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 PHILLIPS CURRAULT**
CITY OF MANDEVILLE and JASON ZUCKERMAN, INDIVIDUALLY	*	**DIVISION: D(2)**

****

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Jason Zuckerman provides this memorandum in support of his motion to dismiss the claims filed against him by Woodward Harbor L.L.C. and LSU Health Foundation New Orleans (together, "Plaintiffs"). As explained below, Mr. Zuckerman—a city councilmember—enjoys immunity for his role in evaluating and voting on an ordinance addressing a planned real estate development. The developers are understandably disappointed that their plan was rejected, but their retaliatory suit against this public official should be dismissed.

I. INTRODUCTION

Commercial development is a fraught issue in Mandeville. To preserve their quality of life, area residents are quick to oppose projects that, because of density or placement, threaten traffic congestion, noise, or obstructed views. When those issues arise, they are resolved in democratic fashion. The elected representatives of the people—the Mandeville City Council—make final decisions on zoning laws and similar land-use questions.

This motion asks whether developers whose plans fail in the legislative arena (and in the

eyes of the public) may recover damages from an individual councilmember who voted against them. Plaintiffs presume that the answer is yes, but they are wrong. Councilmembers, like other legislators, enjoy immunity for their votes and decisions. And on that basis alone, Plaintiffs' claims against Mr. Zuckerman should be dismissed with prejudice.

Plaintiffs hoped to develop vacant lakefront acreage in Mandeville. Though the property was only 15 acres, their ambitious plans included a multi-story hotel, a 201-unit apartment building, an event facility, 110 slip-marina, and a two-story restaurant. Over a span of months, the Mandeville City Council gave their project hours of attention and devoted several hearings to it. And the public was fully engaged, as was their First Amendment right. Ultimately, the Council voted to reject an ordinance that would have approved the project and made the necessary zoning changes it required. The density of use for the parcel was just too great, and its proximity to residences made the developers' plans unsuitable for this site. The project did not receive a single vote.

The developers sued Mandeville and, for reasons not explained, singled out Mr. Zuckerman as an individual defendant. They contend that the City (through the City Council) and Mr. Zuckerman denied them due process, denied them equal protection, and otherwise trampled their constitutional rights when they voted against the ordinance. The complaints are hollow, but this motion addresses a more basic defect: Mr. Zuckerman is immune from suit.

Legislators like Mr. Zuckerman are entitled to *absolute* immunity for their votes and other actions on the City Council. "The decision to pass or not to pass such a [land-use] resolution involves action of the legislature as a body and thus is legislative in character."[1] And when a party takes issue with a legislator's vote or other action, absolute immunity permits no inquiry into his

[1] *Petroplex Int'l, LLC v. St. James Par.*, 15-140, 2015 WL 6134097, at *5 (E.D. La. Oct. 19, 2015).

motivations or level of care. Legislative immunity applies equally to claims under federal or state law.

Aside from absolute immunity, Mr. Zuckerman enjoys *qualified* immunity as a public official.[2] Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law."[3] Unless Plaintiffs can identify a controlling case placing their rights beyond all doubt, their claims fail. And the Fifth Circuit has stressed that merely citing a case for an abstract proposition (like due process, for instance) is insufficient. Instead, the case must show, at a level of "specificity and granularity," that the defendant's particular conduct violates federal law.[4] Plaintiffs cannot make that showing, and they cannot overcome the parallel immunities that block their state-law claim, either.

The Court need not rely on policy grounds to dismiss the claims against Mr. Zuckerman, but it is appropriate to consider the ramifications of allowing suits against councilmembers who vote in ways big developers don't like. The duty of Mandeville councilmembers is to the City and the citizens. It would set a dangerous precedent, and introduce a conflict of interest, to subject these public servants to the threat of litigation for voting the "wrong way."

Plaintiffs' claims against Mr. Zuckerman are vindictive and abusive. The Court should dismiss them on immunity grounds.

---

2 *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993).

3 *McLin v. Twenty-First Jud. Dist.*, 79 F.4th 411, 418 (5th Cir. 2023) (quoting *Cunningham v. Castloo*, 983 F.3d 185, 190 (5th Cir. 2020)).

4 *Garcia v. Blevins*, 957 F.3d 596, 600 (5th Cir. 2020) (quoting *Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019)).

II. BACKGROUND

A. Plaintiffs seek to build a hotel, event space, restaurant, marina, and apartments on 15-acres on the lakefront.

This case involves the attempted development of fifteen acres on the north shore of Lake Pontchartrain. The developers had ambitious plans for "Parcel D, Mariners Village Section 46, T-8-S, R-11-E, Greensburg Land District, City of Mandeville, St. Tammany Parish, Louisiana" ("Parcel D") and the seven acres alongside it (together, the "Property").[5] In August 2022, they applied "for the approval of site development plans and a conditional use permit" for the Property called Sucette Harbor.[6] The developers allege that their original vision included an 84 "room boutique hotel, with corresponding amenities including a beach front, pool, and event space or ballroom[,] 201 age-restricted apartments[,] a restaurant," and a 110 boat marina."[7] The hotel alone exceeded 108,000 square feet.

The developers first presented their proposal to Mandeville's Planning and Zoning Commission.[8] After six public hearings, the commission "recommended approval of the Plaintiff's

---

5 Rec. Doc. 1 ¶¶ 1 & 47-48.

6 *Id.* ¶ 47.

7 *Id.* ¶ 19; *compare with* Exhibit 1, Ordinance 23-16 with amendments, p. 3. The Court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)). Ordinance 23-16 is referenced throughout the complaint. *See, e.g.*, Rec. Doc. 1 ¶¶ 53 & 72. The ordinance is publicly available on the City of Mandeville's website at: https://cityofmandeville.com/sites/default/files/fileattachments/ordinance/4349/binder1.pdf. There are slight discrepancies between the amended ordinance and their allegations. In their complaint, Plaintiffs allege that the development would have included an 82 room boutique hotel (instead of 84) and a 103 boat marina (instead of 110). Rec. Doc. 1 ¶¶ 19 & 49.

8 Rec. Doc. 1 ¶ 51.

Application and reported its recommendations to the Mandeville City Council."[9] The vote was close—4 to 3.[10]

B. After nine public hearings, the City Council unanimously votes down the ordinance that would have authorized Plaintiffs' development.

After the planning and zoning process, the developers moved on to the City Council. They drafted Ordinance 23-16, which they presented to the Council.[11] That ordinance would have implemented "Plaintiffs' Application for a conditional use permit."[12] Specifically, the Property would have been rezoned as "Planned Combined Use District" and "re-zoned to the extent necessary."[13]

Mr. Zuckerman moved to amend the proposed ordinance to limit the number of apartments. That amendment passed.[14] If the amended ordinance as a whole had passed, the Property could have had 90 units of age-restricted housing, an 84-room hotel, retail and office space, a restaurant, a marina with 103 boat slips, and 622 parking spaces.[15]

The City Council held nine public hearings on the ordinance over four months.[16] Mr.

---

9 *Id.*

10 Exhibit 2, September 5, 2023 City Council Meeting Transcript Excerpt, at 52. The Court may consider the transcript as it is both referenced in the complaint and a publicly available document of which the Court can take judicial notice. *Dorsey*, 540 F.3d at 338. The exhibit is a transcript of a City Council meeting which is publicly available on the City of Mandeville's website, https://vimeo.com/cityofmandeville. Further, the vote and particular councilmember's comments on their vote are alleged in the complaint at ¶ 72.

11 Exhibit 2, September 5, 2023 City Council Meeting Transcript Excerpt, at 52.

12 Rec. Doc. 1 ¶ 53.

13 Exhibit 1, Ordinance 23-16 with amendments pp. 1, 4.

14 *Id.* p. 3.

15 *Id.* pp. 3-4.

16 Rec. Doc. 1 ¶ 53.

Zuckerman actively participated in those hearings,[17] sought advice from his constituents,[18] and informed himself through investigations.[19]

In evaluating the ordinance, the City Council needed to consult the Comprehensive Land Use and Regulation Ordinance ("CLURO").[20] As Plaintiffs explain,"[t]he CLURO is a complicated document that requires intense reading to determine how its various provisions interact and are reconciled from a legal standpoint."[21] As an additional wrinkle, the various stakeholders disagreed on the zoning designation of the Property.[22] Plaintiffs say the property was zoned "Planned District," but the City understood that the property was zoned "Planned Residential District."[23] This motion assumes that Plaintiffs are correct that the Property had been zoned as "Planned District."[24]

On September 5, 2023, the five-member City Council unanimously denied Ordinance 23-

---

17 *See, e.g., id.* ¶ 54 ("With Zuckerman taking the lead in unrestrained opposition, and McGuire supporting his efforts, their comments in denying the ordinance were best described as personal and individual interpretations of the CLURO, and all of their comments were intentionally designed to 'kill' the project."), ¶ 58 ("The public hearings surrounding the Sucette Harbor project were a constant, uncontrollable, irrational 'debate' on the meaning of the CLURO and the significance of the fictitious PRD zoning asserted for Parcel D."), ¶ 80 ("The City Council meetings were nothing more than a veiled attempt to deny the relevant site plans, with Councilmembers Jason Zuckerman and Jill McGuire often providing longwinded, yet hollow, verbiage from the CLURO designed to give the appearance of propriety.").

18 *See, e.g., id.* ¶ 59, 65 ("Councilmembers Jason Zuckerman and Jill McGuire, along with approximately 25-50 vocal and often angry residents substituted their own opinions concerning traffic or density for those of professional engineers, planners, and architects."), ¶ 78 ("Upon information and belief, the Defendants even met in local establishments, such as the Book and the Bean or Ruby's Roadhouse, to actively 'kill' the subject project.").

19 *See id.* ¶¶ 59, 65, 70.

20 *Id.* ¶ 16.

21 *Id.* ¶ 25.

22 *Id.* ¶ 38.

23 *Id.* ¶ 36 & 38.

24 *Id.* ¶ 36.

16.[25] Mr. Zuckerman spoke for over fifteen minutes describing the reasoning behind his vote.[26] He pointed out that the Planning and Zoning Commission was not presented with Ordinance 23-16 itself—only the developers' plan.[27] He also considered all 12 criteria referenced in the CLURO.[28] He felt that there was no "reasonable explanation" why the ordinance was "in the best interest of the City of Mandeville and its health, safety and welfare."[29] And he concluded with a reminder of his role as an elected official: "I look out to all of you today armed with my charge to represent your interests, the interests of the city, and the people of Mandeville and do what is best for the citizens of this community."[30]

Plaintiffs sued. They targeted both the City of Mandeville and Mr. Zuckerman individually. Against Mr. Zuckerman, Plaintiffs assert a litany of federal and state claims.[31] But merits aside, Mr.

---

25 *Id.* ¶ 72.

26 Exhibit 2, September 5, 2023 City Council Meeting Transcript Excerpt, pp. 51-56.

27 *Id.* p. 52.

28 *Id.* pp. 53-56.

29 *Id.* p. 55.

30 *Id.* p. 56.

31 Plaintiffs assert eight causes of action against Defendants: (1) judicial review of the denial of the ordinance and a declaratory judgment declaring the application for Sucette Harbor approved, *id.* ¶¶ 93-98; (2) a declaratory judgment that Mr. Zuckerman improperly calculated density, *id.* ¶ 99; (3) an inverse condemnation claim under the Fifth and Fourteenth amendments of the United States Constitution, *id.* ¶¶ 102-110; (4) an unconstitutional taking claim under Louisiana law, *id.* ¶¶ 112-115; (5) a substantive due process claim for denial of the project, *id.* ¶¶ 117-123; (6) a procedural due process claim, *id.* ¶¶ 125-130; (7) a denial of equal protection claim, *id.* ¶¶ 132-137; and a (8) 42 U.S.C. 1983 claim, *id.* ¶¶ 139-144. As a threshold note, Plaintiffs name both Defendants in Count One, but even if the Court granted Plaintiffs' request for relief, Mr. Zuckerman individually has no authority to affect that relief. Further, Count Eight's "Claims Against the Defendants, Including Jason Zuckerman in his Individual Capacity under 42 U.S.C. § 1983, Including Attorneys' Fees Under 42 U.S.C. § 1988" does not present a stand-alone claim. *Albright v. Oliver*, 510 U.S. 266, 270 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'") (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

Zuckerman acted in his capacity as a councilmember in every act alleged by Plaintiffs, so he is immune from suit. Indeed, it was only in that capacity that he had a vote.

III. LAW AND ARGUMENT

A. The claims against Mr. Zuckerman should be dismissed under Rule 12(b)(6).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court may dismiss a case "for failure to state a claim upon which relief can be granted." A claim "may be dismissed when a plaintiff fails to allege any set of facts in support of his claim which would entitle him to relief."[32] In assessing a motion to dismiss, the Court accepts all well-pleaded factual allegations as true.[33] But it is not required to "accept as true conclusory allegations or unwarranted deductions of fact."[34] The court may consider the complaint, its attachments, and "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."[35] "[D]ismissal under [R]ule 12(b)(6) may be appropriate based on a successful affirmative defense" if the defense appears "on the face of the complaint."[36] A defendant may raise an immunity defense, in particular, before answering the complaint.[37]

Even accepting Plaintiffs' factual allegations as true, as we must at this stage, they do not state a plausible claim for relief because Mr. Zuckerman is immune. This immunity is not merely a defense to liability, but immunity from litigation itself, so it must be resolved at the earliest

---

32 *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002).

33 *Id.*

34 *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

35 *Dorsey*, 540 F.3d at 338)(quoting *Tellabs*, 551 U.S. at 322 (2007)).

36 *Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017) (quoting *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 470 (5th Cir. 2006)).

37 *See, e.g., LaVergne v. Stutes*, 82 F.4th 433, 435-436 (affirming district court's dismissal on qualified immunity grounds at the motion to dismiss stage).

opportunity.[38]

B. Mr. Zuckerman is entitled to legislative immunity under federal law.

"The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law."[39] This protection extends to local legislators.[40] Legislators, of course, are not beyond criticism. But the system of checks and balances in our democratic government—not litigation—provides the limit on their actions:

> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.[41]

Councilmembers would not volunteer for public service without the protections of absolute legislative immunity. The shield allows them to perform their duties diligently and responsibly.

Immunity applies to "those duties that are functionally legislative."[42] To determine whether an act is legislative, the court must focus on "the nature of the act, rather than on the motive or intent of the official performing it."[43] "[T]he courts have consistently held that zoning

---

38 *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"); *Hughes v. Tarrant Cnty.*, 948 F.2d 918, 919 (5th Cir. 1991) ("The district court's denial of the appellants' claim of absolute immunity is 'appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.'") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)).

39 *Craig v. Police Jury Par.*, 265 F. App'x 185, 189 (5th Cir. 2008) (unpublished) (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998)).

40 *Id.*

41 *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951) (footnote omitted).

42 *Craig*, 265 F. App'x at 189-90 (quoting *Hughes*, 948 F.2d at 920); *see also Bryan v. City of Madison*, 213 F.3d 267, 272 (5th Cir. 2000) ("Absolute immunity applies to activities, not offices.").

43 *Craig*, 265 F. App'x at 190 (quoting *Bogan*, 523 U.S. at 54); *see also Petroplex*, 2015 WL 6134097, at *4 ("Relevant considerations include whether the decision involves formulation of a policy or ad hoc decision-making, whether the decision involves prospective, legislative-type rules or executive-

actions by legislative bodies are legislative, even where they affect only one piece of property."[44] Even in the face of allegations of discriminatory intent, legislative immunity applies.[45] The legislator's subjective intent is irrelevant.[46]

A Fifth Circuit case illustrates the application of legislative immunity in the § 1983 context. In *Craig v. Police Jury Parish*, the court held that parish police jurors were entitled to absolute legislative immunity for their decision to cease maintaining and thus abandon a portion of a road.[47] In that case, plaintiffs who owned nearby property sued the parish and local police jury; they alleged liability under § 1983 for an alleged violation of their constitutional rights.[48] The court found legislative immunity to be appropriate, explaining that "[o]bjectively, the police jury passed an ordinance implicating the fiscal priorities of the parish, which bears 'the hallmarks of traditional legislation.'"[49] The police jurors were fulfilling their duties as local legislators when they "receiv[ed] a complaint from a resident, discuss[ed] the issue at a meeting, h[eld] a public hearing on the issue, and pass[ed] an ordinance."[50]

The same is true for Mr. Zuckerman. He fielded questions and complaints from

---

type enforcement, and whether the facts underlying the decision are legislative facts (such as generalizations concerning a policy or the state of affairs) or facts that relate to particular individuals or situations (making the decision administrative.)").

44 *Petroplex*, 2015 WL 6134097, at *4.

45 *Calhoun v. St. Bernard Par.*, 937 F.2d 172, 174 (5th Cir. 1991) ("The Police Jurors of St. Bernard Parish are entitled to a legislative immunity against damages in their individual capacities. This holds true regardless of the allegations of discriminatory intent.").

46 *Craig*, 265 F. App'x at 191.

47 *Id.* at 192.

48 *Id.*at 187.

49 *Id.* at 191 (quoting *Bogan*, 523 U.S. at 55-56).

50 *Id.* at 192.

constituents, participated in nine public hearings, and ultimately voted against a proposed ordinance.[51] These are all legislative functions.

Zoning decisions like those challenged here bear all the hallmarks of legislative action. The Fifth Circuit has explained that "[w]e have long insisted that review of municipal zoning is within the domain of the states, the business of their own legislatures, agencies, and judiciaries, and should seldom be the concern of federal courts."[52] "Attacks against zoning plans invoke the legislative model and have only rarely been sustained."[53] Denials of requests for variance from a zoning decision are legislative.[54] Spot zoning is legislative, too. Although "it relates to a specific plot, [it] is still a prospective amendment of a larger general plan."[55] Even when actions are "'irregular and inappropriate,' the[] activities 'were still legislative in nature because they involved a rezoning provision.'"[56] Immunity is the prevailing rule in these cases.

The Eastern District of Louisiana applied legislative immunity to dismiss § 1983 claims against St. James Parish Council members.[57] Developers sued those councilmembers and alleged that they violated their procedural due process rights by enacting an ordinance that re-organized

---

51 *See, e.g.,* Rec. Doc. 1 ¶¶ 53, 59, 65, & 72.

52 *Shelton v. City of Coll. Station*, 780 F.2d 475, 477 (5th Cir. 1986).

53 *Id.* at 479.

54 *Calhoun*, 937 F.2d at 174 (citing *Shelton*, 780 F.2d 475) ("In *Shelton*, we held that the denial of a request for a variance from a zoning ordinance was a legislative decision."); *see also Landers v. City of Cleburne*, 44 F. App'x 653, 653 (5th Cir. 2002) (unpublished) ("The denial of a request for rezoning is a legislative act.").

55 *Bryan*, 213 F.3d at 274; *see also Calhoun*, 937 F.2d at 174 (citing *Shelton*, 780 F.2d 475 ("[T]he spot zoning remained legislative in character."). The *Calhoun* Court relied on Supreme Court precedent in reaching that decision. *Id.* ("The result in *Shelton* accords with *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), where the Court evaluated the denial of a request for rezoning of a specific parcel of property as a legislative act.") (citations omitted).

56 *Craig*, 265 F. App'x at 190 (quoting *Bryan*, 213 F.3d at 274).

57 *Petroplex*, 2015 WL 6134097, at *5.

the use of the land in the parish, passing a resolution that permitted construction on the property, and then failing to grant a hearing before issuing a stop-work order on construction on the same property.[58] Even though their decision affected "a particular piece of property," it was still legislative in nature.[59] "The decision to pass or not to pass such a resolution involves action of the legislature as a body and thus is legislative in character."[60] The same result is appropriate here. Whether Ordinance 23-16 called for a rezoning, a conditional use permit, or both, the actions of the councilmembers were legislative, and immunity should apply.

Plaintiffs are sensitive to the role of immunity and try to rebut it in advance. They assert in their complaint that Mr. Zuckerman "is not entitled to legislative immunity from liability under 42 U.S.C. § 1983."[61] This is a conclusory allegation that the Court need not accept as true.[62] Plaintiffs contend that the City Council's "purported[]" application of the CLURO to "a specific development on one specific piece of property" is not legislative.[63] Not so. As discussed above, zoning decisions that affect only one piece of property are still legislative. Because Mr. Zuckerman served his City as a councilmember, he is entitled to the protection of absolute legislative immunity. All claims against him should be dismissed with prejudice.

C. Mr. Zuckerman is also entitled to qualified immunity.

Under qualified immunity, public officials are protected for "the performance of their

---

58 *Id.* at *1, 3

59 *Id.* at *5.

60 *Id.*

61 Rec. Doc. 1 ¶¶ 88-89.

62 *Tuchman*, 14 F.3d at 1067.

63 Rec. Doc. 1 ¶ 88.

discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[64] The shield "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[65] The doctrine applies to state constitutional claims[66] and local legislators.[67]

The Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation."[68] "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'"[69]

Qualified immunity applies "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'"[70] Meeting this second element is especially hard. "A right is clearly

---

64 *Buckley*, 509 U.S. at 268 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

65 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

66 *Mills v. Tarver*, 2021-0666 (La. App. 1 Cir. 12/30/21), 340 So. 3d 959, 967 ("The Louisiana Constitution's due process guarantee is coextensive with that of the United States Constitution; therefore, the qualified immunity defense available to state officials sued under § 1983 applies equally to state constitutional claims.").

67 *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. Unit A May 1981) ("[L]ocal legislators are entitled to absolute immunity from suit under § 1983 for conduct in the furtherance of their duties."); *see also Bogan*, 523 U.S. at 49 ("Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities.").

68 *Pearson*, 555 U.S. at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)).

69 *Id. at* 231 (quoting *Mitchell*, 472 U.S. at 526).

70 *McLin*, 79 F.4th at 418 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.'"[71] In other words, for the right to be sufficiently clear, "every reasonable official would understand that what he is doing violates the law."[72] "[E]xisting precedent must have placed the statutory or constitutional question *beyond debate*."[73] And the rules derived from that precedent must come from a holding; dicta will not suffice.[74]

Unlike most defenses, Plaintiffs bear the burden on qualified immunity.[75] To negate it, Plaintiffs must find a controlling case in their "favor that does not define the law at a 'high level of generality.'"[76] "[T]he question must be framed with specificity and granularity."[77]

In this case, Plaintiffs cannot point to a case in which a councilmember violated a developer's constitutional rights by voting against an ordinance proposing a multi-faceted commercial development near residential areas, by participating in hearings and listening to testimony from the developers and the public, and by meeting with his constituents. But generally, a public official can be liable only if "he 'was personally involved in the acts causing the deprivation of his constitutional rights or a causal connection exists between an act of the official and the alleged

---

71 *Bustillos v. El Paso Cnty. Hosp. Dist.*, 891 F.3d 214, 220 (5th Cir. 2018) (quoting *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014)).

72 *McLin v. Ard*, 866 F.3d 682, 695 (5th Cir. 2017) (alterations adopted; quoting *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc)).

73 *Bustillos*, 891 F.3d at 222 (quoting *Ashcroft*, 563 U.S. at 741) (emphasis added).

74 *Morrow*, 917 F.3d at 875 ("Second, clearly established law comes from holdings, not dicta.").

75 *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) ("Although nominally an affirmative defense, the plaintiff has the burden to negate the assertion of qualified immunity once properly raised.").

76 *Bustillos*, 891 F.3d at 222 (quoting *Vann v. City of Southaven*, 884 F.3d 307, 310 (5th Cir. 2018)).

77 *Garcia*, 957 F.3d at 600 (alterations adopted, quoting *Morrow*, 917 F.3d at 874-75).

constitutional violation.'"[78] As one vote of a unanimous panel of five striking down the ordinance, Mr. Zuckerman's actions alone could not have caused the injuries that Plaintiffs allege.

The Fifth Circuit in *Craig* (discussed above) found that police jurors were entitled to qualified immunity along with absolute legislative immunity.[79] Similarly, the Eastern District of Louisiana granted qualified immunity to government officials who approved a plan for grading and filling a neighboring lot that was allegedly not in compliance with a local ordinance.[80] Plaintiffs alleged that the fill changed the "natural drainage of their property and caused it damage," but those allegations did not affect the officials' immunity.[81] Likewise, Mr. Zuckerman should be entitled to the defense of qualified immunity, which protects him at the earliest possible stage of litigation.

D. Mr. Zuckerman is also entitled to state-law immunity; the state claims fail.

In their fourth cause of action, Plaintiffs allege that Defendants are liable for an "unconstitutional taking" under Louisiana law.[82] Mr. Zuckerman is entitled to three immunities under Louisiana law, so this claim fails too.

1. Mr. Zuckerman is entitled to qualified immunity as established by the Louisiana Supreme Court in *Moresi v. Department of Wildlife & Fisheries*.

First, the Louisiana Supreme Court has adopted qualified immunity for state constitutional claims. *Moresi v. Department of Wildlife & Fisheries* explained that "[t]he same factors that

---

78 *Deshotels v. Vill. of Pine Prairie*, No. 11-2052, 2012 WL 1712358, at *4 (W.D. La. Apr. 13, 2012) (quoting *Douthit v. Jones*, 641 F.2d 345 (5th Cir. 1981), adopting report and recommendation, 2012 WL 1712549.

79 *Craig*, 265 F. App'x at 194.

80 *Mary v. Brister*, No. 17-4977, 2019 WL 1326427, at *1, 3 (E.D. La. Mar. 25, 2019).

81 *Id.* at *1.

82 Rec. Doc. 1 ¶¶ 112-115.

compelled the United States Supreme Court to recognize a qualified good faith immunity for state officers under § 1983 require us to recognize a similar immunity for them under any action arising from the state constitution."[83] As in the federal test, the right must be "clearly established."[84]

Plaintiffs cite two cases to support their state-law claim.[85] In the first case, *Louisiana v. City of New Orleans*, the Louisiana Fourth Circuit Court of Appeal affirmed the City Council's denial of a conditional use permit.[86] Plaintiffs quote dicta from that case, but they ignore that the court ultimately found that the owner was not deprived "of 'all practical use'" of his property.[87] The court explained that "an unconstitutional taking of private property does not result merely because the owner is unable to develop it to its maximum economic potential."[88] The court affirmed the dismissal of the owner's petition in its entirety.[89]

Plaintiffs then cite a 1978 Louisiana Third Circuit case.[90] In that case, the court held that the property was "completely unsuited" for its zoning classification.[91] The same is not true here. Plaintiffs are not forever barred from applying for a conditional use permit. The Mandeville City Council disapproved of a single ordinance tied to a particular use of the property.

Because Plaintiffs cannot show a constitutional violation or that their rights are "clearly

---

83 567 So. 2d 1081, 1093 (La. 1990).

84 *Id.* at 1094.

85 Rec. Doc. 1 ¶ 114.

86 95-1757 (La. App. 4 Cir. 5/29/96), 676 So. 2d 149, 154.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Pomeroy v. Town of Westlake*, 357 So. 2d 1299 (La. App. 3 Cir. 1978).

91 *Id.* at 1303.

established," Mr. Zuckerman is entitled to qualified immunity under *Moresi*.

2. Mr. Zuckerman is also entitled to statutory immunity.

Louisiana Revised Statute § 9:2798.1 provides that "[l]iability shall not be imposed on public entities or their officers or employers based upon the exercise of performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties."[92] Immunity does not apply, however, "(1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct."[93]

The Louisiana Supreme Court has adopted a two-part test to determine whether immunity is appropriate under La. R.S. § 9:2798.1.[94] "First, a court must determine whether a statute, regulation or policy specifically prescribes the course of action for the employee or agency to follow. If so, there is no discretion on the part of the employee or agency and therefore no immunity."[95] Here, Mr. Zuckerman applied the CLURO in deciding on his vote on Ordinance 23-16. The "complicated document," as Plaintiffs call it,[96] does not mandate that Ordinance 23-16 must be passed. Mr. Zuckerman, therefore, had discretion in determining how to vote.

Once a court "determines discretion is involved, the court must then determine whether

---

92 Public entities include the state and its "political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions." La. R.S. § 9:2798.1(A).

93 *Id.*(C).

94 *Simeon v. Doe*, 618 So. 2d 848, 852-53 (La. 1993).

95 *Id.*

96 Rec. Doc. 1 ¶ 25.

that discretion 'is the kind which is shielded by the exception, that is, one grounded in social, economic or political policy.'"[97] "[O]nly the most egregious conduct by parish agents, employees or representatives that exhibits an active desire to cause harm, or a callous indifference to the risk of potential harm from flagrantly bad conduct, will rise to the level of 'willful misconduct' or 'criminal, willful, outrageous, reckless, or flagrant misconduct' resulting in a forfeiture of all the immunity protections afforded by" the statute.[98] Mr. Zuckerman analyzed the ordinance and considered input from his constituents. His actions were "reasonable under the circumstances, and do[] not constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct under La. R.S. 9:2798.1(C)(2)."[99]

At all relevant times, Mr. Zuckerman was exercising his discretion as a councilmember. Accordingly, he is entitled to statutory immunity under Louisiana law.

3. Finally, Mr. Zuckerman is protected by the legislative privileges and immunities clause in the Louisiana Constitution.

Article 3, section 8 of the Louisiana Constitution codifies legislative immunity:

> A member of the legislature shall be privileged from arrest, except for felony, during his attendance at sessions and committee meetings of his house and while going to and from them. No member shall be questioned elsewhere for any speech in either house.

The clause also protects "the legislative bodies of parish and city governments."[100] Every

---

97 *Simeon*, 618 So. 2d at 853.

98 *Haab v. E. Bank Consol. Special Serv. Fire Prot. Dist. of Jefferson Par.*, 13-954 (La. App. 5 Cir. 5/28/14), 139 So. 3d 1174, 1182.

99 *Simeon*, 618 So. 2d at 853.

100 *Timothy v. Par. of Jefferson*, No. 22-185 (La. App. 5 Cir. 5/20/22), 2022 WL 1598023, at *2 (quoting *Ruffino v. Tangipahoa Par. Council*, 2006-2073 (La. App. 1 Cir. 6/8/07), 965 So. 2d 414, 417); *see also Roper v. Loupe*, 2015-1956 (La. App. 1 Cir. 10/28/16), 2016 WL 6330407, at *6 (unpublished) (The prohibition contained in Article III, § 8, extends not only to the Louisiana legislature but also other legislative bodies such as the legislative bodies of parish and city governments.").

constitution since Louisiana became a state has included this provision.[101]

"This article has been held to constitute 'an absolute bar to interference when members are acting within the legislative sphere.'"[102] It provides "not only a defense on the merits, but also protects legislators from the burden of defending themselves."[103] The immunity is necessary to ensure that legislative actions "are performed 'with independence and without fear of consequences.'"[104] Without it, "[i]t could deter constituents from candid communication with their legislative representatives and otherwise cause the loss of valuable information."[105] Legislative immunity is "rooted in the separation-of-powers doctrine."[106]

Legislative immunity in Louisiana is broad. It "protects against inquiry into the acts that occur in the regular course of the legislative process and into the motivation for those acts."[107] "The Speech and Debate Clause 'obviously covers core legislative acts—"how [a Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee."'"[108] Legislative acts protected by the clause include but are not limited to "delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing,

---

101 *Copsey v. Baer*, 593 So. 2d 685, 687 (La. App. 1 Cir. 1991) ("Every constitution of Louisiana since the admission of Louisiana to statehood on April 30, 1812, has contained a provision for legislative privileges and immunities.").

102 *Roper*, 2016 WL 6330407, at *6 (quoting *Ruffino*, 965 So. 2d at 417).

103 *In re Arnold*, 2007-2342 (La. App. 1 Cir. 5/23/08), 991 So. 2d 531, 542 (citing *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969)).

104 *Roper*, 2016 WL 6330407, at *8 (quoting *Loupe v. O'Bannon*, 824 F.3d 534, 538 (5th Cir. 2016)).

105 *Copsey*, 593 So. 2d at 688 (quoting *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983)).

106 *Id.*

107 *Roper*, 2016 WL 6330407, at *6 (quoting *Copsey*, 593 So. 2d at 687).

108 *Id.* at *8 (quoting *Fields v. Off. of Eddie Bernice Johnson*, 459 F.3d 1, 9 (D.C. Cir. 2006)).

presenting, and using legislative reports; authorizing investigations and issuing subpoenas; holding hearings; and introducing material at Committee hearings."[109] Investigations, whether formal or informal, "'plainly fall[] within' the legislative sphere."[110]

The privilege is to be read "broadly."[111] In interpreting this clause, Louisiana courts are guided by federal jurisprudence interpreting "the federal Speech or Debate Clause, which [the Louisiana First Circuit Court of Appeal] determined was 'identical' to Louisiana's Legislative Privileges and Immunities Clause."[112]

As with federal jurisprudence, state cases show that votes and deliberations on property-development and zoning issues support legislative immunity. For example, the Louisiana Fifth Circuit Court of Appeal applied legislative immunity to protect a councilmember from testifying about a decision he made in that capacity.[113] "The approval or disapproval of a subdivision plat is a legislative function involving the exercise of legislative discretion by the governing authority of a parish or municipality."[114] Mr. Zuckerman likewise was acting in his legislative capacity when he considered his decision on Sucette Harbor. In considering similar issues for the Port Marigny Project—another recent development proposal in Mandeville—the Eastern District of Louisiana

---

109 *Id.* (quoting *Fields*, 459 F.3d at 10-11).

110 *Id.* at *9 (quoting *Williams v. Johnson*, 597 F. Supp. 2d 107, 114 (D.D.C. 2009)).

111 *In re Arnold*, 991 So. 2d at 542.

112 *Id.* at 541 (quoting *Copsey*, 593 So. 2d at 688). For example, the Louisiana Fifth Circuit Court of Appeal applied legislative immunity while relying on the previously-cited language from *Tenney*: "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and is readily believed. Courts are not the place for such controversies." *Par. of Jefferson* v. *SFS Constr. Grp., Inc.*, No. 01-1118 (La. App. 5 Cir. 2/13/02), 812 So. 2d 103, 106 (quoting *Tenney*, 341 U.S. at 377-78).

113 *Timothy*, 2022 WL 1598023, at *2.

114 *Id.*

noted that "the City Council was acting as a legislative agency for the City during the deliberation and subsequent denial of Plaintiffs' Port Marigny project development plan."[115] The same should be true here. Mr. Zuckerman was serving as a legislator on the City Council in considering Plaintiffs' development proposal.

Because Mr. Zuckerman is entitled to the protections of three immunity doctrines under Louisiana law, any state-law claims asserted against him should be dismissed with prejudice.

IV. CONCLUSION

Immunities under both federal and state law protect Councilmember Zuckerman against Plaintiffs' claims. First, Mr. Zuckerman is protected by absolute legislative immunity because every allegation in Plaintiffs' complaint could have been undertaken only in Mr. Zuckerman's role as councilmember. Second, Mr. Zuckerman is protected by qualified immunity because Plaintiffs cannot point to a comparable case showing that it is "clearly established" that Mr. Zuckerman violated their rights. And third, Mr. Zuckerman is entitled to immunity under Louisiana law for any state-law claims that Plaintiffs assert.

These immunities exist for good reason. Local legislators have the unenviable task of balancing competing interests as they discern how best to serve their constituents. We see here an exercise of local government, in all its mess and glory, and a textbook example of the political process. The developers are disappointed that their proposal failed. But in this forum, at least, they cannot vent their frustration on one member of a unanimous Council for rejecting an ordinance that would have both authorized their project and rezoned a controversial piece of property. The

---

115 *Port Marigny, LLC v. City of Mandeville*, No. 17-4727, 2018 WL 1757385, at *6 (E.D. La. April 12, 2018).

consequences of a contrary ruling, in which councilmembers vote on legislation while under an implicit threat of litigation by disappointed parties, are untenable and wisely foreclosed by precedent.

For all these reasons, the Court should grant Mr. Zuckerman's motion and dismiss Plaintiffs' claims against him with prejudice.

Respectfully submitted,

/s/Thomas M. Flanagan
Thomas M. Flanagan (#19569)
Anders F. Holmgren (#34597)
Kansas M. Guidry (#39203)
FLANAGAN PARTNERS LLP
201 St. Charles Avenue, Suite 3300
New Orleans, LA 70170
Telephone: (504) 569-0235
Facsimile: (504) 592-0251
tflanagan@flanaganpartners.com
aholmgren@flanaganpartners.com
kguidry@flanganpartners.com

Attorneys for Jason Zuckerman