supra*, § 53, citing *Kling v. City Council of Newport Beach*, 155 Cal.App.2d 309, 317 P.2d 708 (1957). In that case, approval had been denied by the planning commission because the proposed subdivision, though in compliance with city ordinances, was to be located in a scenic neighborhood with many large lots, and surrounding landowners objected that the development would be aesthetically discordant.

Mandamus is also appropriate where all applicable ordinances have been complied with, and the proposal is denied because adjacent property owners object. “. . . . Neighboring property owners do not possess the right to impose, for their own special benefit, restrictions upon the lawful use of a tract of land. . . .” Yokley, *supra*, § 54.

Regulations enacted by the planning commission must be of general application and set forth sufficient standards to give applicants notice of what is required of them. Powell, *Law of Real Property*, Chapter 79, “Subdivision Control,” 866. As stated by the Court of Appeals of Alabama:

“Municipal ordinances, placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct of business, and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply.” *Longshore v. City of Montgomery*, 22 Ala.App. 620, 622, 119 So. 599, 600 (1928).

Longshore held invalid a zoning ordinance which required property owners to secure the consent of their neighbors before a permit to build would be issued. See, also: *Swann v. City of Graysville*, 367 So.2d 952, 954 (Ala.1979), wherein it was held that a municipality’s “. . . power of control and regulation . . . may not be exercised in an arbitrary or discriminatory manner. To apply . . . [an] ordinance dissimilarly to those similarly situated is a denial of equal protection of law. . . .”

The Supreme Judicial Court of Massachusetts has likewise stated:

“. . . The subdivision control law attaches such importance to planning board regulations as to indicate to us that they should be comprehensive, *reasonably definite*, and carefully drafted, so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them. Without such regulations, the purposes of the law may easily be frustrated.

“. . . [These] regulations deal with the matters here in issue in terms . . . too vague and general to inform owners about the standards which they must meet. . . .” (Emphasis Added) *Castle Estates, Inc. v. Park & Planning Board of Medfield*, 344 Mass. 329, 182 N.E.2d 540, 545, 545 (1962).

Similarly, Yokley, *supra*, § 54 (Supp.1979), states:

“Where a subdivision plan is disapproved, valid reasons must be given for such action. Where reasons for disapproving a subdivision plan, or a development plan, are vague and uncertain in meaning, and provide no information to a developer to enable him to know wherein the plan failed to meet the requirements of the regulations, it has been held that such action operates to deprive a developer of his property without due process of law. If a plan fails in any respect to conform to the regulations it becomes the duty and obligation of the approving authority to so indicate. A city council, vested with authority to approve a plan, may not disregard the regulations and

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substitute its pure discretion for a discretion controlled by fixed standards applying to all cases of a like nature." Citing *RK Dev. Corp. v. Norwalk*, 156 Conn. 369, 242 A.2d 781 (1968).

The Planning Commission's authority to adopt regulations governing the subdivision of land is set out in Code 1975, § 11-52-31. The Commission is empowered to adopt regulations which provide:

" . . . for the proper arrangement of streets in relation to other existing or planned streets and to the master plan, for adequate and convenient open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air and for the avoidance of congestion of population, including minimum width and area of lots. Such regulations may include provisions as to the extent to which streets and other ways shall be graded and improved and to which water and sewer and other utility mains, piping or other facilities shall be installed as a condition precedent to the approval of the plat. . . ." (§ 11-52-31, supra)

Pursuant to this authorization, the Mobile City Planning Commission has enacted subdivision control ordinances. Section V(D) of those ordinances sets out the requirements which individual lots in a subdivision must meet. In addition to specific criteria regarding minimum lot size, maximum depth, position of lots in relation to streets, etc., the requirements of Section V(D)(1) are set out, supra.

To construe the provisions of Section V(D)(1), as appellees urge, as being synonymous with "out of character with other lots in the area" would be to ignore the specific criteria which follow it and vest a discretion in the Planning Commission which is unguided by uniform standards, and capable of arbitrary application. This we decline to do. If, as the City contends, the statute allows the Planning Commission to take into account aesthetic factors, the exercise of that discretion must be guided and limited by clearly drawn standards which can be uniformly applied and which give reasonable notice to applicants of requirements

with which they must comply to obtain approval.

[3, 4] The Planning Commission's denial of approval of Arden Court on the grounds that it was "out of character with other lots in the area" was unrelated to its conformance with the Planning Commission's own regulations and exceeded its statutory grant of power. In such a case, mandamus will issue to require the approval of the subdivision. *Yokley*, supra, § 53. See, also, cases cited above. In general, a plaintiff must demonstrate complete compliance with all requirements in connection with his or her plan before he or she will be entitled to a writ of mandamus. *Yokley*, supra (Supp.1979, § 53). No contention was made by the Planning Commission that Arthur Smith's plan is in violation of any ordinances other than Section V(D)(1). The plan was presented to the Commission on three separate occasions and three public hearings were held. After each such hearing, the application was denied on the sole ground that the lots would be "out of character."

The judgment of the trial court is reversed and the cause remanded for the issuance of the writ of mandamus directing the Planning Commission to approve the appellant's subdivision plan.

REVERSED AND REMANDED WITH DIRECTIONS.

TORBERT, C. J., and MADDOX, JONES and BEATTY, JJ., concur.



500/4 30-18-20



That part of the S&T of the City of Birmingham, Alabama, which is more particularly described by name and bounds as follows: ...

PART 1

WHEREAS the City of Birmingham, Alabama, has certain lands, buildings, and improvements, the title to which is vested in the City of Birmingham, Alabama, and the same are now being offered for sale by public auction, and the City of Birmingham, Alabama, desires to sell the same for cash, and to receive the proceeds of the sale for the purpose of paying the principal and interest on the bonds of the City of Birmingham, Alabama, and for other purposes, and to the end that the same may be lawfully sold, the City of Birmingham, Alabama, has caused this ordinance to be enacted, and the same shall have the force and effect of law from the date of its passage.

B

Handwritten signature or initials.

6590-182

STATE OF ALABAMA
JEFFERSON COUNTY

9-2-22

Roller form book

Enfile 31-18-201

Begin at the northwest corner of the NE 1/4 of the NE 1/4 of section 31, and run thence easterly along the north line thereof, for a distance of 19.20 feet, to a point on the easterly line of the Old Montgomery Highway, thence turn an angle of 124° 53' 10" to the right and run southerly along the easterly line of said way, for a distance of 418.74 feet, to the point of beginning of the tract here described; from the point of beginning of the tract here described, run westerly along the easterly line of said way and along the same course last described for a distance of 108.23 feet to the point of a curve turning to the left, said curve having a radius of 137.70 feet and subtending a central angle of 52° 19' 40", run thence southerly and along the arc of said curve and along the easterly line of said way for a distance of 127.87 feet to the point of compound curvature with a curve having a radius of 1254.43 feet and subtending a central angle of 12° 22' 30", thence run southerly and along the north line of the right of way of the Old Montgomery Highway, for a distance of 272.78 feet to the end of said curve, thence continue south-

That part of the North Half of Section 31, Township 18 South, Range 2 West, situated in Jefferson County, Alabama, more particularly described as follows:

PARCEL 2

For a distance of 28.28 feet thence turn an angle of 23° 11' to the right and run southerly along the easterly line of said Highway, for a distance of 141.11 feet to the point of curve of a curve turning to the right, said curve having a radius of 212.01 feet and subtending a central angle of 2° 32' and 18", run thence southerly along the arc of said curve for a distance of 211.88 feet thence turn an angle of 80° to the right from the tangent of said curve and run westerly along the line of said right of way for a distance of 20 feet, to a point on a curve, said curve having a radius of 272.01 feet subtending a central angle of 4° 23' and 24" and whose tangent forms an angle of 90° to the left with the last above described course when produced through said point of intersection, thence southerly along the arc of said curve and along the easterly line of said Highway, for a distance of 168.42 feet to the right of way, for a distance of 168.42 feet to the point of a curve turning to the right having a radius of 212.01 feet and subtending a central angle of 10° 31' and 06", run thence southerly along the arc of said curve and along the easterly line of said Highway, for a distance of 1022.84 feet to a point in the easterly line of the Old Montgomery Highway, thence turn an angle of 110° 41' and 10" to the right and run northerly along the easterly line of the right of way of the Old Montgomery Highway, for a distance of 443.74 feet, more or less, to the point of beginning, excepting mineral and mining rights not owned by the grantors as the law of the execution of this deed.

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DEED 6590-185

not be used during said period as a site for any city hall, jail, school or fire station.

For a period of fifty years from the date of this deed Parcel 2 shall not be used for any purpose other than the following purposes: as a site for municipal buildings or other reasonable municipal purposes.

It is expressly agreed that one of the considerations for the execution of this deed by the grantors, at and for the price herein specified, is the imposition upon said Parcels 1 and 2 of the restrictions hereinabove prescribed, which said restrictions the grantors have required in view of their ownership of other realty contiguous to the two parcels hereby conveyed.

It is agreed by and between the grantors and the grantee that so long as any portion of Parcel 1 is used for park purposes the portion of said Parcel 1 so used shall be named Wald Park in memory and honor of the grantors' father.

We, the said grantors, Edna Wald, Mildred Wald and Edna Wald, as Guardian of Pearl W. Marcuse, do for ourselves, our heirs, executors and administrators, covenant with the said City of Vestavia Hills and its assigns that we, the said undersigned grantors, are lawfully seized in fee simple of the said Parcels of land above described (excepting mineral and mining rights not owned by the grantors at the time of the execution of this deed) and that the said Parcels are free from all encumbrances, and that we have a good right to sell and convey the same as aforesaid, and that we will, and our heirs, executors and administrators shall warrant and defend the same to the said City of Vestavia Hills and its assigns forever against the lawful claims of all persons.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 29 day of December, 1980.

Edna Wald (SEAL)
Edna Wald

Mildred Wald (SEAL)
Mildred Wald

Edna Wald as Guardian of Pearl W. Marcuse (SEAL)
Edna Wald, as Guardian of Pearl W. Marcuse.

NO TAX COLLECTED

[Handwritten signature]

STATE OF ALABAMA
NOTARY PUBLIC
No. 06590
APR 10 11 AM '80
I, *[Signature]*
do hereby certify that the foregoing is a true and correct copy of the original as shown to me.



[Handwritten signature]
Notary Public

day of *[illegible]*, 1980.
Given under my hand and official seal this 19th day of *[illegible]*, 1980.
the same voluntarily on the day the same date,
the conveyance, she, in her capacity as such guardian, executed
before me on this day that, being informed of the contents of
to the foregoing conveyance and who is known to me, acknowledged
said, whose name as guardian of Pearl E. Marcus, is signed
in and for said County in said State, hereby certify that said



[Handwritten signature]
Notary Public

day of *[illegible]*, 1980.
Given under my hand and official seal this 19th day of *[illegible]*, 1980.
they executed the same voluntarily on the day the same date,
this day that, being informed of the contents of the conveyance,
conveyance, and who are known to me, acknowledged before me on
said and said said said, whose names are signed to the foregoing
in and for said County in said State, hereby certify that said

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STATE OF ALABAMA,
JEFFERSON COUNTY.

06590186

That part of the SE1/4 of the SMI/4 of Section 30, Township 18 South, Range 2 West, and that part of the North 1/2 of the NMI/4 of Section 31, Township 18 South, Range 2 West, situated in Jefferson County, Alabama, all more particularly described by metes and bounds as follows:

Begin at the Northwest corner of the NE1/4 of the said Section 31 and run thence eastwardly along the north line thereof, for a distance of 16.20' to a point on the easterly line of the Old Montgomery Highway, thence turn an angle of 124°53'10" to the right and run southwardly along the easterly line of said right of way, for a distance of 443.74', to the point of beginning of the tract here described, from the point of said right of way and along the same course last described for a distance of 109.73' to the point of a curve turning to the left, said curve having a radius of 137.70' and subtending a central angle of 55°19'40", run thence southwardly and along the arc of said curve and along the easterly line of said right of way for a distance of 132.97' to the point of compound curvature with a curve having a radius of 1254.43' and subtending a central angle of 120°27'30", thence in a southeasterly direction along the arc of said Highway, for a distance of 272.76' to the end of said curve, thence continue southeasterly along the northerly line of said curve, thence continue southeasterly along the northerly line of said curve, thence tangent to said curve turning to the left, a central angle of 32°07'30", run thence eastwardly along the arc of said curve and along the northerly line of said right of way, for a distance of 210.26' to the end of said curve, thence continue eastwardly along a tangent to said curve and along said right of way for a distance of 23.13' to the point of a curve turning to the left, said curve having a radius of 1482.65' and subtending a central angle of 50°19'00", thence along the arc of said curve and along the northerly line of said curve, thence continue eastwardly along a distance of 17.58' to the end of said curve, thence continue eastwardly along a tangent to said curve and along the northerly line of said right of way, for a distance of 134.00' to the point of a curve turning to the right, said curve having a radius of 516.82' and subtending a central angle of 100°19'00", thence continue along the northerly line of said right of way and along the arc of said curve for a

Pursuant to the requirements of the United States Department of Interior, the real property described hereinafter situated in Jefferson County, Alabama, is hereby restricted and limited as follows:

The real property, described hereinafter, has been developed with Federal financial assistance provided by the Heritage Conservation and Recreation Service (formerly the Bureau of Outdoor Recreation) of the Department of the Interior in accordance with the Land and Water Conservation Fund Act of 1965, as amended, 16 U.S.C. 4601-5, et. seq. (1970 ed.). Pursuant to a requirement of that law, this property may not be converted to other than public outdoor recreation uses, whether by transfer, sale, or in any other manner, without the express written approval of the Secretary of the Interior. By law, the Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan, and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

The real property situated in Jefferson County, Alabama, which is being limited by this Notice of Limitation of Use is legally described as follows:

NOTICE OF LIMITATION OF USE

FILE 1866 PAGE 437

STATE OF ALABAMA
JEFFERSON COUNTY

General Restriction on Wild Ponds

JUDGE OF PROBATE
NOTARY PUBLIC
AUG 27 4 11 PM '79
REAL ESTATE
NOTARY PUBLIC

437

Notary Public

I, the undersigned, a Notary Public in and for said County and said State, hereby certify that Jack O. Grace, whose name as Mayor of the City of Vestavia Hills, a municipal corporation, is signed to the foregoing Notice of Limitation of Use and who is known to me, acknowledged before me on this day that being informed of the contents of the conveyance, he, as such officer, and with full authority, executed the same voluntarily for and as the act of said corporation.

STATE OF ALABAMA)
JEFFERSON COUNTY)

Helma K. Moon, City Clerk

ATTEST:

BY: Jack O. Grace, Mayor

CITY OF VESTAVIA HILLS, ALABAMA

DONE AND EXECUTED and LIMITED this 24th day of August, 1979.

distance of 93.06' to the end of said curve, then continue southeast-wardly along the tangent to said curve and along the northerly line of said right of way for a distance of 64.68' to the point of curve of a curve to the right, said curve having a radius of 269.48' and subtending a central angle of 23°07'00", then continue southeastwardly along the arc of said curve and along the northerly line of said right of way, for a distance of 108.72' to the end of said curve; then continue southeast-wardly along the tangent to said curve and along the northerly line of said right of way for a distance of 19.23' to the point of intersection with the westernly line of the right of way of U.S. Highway #31, as presently laid out and constructed, said point being on a curve having a radius of 3154.18', subtending a central angle of 22°50'30" and whose tangent forms an angle of 13°10'50" to the left with the last above described course when extended eastwardly through said point of intersection, run thence northerly along the arc of said curve and the westernly line of said right of way, for a distance of 1257.45' to the point of compound curvature with a curve having a radius of 2172.01' and subtending a central angle of 201°4'28", then in a northerly direction along the arc of said curve and along the westernly line of said right of way for a distance of 84.96' to a point, then turn an angle of 107°05'11" to the left from the tangent of the last above described curve and run in a southwestwardly direction for a distance of 469.35' to a point, then turn an angle of 54°46'00" to the right and run in a northwest-wardly direction for a distance of 250.41' to a point, then turn an angle of 20°20'45" to the right and run in a northwestwardly direction for a distance of 150.00' to a point on the easterly line of the Old Montgomery Highway, thence turn an angle of 117°58'06" to the left and run southwardly along the easterly line of said right of way for a distance of 278.55' to the point of beginning.

REAL 1806 PAGE 438

RESOLUTION NUMBER 4784

A RESOLUTION AUTHORIZING APPLICATION TO ADECA FOR A LAND AND WATER CONSERVATION FUND GRANT TO CONSTRUCT A PARK AT PATCHWORK FARMS

WHEREAS, the City of Vestavia Hills owns property intended for recreational use at Patchwork Farms and proposes to have constructed recreational resources at Patchwork Nature Park for the health and wellbeing of the general public; and

WHEREAS, the Alabama Department of Economic and Community Affairs (ADECA) administers the Land and Water Conservation (LWCF) Program of the National Park Service, which provides assistance to communities for development of recreational assets for parks with Section 6(f)(3) protection; and

WHEREAS, the estimated overall cost to construct Patchwork Nature Park is approximately \$500,000, which may be performed in phases; and

WHEREAS, the construction of trails with foot bridges has been included in the master plan for Patchwork Nature Park, with estimated cost of \$340,000; and

WHEREAS, the construction of the proposed trails and bridges will provide for expanded recreational opportunities by making an additional 8.49 acres accessible to park users; and

WHEREAS, the required match percentage for the 2015 Funding Cycle LWCF grant is 50/50 and the grant ceiling is \$150,000; and

WHEREAS, the Mayor and City Council find it is in the best public interest to accept said grant and construct pursuant to the Patchwork Nature Park master plan.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VESTAVIA HILLS, ALABAMA, AS FOLLOWS:

1. The City Manager is hereby authorized to make application to ADECA for LWCF 2015 Funding Cycle assistance to construct trails at Patchwork Nature Park; and
2. The City of Vestavia Hills will hold in reserve \$190,000, which is the required match for LWCF assistance; and
3. The City of Vestavia Hills understands that it will sign assurances to comply with all applicable Federal and State laws, rules, and regulations, including the LWCF Act Section 6(f)(3) protection of the park if it is developed with LWCF funding; and
4. This Resolution Number 4784 shall become effective immediately upon adoption and approval.

DONE, ORDERED, ADOPTED and APPROVED this the 25 day of January, 2016.

Alberto C. Zaragoza, Jr.
Mayor

ATTESTED BY:

Rebecca H. Leavings,
City Clerk



Patchwork Farm Nature Park Executive Summary



The project is to construct a 8' wide, 1850 lf linear diverse-use asphalt* connector trail including one foot bridge between Healthy Way and Old Looney Mill Road, along with a 8' wide 1080 lf diverse-use gravel* trail with two foot bridges for crossing the creek that runs parallel to the trail. Patchwork Nature Park is a greenspace buffer of 8.49 acres owned by the City of Vestavia Hills and located between Lifetime Fitness and the mixed use development of Vestavia Reserve in Patchwork Farms. The property is also bounded by Cahaba River Road and Old Looney Mill Road (Jefferson County, AL).

The proposed trail will connect with the Vestavia Hills sidewalks system, and it will be contiguous to existing fitness/recreational facilities and residential/mixed use area. In addition to providing recreational opportunities, the low-impact construction park will serve to protect the riparian buffer around the stream. Amenities are planned to be minimal, to include benches, garbage cans doggie waste stations, and a pavilion (in the future).

*Width and construction of the trails to be determined through public involvement process.

<u>Item</u>	<u>Cost</u>	<u>City</u>	<u>City in-kind</u>	<u>LWCF</u>
Trail, 1850 lf 8' asphalt	\$59,500	.	.	\$59,500
Trail, 1080 lf 8' gravel	\$21,500	.	.	\$21,500
Other amenities	\$5,000	.	.	\$5,000
Signage (2, one per entrance)	\$1,000	.	.	\$1,000
Bridges (3@\$20K each)	\$60,000	.	.	\$60,000
Landscaping	\$60,000	\$60,000	.	.
Drainage	\$30,000	\$30,000	.	.
Site grading	\$40,000	\$40,000	.	.
Clearing, grubbing, privet eradication	\$35,000	\$35,000	.	.
Erosion control	\$18,000	\$15,000	.	\$3,000
Crosswalk(s)	\$5,000	\$5,000	.	.
Project (grant) management and engineering oversight	\$5,000	.	\$5,000	.
PROJECT TOTAL	\$340,000	\$185,000	\$5,000	\$150,000
		Cash Outlay	City I/K	LWCF

