UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WOODWARD HARBOR L.L.C. and LSU HEALTH FOUNDATION NEW ORLEANS	*	**CIVIL ACTION NO. 2:23-cv-05824**
	*	**JUDGE WENDY B. VITTER**
VERSUS	*	**MAG. JUDGE DONNA P. CURRAULT**
CITY OF MANDEVILLE and JASON ZUCKERMAN, INDIVIDUALLY	*	**DIVISION D (2)**

MEMORANDUM IN SUPPORT OF F.R.C.P. 12(b)(1) MOTION TO DISMISS CERTAIN CLAIMS AS NOT RIPE FOR ADJUDICATION

In this case, Plaintiffs, Woodward Harbor, L.L.C. and LSU Health Foundation New Orleans (individually "Woodward" and "LSU" and collectively "Plaintiffs") challenge the denial of their application for a zoning change and approval of a requested conditional use by the City of Mandeville ("the City" or "Defendant"). Plaintiffs assert multiple constitutional challenges to the City's actions as well as a Louisiana state law claim. While the City contends no merit exists to any of Plaintiffs' claims, this Court is without jurisdiction to hear Plaintiffs' regulatory takings, due process and equal protection claims[1] as those are not yet ripe for consideration. Accordingly, the City moves for dismissal of those claims pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that this Court lacks subject matter jurisdiction over these claims.[2]

I. BACKGROUND

This case arises from the Plaintiffs' submission to the City of an Application for Planned District and Conditional Use Approval (the "Application") in connection with its proposed Sucette

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1 Generally, Plaintiffs' regulatory takings claims are set forth as Counts 3 and 4; the due process claims as Counts 5 and 6; and the equal protection claims as Count 7.

2 The City has, contemporaneously with the filing of this Rule 12(b)(1) motion, also filed a separate Rule 12(b)(6) motion.

Harbor development,[3] which was designated as zoning change Case Number Z22-10-02 and approval of conditional uses Case Number CU22-10-02.[4] The City Planning and Zoning Commission (the "Commission") held five (5) special meetings and a final voting meeting in which it recommended approval with certain conditions, but because the application was in a Planned District – PD, it also required Council Approval.[5] After the Commission voting meeting, Plaintiffs prepared a proposed ordinance, Ordinance 23-16 (the "Ordinance"), requesting the City Council to approve the Site Plan, zone the subject property Planned Combined Use District ("PCUD") and grant a Conditional Use Permit for development of the site.[6] Several public hearings

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3 *See* Complaint Ex. 3, R. Doc. 1-5 (the Application). The Application was submitted by Woodward as "agent" for LSU.

4 The referenced excerpts of meeting minutes of the City of Mandeville's Planning and Zoning Commission are attached hereto as **Exhibit 1-A**, *in globo* ("Commission Minutes"). *See* Exhibit 1-A, Commission Minutes (Sept. 21, 2022), p. 1; *see also* **Exhibit 1** hereto Affidavit of Alexander Weiner. The meeting minutes for the City of Mandeville's Planning and Zoning Commission are public records, which are available at https://www.cityofmandeville.com/meetings.

5 The rules relating to a PD-Planned District are set forth in Section 7.5.15 of the Comprehensive Land Use Regulations Ordinance (the "CLURO"). The referenced excerpts of the CLURO are attached hereto as **Exhibit 2**. All uses permitted in a Planned District are conditional uses and shall be subject to the procedural requirements for Planned District zoning. *See* CLURO Section 7.5.15.2. Section 4.3.3 of the CLURO sets forth the procedure for Planned District approvals, which requires a site plan review procedure for approval of mixed uses by *ordinance* of the *Council* subsequent to *recommendation* by the Planning Commission (emphasis added). The procedure is as follows: PD applications shall be filed with the Planning Director. *See* CLURO Section 4.3.3.4. The Planning Commission shall hold public hearings. *See* CLURO 4.3.3.5. The Planning Commission may recommend, and the City Council may establish conditions for approval. *See* CLURO Section 4.3.3.9. The decision of the Planning Commission shall be forwarded to the Council with a *recommendation* to *grant* or *deny*. *See* CLURO Section 4.3.3.11 (emphasis added). The City Council shall hold public hearings. *See* CLURO Section 4.3.3.11. City Council approval of Planned District Development shall be by amendment to the CLURO and the Official Zoning Map. *See* CLURO Section 7.5.15.3. Section 7.5.15.1 of the CLURO provides that development sites approved by ordinance under the site plan review procedures of a Planned District shall be approved as a Planned Residential District (PRD), a Planned Commercial District (PCD), a Planned Industrial District (PID) or a Planned Combined Use District (PCUD).

6 *See* Mandeville City Council Meeting, Agenda Packet, Introduction of Ordinance No. 23-16 (May 11, 2023), attached hereto as **Exhibit 3-A**. The court may take judicial notice of the City Council minutes, agenda, and City Ordinances. For the Court's ease of reference, excerpts of the City Council meeting minutes and agenda reports referenced herein are attached as **Exhibit 3-A**, *in*

were held before the Council, and the Ordinance was amended by the Council multiple times during that process. Ultimately, the Council rejected Ordinance 23-16 by a unanimous roll call vote. Plaintiffs immediately filed suit against the City and councilmember Jason Zuckerman, individually, alleging that the actions of the Defendants violated the Plaintiffs' constitutional and statutory rights under state and federal law. Plaintiffs seek damages for the alleged violations, as well as declaratory relief. As set forth more fully hereafter, Plaintiffs' claims are premature and are not ripe for consideration by this Court.

II. LAW AND ARGUMENT

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977)); *Napoleon v. Shows, Cali & Walsh*, 573 F. Supp. 3d 1063 (E.D. La. 2021).

In ruling on a Rule 12(b)(1) motion, "the court is permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments." *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009), *cert. denied*, 558 U.S. 1111, 130 S. Ct. 1054, 175 L. Ed. 2d 883 (2010); *Ramming*, 281 F.3d at 161 (stating that a court ruling on a Rule 12(b)(1) motion may evaluate "(1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts)."

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globo; *see also* **Exhibit 3**, Affidavit of Kristine Scherer. Mandeville City Council meeting minutes, agendas, and agenda packets may also be obtained at https://www.cityofmandeville.com/meetings.

Ripeness ensures that federal courts do not decide disputes that are "premature or speculative." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002) (citing *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000)). "Ripeness is a question of law that implicates this court's subject matter jurisdiction." *Urban Developers LLC v. City of Jackson, Miss.*, 468 F.3d 281, 292 (5th Cir. 2006). A case becomes ripe when it "would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now." *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010). The ripeness inquiry reflects " 'Article III limitations on judicial power' as well as 'prudential reasons for refusing to exercise jurisdiction.' " *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 670 n.2, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993)).

A regulatory takings claim is not ripe until the government has reached a final decision on the challenged regulation. *Williamson Cnty. Reg'l Plan Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), *overruled on other grounds by Knick v. Township of Scott*, —— U.S. ——, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).[7] Only after the final regulatory decision will a court have before it the facts necessary to evaluate a regulatory takings claim, such as "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Id.* at 191. When similar "factual development is necessary" for related claims—like due process and equal protection claims—then

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[7] *Williamson County* adopted a two prong test for ripeness under the Fifth Amendment's Takings Clause, explaining that such claims are not ripe until (1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner; and (2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures the state provides. While the Supreme Court's decision in *Knick* reversed the second prong, the first prong remains valid.

those claims are also not ripe until the regulator has made a final decision. *John Corp. v. City of Houston*, 214 F.3d 573, 586 (5th Cir. 2000).

In adopting the first prong, the *Williamson* court explained its reluctance to hear premature takings claims as follows:

> This Court consistently has indicated that among the factors of particular significance in the [*Penn Central*] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson County, 473 U.S. at 191 (citations omitted).

A. Plaintiffs' claim is not ripe because they have failed to submit an alternative plan.

In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 2665–66, 57 L. Ed. 2d 631 (1978), the United States Supreme Court declined to hold that New York City's Landmarks Preservation Law effected a taking as applied to Grand Central Terminal. The Court reasoned that although the City had disapproved a plan for a 50–story building above the terminal, **the property owners had not sought approval for an alternative plan**, and it was, therefore, uncertain whether the City would disapprove of all economically beneficial uses of the land.

In *Beach v. City of Galveston*, No. 21-40321, 2022 WL 996432, at *1 (5th Cir. Apr. 4, 2022), the Fifth Circuit found that the plaintiff's claim was not ripe because the plaintiff failed to pursue options that remained for the city to change its decision:

> The Supreme Court has held that "[w]hen a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision." *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2228 (2021). Under the finality requirement, "a plaintiff must show that 'there [is] no question ... about how the "regulations at issue apply to the particular [property] in question." ' " *Id.* at 2230 (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)). While a plaintiff is no longer required to exhaust state remedies in order to pursue "a takings claim when the government has reached a conclusive position," "a plaintiff 's failure to properly

> pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision." *Id.* at 2231; *see also Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) ("[T]he settled rule is that 'exhaustion of state remedies "is *not* a prerequisite to an action under [42 U.S.C.] § 1983." ' ").
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> Here, because two such avenues remained available, the district court properly concluded that Plaintiffs-Appellants' claims were not ripe for judicial review. First, when Ben-Amram was notified that the City had revoked the Property's grandfather status because the Property had been unoccupied for more than six months, he could have appealed the City's decision to the Board of Adjustments. To the extent that Plaintiffs-Appellants contest the City's interpretation of "occupancy" under zoning standard § 29-111(a)(4), appealing to the Board of Adjustments offered a relevant form of review, but Plaintiffs-Appellants never filed an appeal with the Board. ***Second, nothing prevented Ben-Amram from reapplying for an SUP after the city council denied his first application, yet he failed to reapply***.

Id. at **2-3.

Here, Plaintiffs have not sought approval of an alternate plan after the City Council denied this application. Further, when given the opportunity to revise its submitted site plan to accord with the City Council's proposal, Plaintiffs declined.

Plaintiffs erroneously assert that the Application was consistent with the land uses contemplated by the City's land use regulations with *limited* and *minimal* departures from its strict requirements[8] and should have simply been approved as submitted. Instead, the Plaintiffs' application includes a request to ***change*** the zoning of property from Planned *Residential* District (PRD)[9] to a Planned *Combined Use* District (PCUD). This request for change in zoning designation accompanied a request for Conditional Use Approval to allow for the following mix of residential and commercial uses: administrative and business offices, multi-family residential

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8 Complaint, R. Doc. 1 at ¶¶ 86, 96.

9 Parcel D, Mariners Village Subdivision, upon which the proposed Sucette Harbor development would be built was zoned to the PD sub-category of Planned Residential District (PRD) pursuant to Pursuant to Ordinance 98-40. *See* City of Mandeville, Ordinance No. 98-40, attached hereto as **Exhibit 4**. *See In re Waller Creek, Ltd.*, 867 F.2d 228, 238 n.14 (5th Cir. 1989) (federal courts may take judicial notice of a city ordinance); *accord Port Marigny, LLC v. City of Mandeville*, No. CV 17-4727, 2018 WL 1757385, at *6 (E.D. La. Apr. 12, 2018).

housing, a hotel, a restaurant with a lounge, and general and marine retail sales.[10] Specifically, the Plaintiffs' original Application requested approval of a mixed use development consisting of a 201 unit multi-family building, an 82 room hotel, two restaurant/retail buildings, and a 103 slip marina.[11]

The CLURO provides that the unique nature of each Planned District application may require, *under proper circumstances*, the departure from strict enforcement of codes and ordinances.[12] The Plaintiffs' Application included four (4) departures from CLURO standards, including increased building height of sixty (60) feet for the multi-family building instead of the standard required 35 foot limit for multi-family,[13] increased hotel size to 108,000 square feet instead of the standard required 100,000 square foot limit for buildings in a highway commercial district[14], decreased parking to 500 spaces instead of the required 624 space minimum,[15] and removal of live oak trees.[16] [17] After five (5) public hearings before the Commission, Plaintiffs modified its plans at the sixth and final voting meeting to remove a proposed café to allow for additional parking spaces.[18] Nevertheless, the modified plans for 589 parking spaces were still a departure from the CLURO standards.[19] After a failed motion to reduce the hotel size to the

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10 *See* Exhibit 3-A attached hereto, Mandeville City Council Minutes (May 25, 2023), p. 7.

11 *See* Complaint, R. Doc. 1 at ¶ 19; *see also* Ex. 3 to Complaint, R. Doc. 1-5 at p. 1 (Application).

12 *See* Exhibit 2, CLURO Section 7.5.15.4 (emphasis added).

13 *See* Exhibit 2, CLURO Section 7.5.4.3, which provides that structures in a R-3 Multi-family District zone shall be a maximum 35 feet.

14 *See* Exhibit 2, CLURO Section 7.5.9.3, which provides that buildings in a B-2 Highway Commercial District zone shall be a maximum of 100,000 square feet.

15 *See* Exhibit 2, CLURO Section 9.1.4 minimum parking requirements for each type of use.

16 *See* Exhibit 2, CLURO Section 9.2.5.7 live oak protection requirements.

17 *See* Exhibit 1-A, Commission Minutes (Sept. 21, 2022), p. 2, ¶¶ 4-8.

18 *See* Exhibit 1-A, Commission Minutes (April 17, 2023), p. 1.

19 *Id.*

CLURO standard of 100,000 square feet, the Commission voted by narrow margin of 4-3 to recommend approval of the revised plans submitted with the following conditions: (a) addition of pedestrian and bike path, (b) landscaping inspection, and (c) plan review by City's Design Review Committee.[20]

The City Council then introduced Ordinance 23-16 prepared by the Plaintiffs, which provided for (1) the approval of the site[21] as a Planned Combined Use District (PCUD) and rezoned to the extent necessary; (2) the approval of the site development plans attached thereto; (3) the approval of a conditional use permit for (a) a 201 unit multi-family/age restricted housing, (b) an 84 room/108,813 square foot hotel, (c) an 11,700 square foot retail and office, (d) a 100 boat slip marina, and (e) 589 parking spaces, together with approval of all variances and departures from the CLURO.[22]

The City Council addressed proposed Ordinance 23-16 at nine (9) separate Council meetings, including the meetings for introduction and final vote. After hearing comments at the first several meetings, the Plaintiffs revised their plan at the fifth Council Meeting to reduce the multi-family building to 178 units, which reduced the number of required parking spaces and enabled the increase in number from 589 to 622 spaces.[23] At the next meeting, the Council then amended the proposed Ordinance 23-16 to further reduce the size of the multi-family building to

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20 *See* Exhibit 1-A, Commission Minutes (April 17, 2023), p. 6.

21 The Application for zoning change and conditional use approval included Parcel D and not neighboring Parcel U upon which the marina was to be constructed, but Ordinance 23-16 was subsequently amended by the Council to add Parcel U (the "Marina"); *See* Exhibit 3-A, City Council Minutes (July 12, 2023), p. 2.

22 *See* Exhibit 3-A, City Council Minutes, New Business No. 5 (May 11, 2023), p. 7, 10; *see also* Exhibit 3-A, proposed draft Ordinance 23-16 in the Agenda Packet for City Council Meeting (May 11, 2023).

23 *See* Exhibit 3-A, City Council Minutes (July 5, 2023), p. 1.

90 units.[24] When asked at the following meeting if the reduction to 90 units would reduce the height or footprint of the building, the Plaintiffs' representative indicated that it had not made a decision on that yet and was trying to get all the issues on the table before coming back with a plan.[25] However, the Plaintiffs' representative added that if the number of units fell below the 178 units that it previously proposed, the Marina would have to be removed from the project.[26]

Instead of preparing a revised site plan reducing the number of units to 90 as amended by the proposed ordinance, the Plaintiffs *countered* the Council proposal with *its* proposed revised plan to reduce the number of units from the 178 that it originally proposed to 170, which Plaintiffs indicated was needed to develop the Marina.[27] The revised plan further reconfigured the buildings to allow for the preservation of the five live oak trees that were previously requested to be removed, and adjusted the parking to 563 parking spaces, which eliminated the departures from the CLURO for parking and trees.[28] However, the departures from the CLURO for the height of the multi-family building and the square footage of the hotel remained, and the proposed plan for a 170 foot multi-family building was inconsistent with and far exceeded the 90 units as proposed by the Ordinance 23-16. Plaintiffs could have proposed a plan for 90 units without a Marina, but they did not.

As it continued to *negotiate* with the Council, Plaintiffs later added that they were unsure if they were willing to do any more revisions to the site plan.[29] At the subsequent Council Meeting

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24 *See* Exhibit 3-A, City Council Minutes (July 12, 2023), pp. 6-7.

25 *See* Exhibit 3-A, City Council Minutes (July 24, 2023), p. 5.

26 *See* Exhibit 3-A, City Council Minutes (July 24, 2023), p. 6.

27 *See* Exhibit 3-A, City Council Minutes (August 15, 2023), pp. 2-3.

28 *Id.*

29 *See* Exhibit 3-A, City Council Minutes (August 15, 2023), p. 38.

where the vote on the ordinance was taken, Plaintiffs refused to present a revised site plan with a modified footprint consistent with the 90 unit requirement of the proposed ordinance, stating that they could reduce the originally proposed 201 units down to a minimum of 170, but could not go below 170.[30] The result was a proposed ordinance providing for 90 units with an unmodified site plan attached, which the Council unanimously voted against.[31] The Council was not denying Plaintiffs from using or developing the property as alleged,[32] it simply denied the specific plan proposed by the applicant. Plaintiffs were not denied *all use* of the property, just the site plan and uses that *they wanted.*

Following a denial of a Conditional Use Permit or Planned District (PD) zoning, the applicant is prohibited from filing the same or substantially the same *use* or conceptual *plan* on the *same* or substantially the same site for one (1) year from the denial.[33] Nevertheless, the Council decision does not prohibit the applicant from submitting an application for alternative uses or site plan. In his comments before voting, Councilman Danielson appears to open the door for such a path forward by stating that the Council should deny the proposed ordinance and *start over from scratch* and work with the developer on an ordinance that fits all requirements.[34] Similar to *Penn Central,* the Plaintiffs have not yet submitted an alternate plan to the one rejected by the Council. Not only have the Plaintiffs not yet submitted an alternative plan that may have been better received by the Council, but they actually refused to submit a plan that was consistent with what was proposed by the Council. Further, Plaintiffs could have submitted an alternative plan with

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30 *See* Exhibit 3-A, City Council Minutes (September 5, 2023), p. 3.

31 *See* Exhibit 3-A, City Council Meeting, Agenda Packet, proposed Ordinance 23-16 as revised (September 5, 2023).

32 *See* Complaint, R. Doc. 1 at ¶ 76.

33 *See* Exhibit 2, CLURO Section 4.3.3.15.

34 *See* Exhibit 3-A, City Council Minutes (September 5, 2023), p. 48.

height limits consistent with CLURO height limits for multi-family dwellings and square footage limits for hotels, but they did not. Additionally, the Plaintiffs have not submitted a plan limited to residential uses only consistent with existing zoning. Plaintiffs' claim that it has been deprived of using or developing the land is premature, because Plaintiffs have not sought approval of an alternative plan that is more suitable with existing zoning and CLURO density and height regulations.

Similar to *Penn Central,* Plaintiffs have not sought approval of an alternative plan, and cannot be said at this time that the City would disapprove of all economically beneficial uses of the land if Plaintiffs would have presented alternative proposals that are consistent with existing zoning and/or CLURO height and density requirements. The records show that the City was open to a modified plan with 90 units, but Plaintiffs declined to pursue such a plan. A similar factual scenario occurred in *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340 (1986). There, a developer proposed a 159-unit development on agricultural land and submitted a preliminary plat, which was rejected by the County Planning Commission as inconsistent with the county plans and zoning regulations. The developer filed suit arguing that the government owed him damages for an alleged taking of his property. The Supreme Court held that the developer's claim was not ripe because a "final and authoritative determination of the type and intensity of development legally permitted on the subject property" was lacking, due to the fact that only a 159-unit subdivision appeared to be precluded. *Id.* at 348. The Court agreed with the state appellate court's explanation that the claim was not ripe because "the refusal of the [the County] to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development." Here, the City's refusal to permit Plaintiffs' desired development does not preclude

a less intensive development that has economic value. The record indicates that the City was open to a less intensive development as well.

Plaintiffs' due process and equal protection claims are likewise unripe. They are based on the same alleged facts as the takings claim – namely that Defendants' failure to approve the Sucette Harbor development plan violated substantive and procedural due process and the Equal Protection Clause. The substantive due process claim is based on allegations of the arbitrary and capricious nature of the rejection of the development plan.[35] The procedural due process claim is based on allegations of denial of proper procedure that resulted in rejection of the development plan.[36] The equal protection claim is based on allegations that Defendants treated Plaintiffs differently by proposing onerous requirements in the approval process not imposed on others that resulted in rejection of the development plan.[37] The harm alleged under all claims is indistinguishable – the purported economic loss flowing from the rejection of the development plan. However, claims based upon this purported loss are premature because the rejection of a single development plan is not a final decision if alternative uses are available. Thus, further factual development relating to a final decision is necessary for the due process and equal protection claims, similar to the takings claim, making them unripe at this juncture. *See generally John Corp.*, 214 F.3d at 586.

B. Plaintiffs' Complaint is Premature because Plaintiffs failed to Pursue an Administrative Appeal Regarding the Need for a Zoning Change

In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981), the Court rejected the claimant's taking claim as premature:

> There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a **variance** from the approximate-original-contour requirement of § 515(d)

[35] Complaint, R. Doc. 1 at ¶¶ 116-123.

[36] Complaint, R. Doc. 1 at ¶¶ 124-130.

[37] Complaint, R. Doc. 1 at ¶¶ 131-137.

> or a **waiver** from the surface mining restrictions in § 522(e). If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution.

In *Williamson*, the Court found that even though the developer had submitted a plan for developing its property, it had failed to seek any variance that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. The Court noted that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant variances from the zoning ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having certain grades. Accordingly, the Court held that the developer "has not yet obtained a final decision regarding how it will be allowed to develop its property." *Id.* at 190.

As the Fifth Circuit noted in *Urban Developers*, "This means that even if a plan is initially disapproved by the government, ***property owners must then seek variances or waivers***, when potentially available, before a court will hear their takings claims." 468 F.3d at 293. *See also Beach v City of Galveston*, No. 21-40321, 2022 WL 996432 (5th Cir. 2022) (affirming district court's dismissal for lack of subject matter jurisdiction based upon a lack of finality where the claimant could have pursued administrative appeals and could have reapplied for the Specific Use Permit it was denied).[38]

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38 The Court noted that multiple city council members had encouraged the developer to make certain repairs and apply again.

The City's planning Staff Report, which was publicly posted, states that Parcel D is *zoned* Planned Residential District (PRD) per Ordinance 98-40.[39] The Application was designated as a zoning change and treated as such throughout the approval process. Plaintiffs now allege in their Complaint that the City *incorrectly* asserted that the property is zoned PRD and incorrectly took the position that a zoning change to PD was required.[40] However, similar to the applicants in *Williamson,* the Plaintiffs could have administratively appealed the decision that a zoning change was required. Similar to most zoning ordinances, the CLURO provides a mechanism for appealing *administrative* decisions of staff to the Zoning Commission acting in a role similar to most Board of Adjustments.[41] Plaintiffs never filed an administrative appeal of the decision of the Planning Commission staff that a zoning change was required. Thus, any claims relating to the rezoning must be dismissed as premature pending an administrative appeal of the decision to rezone the property to the Zoning Commission.

III. CONCLUSION

Plaintiffs could have and still can submit an alternative proposal for development that is more suitable. In addition, Plaintiffs could have administratively appealed the decision to rezone the property. Accordingly, Plaintiffs' regulatory takings, due process and equal protection claims are not yet ripe for consideration and should be dismissed.

Respectfully Submitted,

/s/ Paul M. Adkins
Paul M. Adkins T.A. (Bar No. 14043)

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39 *See* City's **Exhibit 5** attached hereto, Bartholomew Affidavit, and **Exhibit 5-A** City of Mandeville Planning and Development Case Summary Sheet, dated March 14, 2023, revised April 12, 2023, issued by Cara Bartholomew, Planning and Development Director (the "Staff Report").

40 Complaint, R. Doc. 1, ¶¶ 38-39.

41 *See* Exhibit 2, CLURO 4.3.4.1.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023 the foregoing was filed electronically using the CM/ECF system which will send notice of electronic filing to all counsel of record.

/s/ Paul M. Adkins