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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

M & N MATERIALS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civil Action No. 5:14-CV-00184-CLS**
	)	
TOWN OF GURLEY, ALABAMA; VULCAN CONSTRUCTION MATERIALS L.P.; VULCAN LANDS, INC.; and VULCAN MATERIALS COMPANY, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDERS

This suit grew out of the annexation of approximately 266 acres of land by Gurley, Alabama, a small town of about 900 residents located on the eastern side of Madison County,[1] and the Town's subsequent decision to include that property in a zoning classification that did not permit the landowner to use it for the intended purpose of operating a rock quarry. The complaint filed by plaintiff, M & N Materials, Inc. — the former owner of the land in question — asserts that the Town's actions constituted an unconstitutional taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States

[1] Doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 1 (citation omitted).

Constitution,[2] and an arbitrary and capricious deprivation of property without due process of law.[3] In addition, plaintiff seeks judgments under federal and state law declaring the Town's annexation and zoning of its property to be invalid,[4] as well as injunctive relief.[5]

Three dispositive motions are pending: a motion for summary judgment filed by the Town;[6] a motion to dismiss filed by defendants Vulcan Construction Materials L.P., Vulcan Lands, Inc., and Vulcan Materials Company, Inc. (collectively, "the Vulcan defendants");[7] and, plaintiff's motion for partial summary judgment.[8]

I. SUMMARY JUDGMENT STANDARDS

Federal Rule of Civil Procedure 56 provides that summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In other

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[2] *See* doc. no. 1 (Complaint) ¶¶ 33-38.

[3] *Id.* ¶¶ 39-44.

[4] *Id.* ¶¶ 45-52 (28 U.S.C. § 2201), and *id*. ¶¶ 53-60 (Ala. Code § 6-6-220 (1975)).

[5] *Id*. ¶¶ 61-67.

[6] Doc. no. 56.

[7] Doc. no. 70. That motion observes that "no claims for relief are pleaded against any of the Vulcan Defendants[,] nor do the Vulcan Defendants assert any claims against any parties." *Id*. at 2 (alteration supplied). Therefore, the Vulcan defendants ask to be dismissed as parties, *without prejudice,* pursuant to Federal Rule of Civil Procedure 41(b), which provides, in pertinent part: "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."

[8] Doc. no. 74.

words, summary judgment is proper "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "In making this determination, the court must review all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000) (*en banc*) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)). Inferences in favor of the non-moving party are not unqualified, however. "[A]n inference is not reasonable if it is only a guess or a possibility, for such an inference is not based on the evidence, but is pure conjecture and speculation." *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1983). Moreover,

> [t]he mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is *material* to an issue affecting the outcome of the case. The relevant rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.

Chapman, 229 F.3d at 1023 (quoting *Haves*, 52 F.3d at 921) (emphasis supplied). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (asking "whether the evidence presents a sufficient disagreement to require submission to a

jury or whether it is so one-sided that one party must prevail as a matter of law”).

Applying the foregoing standards, and following consideration of the pleadings, briefs, evidentiary submissions, and oral arguments of counsel, this court concludes that the Town’s motion for summary judgment and the Vulcan defendants’ motion to dismiss should be granted, and M & N’s motion for partial summary judgment denied.

II. SUMMARY OF RELEVANT FACTS

In 1992, a real estate firm known as “Country Places, Inc.,” purchased 160 acres of land on the eastern face of Gurley Mountain, near — but not within the corporate limits of — the Town of Gurley, Alabama. The consideration for the sale was $83,500.[9] Later that year, the firm conveyed the property to its sole owner, Charles Brian Nelson.

A. The Creation of, and Conveyance of Property to, M & N Materials, Inc.

Ten years later, during October of 2002, Charles Brian Nelson and another individual named Brian McCord jointly purchased an additional ninety acres of land contiguous to Nelson’s 160-acre tract for $220,000.[10] McCord and Nelson borrowed

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[9] Doc. no. 65-8 (State Trial Transcript), at 347. The parties stipulated that the State Trial Transcript “can be used to the same extent as if it was generated in the present matter.” Doc. no. 32 (Stipulation). Accordingly, the court will frequently cite to the State Trial Transcript.

[10] Doc. no. 57 (Town’s Brief in Support of Summary Judgment) ¶ 3 (citing doc. no. 65-9 (State Trial Transcript), at 359-60; 362).

$264,000 from Community Bank of Huntsville, Alabama, on February 3, 2003. That amount represented the balance then due on the purchase prices of Nelson's 160-acre tract and the ninety acres jointly acquired by McCord and Nelson.[11]

Nearly five months later, on June 27, 2003, McCord and Nelson incorporated M & N Materials, Inc. ("M & N"),[12] "for the purpose of owning and operating a rock quarry."[13] McCord and Nelson conveyed their respective titles to the 160-acre and ninety-acre tracts to M & N on January 4, 2004.

Later that same year, M & N paid $250,000 to acquire a house and sixteen acres of land that adjoined the ninety-acre tract on its western border.[14] That acquisition increased the total amount of land owned by M & N to approximately 266

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[11] Charles Brian Nelson signed the note and mortgage given to Community Bank as security for the loan both individually and in his capacity as President of Country Places, Inc. *See also* doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 6 (citing doc. no. 65-9 (State Trial Transcript), at 360-61; doc. no. 66-2 (State Trial Transcript), at 733-34; doc. no. 66-3 (State Trial Transcript), at 795). As the Town notes in its brief, due to the fact that M & N was not incorporated until June 27, 2003, it was not obligated on the mortgage to Community Bank. *See id.* ¶ 7.

[12] Doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 7 (citing McCord Deposition, at 25-26).

[13] Doc. no. 1 (Complaint) ¶ 8; *see also* doc. no. 101 (M & N's Response in Opposition to Summary Judgment) ¶ 1, at ECF 14 (same). **Note**: "**ECF**" is an acronym formed from the initial letters of the name of a filing system that allows parties to file and serve documents electronically (*i.e.*, "Electronic Case Filing"). Bluebook Rule 7.1.4 allows citation to page numbers generated by the ECF header. *The Bluebook: A Uniform System of Citation*, at 21 (Columbia Law Review Ass'n *et al.* eds., 19th ed. 2010). Even so, the Bluebook recommends against citation to ECF pagination in lieu of original pagination. Consequently, unless stated otherwise, this court will cite to the original pagination in the parties' pleadings. When the court cites to pagination generated by the ECF header, it will, as here, precede the page number(s) with the letters "ECF."

[14] *See* doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 76 (citing doc. 65-9 (State Trial Transcript), at 367, 369).

acres. All of that real property then was located outside the Town's corporate limits. Charles Brian Nelson testified that he, McCord, and M & N would not have purchased the property if it had been located inside the Town's limits, because a rock quarry is "something that becomes political. You know, we — we all think we don't want a quarry or a garbage dump next-door but we all have garbage and, you know, we all drive on roads and live in houses so. But I knew that it would be a political matter."[15]

Prior to M & N's acquisition of the sixteen-acre tract, the company had retained a civil engineer "to assist in preparing air and water [environmental impact] applications for submission to the Alabama Department of Environmental Management ('ADEM')."[16] Brian McCord submitted M & N's National Pollutant Discharge Elimination System ("NPDES") application for authority to conduct quarrying operations to ADEM on April 9, 2003.[17] ADEM approved the application and issued final certification for the operation of a quarry during August of the following year, 2004.[18] By that date, M & N also had obtained appropriate licenses

[15] Doc. no. 65-8 (State Trial Transcript), at 349.

[16] Doc. no. 61-3 (McCord Deposition), at 46-47 (alteration supplied).

[17] *See* doc. no. 59-1 (NPDES Application); doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 8.

[18] Doc. no. 66-2 (State Trial Transcript), at 719, 730; doc. no. 1 (Complaint) ¶ 10; s*ee also* doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 62 (stating that M & N received provisional permits from ADEM on March 23, 2004, and final certification in August 2004).

for quarrying operations from Madison County and the State of Alabama.[19]

After M & N obtained those permits, and, at a time when its property was still located outside the Town's jurisdictional limits, the Vulcan defendants became interested in the M & N property. One of the entities, Vulcan Construction Materials L.P., entered into an exploration agreement with M & N, under the terms of which the company was permitted to explore the property to determine its "potential" for quarrying.[20]

B. Vulcan Lands, Inc., Executes Option to Purchase

On July 12, 2004, at the conclusion of the exploration of M & N's property by Vulcan Construction Materials, its affiliate, Vulcan Lands, Inc., paid $75,000 for an Option to Purchase the property for $3,750,000.[21] Vulcan Lands' obligation to consummate the purchase was contingent upon several conditions precedent, including the condition that "[t]he zoning of the Property shall be or shall continue to be such as to allow the quarrying operations as may be intended by the Buyer."[22]

C. Citizen Opposition to Quarrying Operations Develops

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[19] Doc. no. 1 (Complaint) ¶ 11. *See also* doc. no. 101, at ECF 14 (reciting that the State and County had issued all permits necessary for M & N to begin operating a quarry before its property was annexed into the Town's jurisdictional limits).

[20] *See* doc. no. 59-6 (Christopher Deposition), at 34, 56.

[21] *See* doc. no. 61-1 (Exhibit 26 to the Deposition of Jeff Johnson), at ECF 31-43. The payment was made jointly to M & N, Brian K. McCord, and Charles Brian Nelson.

[22] *Id.* ¶ 11(a), at ECF 34 (alteration supplied).

In June of 2003 — a year prior to the execution of Vulcan Lands' Option to Purchase — opposition to quarrying operations on M & N's property began to percolate among the Town's citizens. The resistance intensified over time. Some events were summarized in the following *undisputed* statements of fact from the Town's brief:[23]

> 10. On June 3, 2003, a resident of Gurley appeared at a Town Council meeting, expressing concerns and seeking information about the proposed rock quarry. . . .
>
> 11. On June 17, 2003, about 35 people attended the Town Council meeting to express their concerns over a rock quarry being located near the town limits. . . . The minutes of that meeting reflect that Mayor Hornbuckle asked ADEM to keep him apprised of any changes in the permit application. . . .
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> 12. Minutes of the Town Council meeting for July 1, 2003, show that several members of a so-called "Rock Quarry Committee" were present and "again expressed their opposition to a rock quarry opening near Gurley." . . . The minutes reflect that a concerned citizen by the name of Ripple McMullen advised those present that a community meeting would be held at the Madison County Elementary School in Gurley on July 7, 2003. . . .
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> 13. Another concerned citizen, Stan Simpson, testified that

[23] *See* doc. no. 11 (ALND Uniform Initial Order), Appendix II (Summary Judgment Requirements), and particularly ¶ D.2.a, which states, in pertinent part, that:

> Any statements of fact that are disputed by the non-moving party must be followed by a specific reference to those portions of the evidentiary record upon which the dispute is based. All material facts set forth in the statement required of the moving party will be deemed to be admitted for summary judgment purposes unless controverted by the response of the party opposing summary judgment.

about 200 people attended this July 7, 2003 community meeting, including Town Council members, State Representative Albert Hall, State Senator Lowell Barron, and Madison County Commissioner Jerry Craig. . . .

. . . .

19. On July 15, 2003, several members of a so-called "rock quarry committee" again appeared at a Town Council meeting and expressed opposition [to] opening a rock quarry. . . .

20. On July 17, 2003, the Town Council . . . passed a resolution opposing a quarry because of the effects such an operation would have on "(1) air quality, (2) damage from blasting to homes and businesses, (3) large volumes of traffic on Gurley Pike (the main service road for Madison County Elementary School), (4) damage to existing streets by heavy trucks and (5) damage to the Town's water storage tank located on Gurley Pike." . . . [24]

. . . .

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[24] The pertinent parts of the Resolution adopted by the Town Council on July 17, 2003 read as follows:

> WHEREAS, the Town Council of the Town of Gurley has obtained information from the Alabama Department of Environmental Management that a corporation by the name of M & N, Incorporated, has applied for a permit to operate a rock quarry near the corporate limits of the Town of Gurley, and
>
> WHEREAS, the Town Council has serious concerns regarding the effects such a rock quarry would have on (1) air quality, (2) damage from blasting to homes and businesses, (3) large volumes of traffic on Gurley Pike (the main service road for Madison County Elementary School), (4) damage to existing streets by heavy trucks and (5) damage to the Town's water storage tank located on Gurley Pike,
>
> NOW, THEREFORE, be it resolved that the Town of Gurley opposes the location of a rock quarry near the corporate limits of the Town.

Doc. no. 58-2 (Exhibits to Bryant Affidavit), at ECF 98.

> 22. Indeed in late July 2003, an informal meeting of over 100 citizens was organized at the United Methodist Church in Gurley to discuss the potential quarry. . . . Out of this meeting sprung a citizens coalition eventually called the "Citizens for a Better Gurley," or "CBG." . . . [Stan Simpson, whose residence was located approximately one mile from the M & N property, became the chairperson of "Citizens for a Better Gurley."] This group grew to have "several hundred people signed up." . . . In addition, 500 people signed their names to petitions circulated by CBG. . . .
>
> 23. By September 2003, the purpose of CBG was to mount an organized citizens' effort to attempt to oppose the quarry. . . . The position of CBG was that "the public health and safety and the good social and economic welfare of our community was not compatible with the quarry operation in Gurley." . . .

Doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶¶ 10-13, 19-20, and 22-23 (bracketed alterations, footnotes, and ellipses supplied) (record citations omitted).

D. The Town Annexes M & N's Property

Stan Simpson and other members of the "Citizens for a Better Gurley" organization contacted State Representative Albert Hall during December 2003, to engage his assistance in annexing the subject property.[25] Simpson and Hall collaborated on House Bill 170, which Hall introduced in the Alabama Legislature during the 2004 regular session.[26] The bill, signed into law on February 26, 2004,

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[25] *See* doc. no. 66-4 (State Trial Transcript), at 910 (describing the legislator's sponsorship).

[26] *See* doc. no. 62-7 (Smith Deposition), at 109.

empowered the Town to annex M & N's property if a majority of Gurley's qualified voters cast affirmative votes during a special referendum called for that purpose.[27] The referendum occurred on April 13, 2004, and the proposal for annexation passed by 191 votes in favor to 23 votes opposed.[28] M & N's property accordingly was incorporated into the Town's jurisdictional limits.[29]

E. Moratorium on Acceptance of Applications for Business Licenses

M & N's property was not zoned at the time of the annexation election. M & N accordingly applied for a business license to operate a quarry on April 21, 2004, one week after the referendum.[30] The Town "never ruled on M & N's application . . . either to grant or deny it,"[31] but Judy Smith, the Town Clerk, testified that she had been "instructed not to issue a business license for M & N."[32]

Approximately two weeks later, on May 4, 2004, the Town Council enacted Ordinance No. 281, which imposed a moratorium on the acceptance of applications for use permits, building permits, right-of-way permits, zoning classifications, variances, special exceptions, business licenses, or other land use actions with regard

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[27] *See* doc. no. 59-4 (H.B. 170, Act No. 2004-19).

[28] *See* doc. no. 58-3 (Vote Count), at ECF 93.

[29] Doc. no. 65-9 (State Trial Transcript), at 427.

[30] Doc. no. 65-8 (State Trial Transcript), at 353; doc. no. 61-2 (Exhibits to April McCord Deposition), at ECF 13.

[31] Doc. no. 66-4 (State Trial Transcript), at 957.

[32] Doc. no. 66-3 (State Trial Transcript), at 832-33.

to the property annexed into the Town pursuant to Alabama Act No. 2004-19.[33] The Ordinance was adopted

> for the stated purpose of permitting the Planning Commission a reasonable time to complete a land use study and to make recommendations for inclusion of the property within a comprehensive zoning plan for the Town. . . . The moratorium explained that the annexation of "such a large parcel of property adjacent to the corporate limits of the Town of Gurley was not reasonably foreseen or planned for by the Planning Commission of the Town," and explained further that time was needed to study and plan for the property. . . .
>
> 73. On July 6, 2004, the Town Council approved a motion to retain Sleiman Research to perform the Land Use Study. . . .

Doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶¶ 72-73 (record citations omitted).[34] The moratorium originally was scheduled to expire ninety days after adoption of Ordinance No. 281, but it was extended in August 2004 to November 1, 2004, and again in December to January 26, 2005.[35]

During July of 2004, the Town also created a Board of Adjustment, "a body which had never before existed in the Town," for the purpose of hearing applications for zoning variances.[36] M & N contends that the board was stacked with persons who

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[33] Doc. no. 58-3 (Exhibits to Bryant Affidavit), at ECF 80-83.

[34] These statements of fact were not disputed by M & N in its responsive brief in opposition to summary judgment. *See* doc. no. 101, at ECF 10.

[35] *See* doc. no. 58-3 (Exhibits to Bryant Affidavit), at ECF 82-83, 91; doc. no. 58-2 (Resolution No. 225), at ECF 105.

[36] Doc. no. 66-6 (State Trial Transcript), at 1102; doc. no. 1 (Complaint) ¶¶ 17-18.

were "dead against" the quarry, and who had displayed yard signs stating "Stop the Quarry."[37]

Moreover, M & N alleges that persons publicly opposed to a quarry were elected to public offices in the Town.[38] One such person was Stan Simpson, the Chairman of Citizens for a Better Gurley, who was elected Mayor in August 2004 and assumed office during October of that year.[39] M & N alleges that, after becoming Mayor, Simpson filled the Town's Planning Commission with individuals opposed to the quarry.[40]

F. Vulcan Lands Refuses to Exercise Its Option to Purchase M & N's Property for the Stated Price of $3,750,000

The July 12, 2004 agreement giving Vulcan Lands, Inc., an option to purchase M & N's property was valid for slightly more than four months: *i.e.*, "until and including November 15, 2004 (the 'Term')."[41] That was seven months *after* the April 13, 2014 annexation referendum, but (as shall be seen in Part II.K., *infra*) two months *before* the property was zoned.[42] The day before the expiration of the term, Vulcan

[37] Doc. no. 1 (Complaint) ¶ 19.

[38] *Id.* ¶ 20.

[39] Doc. no. 62-3 (Simpson Deposition), at 31.

[40] Doc. no. 1 (Complaint) ¶ 22; *see also* doc. no. 101 (M & N's Responsive Brief in Opposition to Summary Judgment), at 17.

[41] Doc. no. 61-1 (Exhibit 26 to Johnson Deposition), at ECF 31, ¶ 1 (ellipsis supplied).

[42] See the discussion in Part II.K., *infra*.

Lands informed M & N that it would not exercise the option at the stated price of $3,750,000, but would be willing to pay $1,000,000 for the property.[43]

G. M & N Sells Its Property to Vulcan Lands for $1 Million

Nine days later, on November 23, 2004, M&N sold its approximately 266 acres of real property to Vulcan Lands, Inc., for $1,000,000.[44]

H. M & N Simultaneously Executes a Royalty Agreement With Vulcan Construction Materials L.P.

On the same day that M & N sold its property to Vulcan Lands, it also entered into a "Royalty Agreement" with "Vulcan Construction Materials L.P., a Delaware Limited Partnership, acting by and through its Southern & Gulf Coast Division ('**Vulcan**')."[45] That agreement recited that Vulcan "intend[ed] to enter into a lease arrangement with *Vulcan Lands, Inc*. that will allow Vulcan to conduct Quarrying Operations on the Property."[46] The agreement recited that it was to become "effective on January 1, 2005[,] and continue thereafter for seventy-five (75) years, or until the Stone reserves on the Property are exhausted, whichever occurs first (the 'Term')."[47] The royalty payments that Vulcan Construction Materials L.P. agreed to make were

[43] Doc. no. 65-9 (State Trial Transcript), at 391.

[44] Doc. no. 66-1 (State Trial Transcript), at 619.

[45] Doc. no. 78-10 (Royalty Agreement), at ECF 2 (boldface emphasis supplied).

[46] *Id*. (alteration and emphasis supplied).

[47] *Id*. ¶ 1 (alteration supplied).

described as follows:

> Earned Royalty. Vulcan will pay [M & N] a royalty equivalent to 5% of the Average Annual Sales Price (as defined below) of Stone quarried, sold and removed from the Property (the "Earned Royalty(ies)") during each Contract Year of the Term. Except as provided in paragraph 3 below, no Earned Royalty shall be paid on Stone not actually quarried from the Property, but which is transferred to the Property from one or more other locations. All payments owed by Vulcan pursuant to this paragraph 2(b) shall be made by the 20th day of the month following the calendar month in which the Earned Royalty is accrued.
>
> Minimum Royalty Payment. If the total of all earned Royalties payable by Vulcan by the end of a Contract Year is less than Fifty Thousand Dollars ($50,000) (the "Minimum"), Vulcan shall pay [M & N] an additional royalty payment equivalent to the difference between the Earned Royalties with respect to that Contract Year and $50,000, which amount is hereinafter referenced as the "Earned Royalty Shortfall". Any Earned Royalty Shortfall will be paid by the 20th day of the month following the expiration of the applicable Contract Year.

Doc. no. 78-10 (Royalty Agreement), ¶¶ 2(a)-(b), at ECF 3 (alterations supplied).

It is important to note that the Royalty Agreement explicitly acknowledged that Vulcan Construction Materials L.P. had no obligation to conduct quarrying operations on the property:

> No Obligation to Mine. [M & N] acknowledges that Vulcan shall have the right, *but not the obligation*, to conduct Quarrying Operations on the Property . . . during the Term, it being agreed that the payment of the Earned Royalty Shortfall set forth in paragraph 2(b) and consideration paid by Vulcan at the time of conveyance of the Property is made in lieu of any such obligation.

Id. ¶ 2(g), at ECF 4 (alteration, emphasis, and ellipsis supplied).

Moreover, the agreement stated that Vulcan Construction Materials L.P. would be relieved from making *any* royalty payments to M & N in the event of the occurrence of certain "Operation[s] of Law."

> 3. **Operation of Law**. Vulcan shall be relieved from the obligation to make any payments to Seller (excluding the consideration paid for the conveyance of the Property but including the Earned Royalty Shortfall, the Earned Royalty, the Hall Royalty or the Accelerated Payment) or otherwise perform any obligation to Seller hereunder if Vulcan (or any of its affiliates) is prevented form conducting Quarrying Operations on the Property . . . for any of the following reasons:
>
> (a) Quarrying Operations are prohibited because the applicable property is condemned, taken for any public or quasi-public use under any statue or by right of eminent domain, or by private purchase in lieu thereof by a body vested with the power of eminent domain (collectively, a "Taking");
>
> (b) Quarrying Operations are prohibited due to an order or ruling of any court, administrative or governmental body or agency;
>
> (c) *Quarrying Operations are prohibited due to any zoning or land use restrictions on the applicable property*;
>
> (d) Quarrying Operations are prohibited due to any other governmental rule, regulation or law; or
>
> (e) Quarrying Operations cannot be conducted because it is determined that Vulcan does not own the rights to recover the Stone reserves on or under the Property.
>
> The matters set forth above in (a)-(d) are collectively referenced

> herein as the "Operation of Law". Vulcan agrees to provide Seller notice of any cessation of Quarrying Operations due to Operation of Law. Vulcan's obligations to perform hereunder shall be suspended during the period it is so prevented from conducting Quarrying Operations. *Vulcan, in its sole discretion, shall determine what action (if any) shall be undertaken to litigate, oppose or otherwise challenge an event constituting Operation of Law*. Seller agrees to reasonably cooperate with Vulcan in the course of any such challenge.

Id. ¶ 3, at ECF 5-6 (boldface emphasis in original, ellipsis and italicized emphasis supplied).

In summary, the only interest retained by M & N in the property it sold to Vulcan Lands, Inc., on November 23, 2004 was the prospective, but contingent, right to receive royalty payments in accordance with the conditions precedent expressed in the Royalty Agreement with Vulcan Construction Materials L.P.

I. Recommendations to Zone the Property for Agricultural Uses

As discussed in Part II.E., *supra*, the Town Council's adoption of Ordinance No. 281 on May 4, 2004 imposed a moratorium on the acceptance of applications for use permits on the M & N property for the purpose of allowing the Planning Commission time to complete a Land Use Study and recommend a zoning classification.[48] On July 6, 2004, the Town Council approved a motion retaining "Sleiman Research" to perform that study.[49] Sleiman's Land Use Study, released on

[48] Doc. no. 58-3 (Exhibits to Bryant Affidavit), at ECF 80.

[49] *See* doc. no. 58-2 (Exhibits to Bryant Affidavit), at ECF 59.

December 16, 2004,[50] recommended that the property be zoned for "agricultural" use.[51]

Following a series of public meetings,[52] the Town's Planning Commission conducted a hearing on December 16, 2004, and adopted Resolution No. PC-2004-02, which recommended that the Town Council zone the land for "agricultural" use.[53]

J. Vulcan Construction Materials L.P. Applies For A Business License

On January 18, 2005, after the Planning Commission adopted the foregoing resolution, but before the Town Council acted on the Commission's recommendation, Vulcan Construction Materials L.P. submitted an application for a business license to the Town, seeking permission to engage in "quarrying & processing construction aggregates."[54] On that date, however, the moratorium on the

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[50] *See* doc. no. 73-17 (Land Use Study), at ECF 2.

[51] *Id.* at ECF 48.

[52] *See* doc. no. 59-10 (Exhibits to Dear Deposition).

[53] *See* doc. no. 60-2 (Exhibits to Dear Deposition); *see also* doc. no. 58-3 (Zoning Ordinance), at ECF 85.

[54] *See* doc. no. 59-6 (Christopher Deposition), at 94-95, 97; doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 99. That statement of fact was not disputed by M & N in its responsive brief. *See* doc. no. 101, at 8-9. Mayor Simpson wrote Vulcan Construction Materials L.P. on January 20, 2005, explaining that its business license application had been denied due to the Town Council's vote zoning the property for agricultural uses on the evening of January 26th, "but noted that Vulcan could seek a variance or special exception. Vulcan then wrote the Town, twice, requesting reconsideration of its position. The Town refused to reconsider its position, but reminded Vulcan of its option to seek a variance or special exception. Vulcan did not do so." Doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 102 (citations omitted). That statement of fact was not disputed by M & N in its responsive brief. *See* doc. no. 101, at 8-9.

acceptance of applications for business licenses or other land use actions still was in effect and not due to expire until January 26, 2005.[55]

K. Town Council Zones Subject Property for "Agricultural" Uses

On the evening of the same day that Vulcan Construction Materials L.P. submitted its application for a business license — *i.e.*, January 18, 2005 — the Town Council met and voted to adopt the recommendations of Sleiman Research and the Planning Commission, and zoned the property sold by M & N to Vulcan Lands, Inc., for agricultural uses.[56] Such a classification precludes quarrying operations. Consequently, M & N has not been paid any monetary amounts pursuant to the terms of its Royalty Agreement with Vulcan Construction Materials L.P.[57]

L. M & N Commences Suit in State Court

M & N commenced suit against the Town in the Circuit Court of Madison County, Alabama on April 14, 2005.[58] Count One of the complaint alleged that the Town's actions amounted to an "inverse condemnation" — "a taking without just

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[55] *See* doc. no. 58-3 (Exhibits to Bryant Affidavit), at ECF 89-91.

[56] *See* doc. no. 58-3 (Zoning Ordinance), at ECF 85; doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 101. That statement of fact was not disputed by M & N in its responsive brief. *See* doc. no. 101, at 8-9. *See also* doc. no. 1 (Complaint) ¶ 23.

[57] *See* doc. no. 61-1 (Vulcan Letter), at ECF 60; doc. no. 1 (Complaint) ¶ 28. *See also* doc. no. 57 (Town's Brief in Support of Summary Judgment) ¶ 103.

[58] *See* doc no. 63-1 (Complaint filed in the Circuit Court of Madison County, Alabama as Civil Action No. CV-05-731-KKH); *see also* doc. no. 67-2, at ECF 14-17 (copy of same complaint attached to the Town's Notice of Removal).

compensation in violation of the Fifth Amendment to the United States Constitution, Article I, Section 6, of the Constitution of Alabama (1901), and *Alabama Code* 1975, § 18-1A-1, *et seq*."[59]

1. Removal to federal court

M & N's reliance upon the Fifth Amendment as part of the basis for its state-court claim allowed the Town to remove the case to this court on May 13, 2005, based upon federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1343(3), 1441, and 1446.[60]

2. Remand to state court

Following removal, the Town moved to dismiss M & N's complaint,[61] and filed a brief arguing (among other things) that M & N's inverse condemnation claim was not "ripe" due to the corporation's failure to exhaust its state remedies.[62] *See, e.g.*, *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 n.8 (1997) ("Ordinarily, a plaintiff must seek compensation through state inverse condemnation

[59] Doc no. 63-1, at ECF 28, ¶ 14; doc. no. 67-2, at ECF 16, ¶ 14 (italicized emphasis in original).

[60] *See* doc. no. 67-2, at ECF 11-17 (Notice of Removal, doc. no. 1 in *M & N Materials, Inc. v. Town of Gurley, Alabama*, No. 5:05-cv-00997-SLB (N.D. Ala. May 13, 2005)).

[61] *See M & N Materials, Inc. v. Town of Gurley, Alabama*, No. 5:05-cv-00997-SLB, doc. no. 2 (Town's Motion to Dismiss) (N.D. Ala. May 13, 2005).

[62] *Id.*, doc. no. 3 (Town's Brief in Support of Motion to Dismiss), at 7-10 (citing, *e.g.*, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (holding that a takings claim is not ripe until a landowner seeks variances from a contested zoning classification)).

proceedings before initiating a takings claim in federal court, unless the State does not provide adequate remedies for obtaining compensation.").[63]

In response to the Town's motion, M & N amended its complaint to withdraw all references to the Fifth Amendment.[64] Accordingly, the Town's motion to dismiss was granted, M & N's Fifth Amendment takings claim was dismissed, and the remaining state-law claims were remanded to the Circuit Court of Madison County, Alabama pursuant to 28 U.S.C. § 1367(c)(3).[65]

Once back in state court, M & N amended its complaint to add as defendants Stan Simpson (both individually, and in his official capacity as Mayor), Vulcan Materials Company, Inc., Vulcan Construction Materials L.P., and Vulcan Lands, Inc.[66]

> The Vulcan entities were named "by virtue of the provisions of Ala. Code § 6-6-227 (1975), which requires that all persons shall be made parties who have or claim any interest which would be affected by the declaration." The Vulcan entities . . . filed a "motion to be excused

[63] The issue of exhaustion of state remedies as it bears upon a federal Fifth Amendment takings claim is discussed Part III.B. of this opinion, *infra*.

[64] *See M & N Materials, Inc. v. Town of Gurley, Alabama*, No. 5:05-cv-00997-SLB, doc. no. 5 (Amendment to Complaint) (N.D. Ala. June 8, 2005) ("Comes now the Plaintiff in this case M&N Materials, Inc. an [*sic*] amends its Complaint by withdrawing from paragraph 14 thereof all references to the Fifth amendment to the United States Constitution.").

[65] *See id.*, doc. no. 7 (Order granting Town's motion, dismissing M & N's Fifth Amendment claim, and remanding remaining claims) (N.D. Ala. June 30, 2005); *see also* doc. no. 67-2 (same), at ECF 19-20. The order dismissing M & N's Fifth Amendment takings claim obviously was effected pursuant to Fed. R. Civ. P. 41(a)(2); hence, the dismissal was without prejudice.

[66] *See* doc. no. 63-1 (Second Amended Complaint filed Oct. 30, 2005) ¶¶ 15-16.

> from participation at trial." In that motion, they "agree[d] to be bound by any judgment entered with regard to [M & N's] declaratory judgment claim."

Ex parte Simpson, 36 So. 3d 15, 22 (Ala. 2009) (alteration in original).

Simpson and the Town each moved for summary judgment. The Town challenged M & N's standing to bring the action, and Simpson argued, among other things, that he was entitled to absolute immunity for any actions taken in opposing quarrying operations, both before and after he became Mayor.

The trial court denied both motions on April 16, 2009, and the defendants separately petitioned the Alabama Supreme Court to issue writs of *mandamus*, requiring the trial court to grant their motions for summary judgment and dismiss M & N's claims.[67]

3. *Mandamus* decisions

Simpson and the Town argued, among other alleged trial court errors, that M & N's November 23, 2004 sale of its property to Vulcan Lands, Inc., divested M & N of standing to sue. The Alabama Supreme Court began its discussion of that issue by observing that a "central theory of M & N's case is that a taking of the property occurred *either* before or after the sale." *Ex parte Simpson*, 35 So. 3d at 23 (emphasis

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[67] *See Ex parte Simpson*, 36 So. 3d at 22 (recording that Simpson filed his petition on May 8, 2009, in case no. 1080981; and that the Town filed its petition on May 11, 2009, in case no. 1081027); *see also Town of Gurley v. M & N Materials, Inc.*, 143 So. 3d 1, 7-8 (Ala. 2012), *modified on reh'g* (Ala. 2013) (same).

in original). Accordingly, the Court parsed its analysis between events that preceded M & N's sale of its property, and those that occurred after the sale.

a. Standing to sue based upon pre-sale events

The *pre-sale conduct* of which M & N complained included the following events:

> (1) the "initial annexation of the subject property into [the Town] in April 2004, [(2)] the denial of the business license to M & N in April 2004, and [(3)] the moratorium placed on the issuance of business licenses thereafter." . . . M & N alleges that these activities of Simpson and the Town cost it the opportunity to sell the property at the original price of $3.75 million, thus resulting in the injury in fact necessary for standing.

Id. at 23 (alterations in original) (record citation omitted). The Court held that M & N possessed standing to seek redress for those allegedly-wrongful pre-sale events based upon the following principles: a landowner's cause of action for damages (just compensation) resulting from an inverse condemnation *accrues when the taking is complete*; and, the damage claim *does not pass to subsequent grantees of the land*.

> "Inverse condemnation is the taking of private property for public use without formal condemnation proceedings and without just compensation being paid by a governmental agency or entity which has the right or power of condemnation." *McClendon v. City of Boaz*, 395 So. 2d 21, 24 (Ala. 1981). "[T]he cause of action [for inverse condemnation] accrues when the taking is complete." *Id*.
>
> "The law is well-settled that 'any damage suffered as a result of [a] taking . . . would have been suffered by the owner at the time the

> damage became ascertainable[.] . . . [T]he *damage claim based on inverse condemnation [does] not pass to subsequent grantees of the land*.'" *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 370 (Mo. 2008) (quoting *Crede v. City of Oak Grove*, 979 S.W.2d 529, 534 (Mo. Ct. App. 1998) (emphasis added)). *See also Steinle v. City of Cincinnati*, 142 Ohio St. 550, 555, 53 N.E.2d 800, 803 (1944) ("The general rule is that the right to damages for the taking of land or for injury to land is in the one who owns the land when the taking or injury occurs, and does not ordinarily pass to a subsequent grantee. 29 Corpus Juris Secundum, *Eminent Domain*, p. 1115, § 202; 30 Corpus Juris Secundum, *Eminent Domain*, p. 101, § 389. See 18 American Jurisprudence, 864, Section 231. Any right on the part of the subsequent grantee to damages is dependent on a new taking or injury after his acquisition of title. 30 Corpus Juris Secundum, *Eminent Domain*, p. 102, § 390."). Indeed, Alabama has regarded this rule as "well settled" since 1927. *Alabama Great Southern R.R. v. Brown*, 215 Ala. 533, 535, 112 So. 131, 132 (1927) (facts analogous to inverse condemnation).
>
> If there was a taking in April or May 2004 as M & N alleges — and we express no view either way — the cause of action for inverse condemnation accrued to M & N at that time. The conveyance of the property in November 2004 did not divest M & N of the right to bring an action for compensation on the basis of the pre-sale events of which M & N complaints. Consequently, M & N has standing to seek redress for the allegedly wrongful pre-sale event involving Simpson and the Town.

Ex parte Simpson, 36 So. 3d at 23-24 (emphasis and alterations in original).

b. Standing to sue based upon post-sale events

The *post-sale conduct* of which M & N complained included the January 18, 2005 denial of a business license to Vulcan Construction Materials L.P., and the zoning of the property for agricultural use that same night. According to M & N, it

had standing to seek redress for these post-sale events on the basis of the Royalty Agreement discussed in Part II.H., *supra*.

The Alabama Supreme Court held that M & N also had alleged "a post-sale injury sufficient to create *standing*," *id*. at 25 (emphasis supplied), but suggested that the Town and Mayor Simpson had failed to allege the most effective basis for blocking a claim flowing from those events, based upon that portion of the Royalty Agreement vesting Vulcan Construction Materials L.P. with sole authority to challenge governmental actions or regulations prohibiting quarrying operations on the subject property: *that is*, *the argument that M & N was not the real party in interest*.[68]

> The distinctions between the standing principle and the real-party-in-interest principle are particularly significant for procedural reasons. *While standing is a necessity for subject-matter jurisdiction and objections to standing are not waivable, "objections based upon an action's not being prosecuted in the name of the real party in interest can be waived.*" *Ex parte Sterilite Corp. of Alabama*, 837 So. 2d 815, 819 (Ala. 2002). Although this Court is duty-bound to notice and address the absence of standing and hence subject-matter jurisdiction *ex mero motu*, *Cadle Co. v. Shabani*, 4 So. 3d 460, 462 (Ala. 2008), it is not so bound when the issue is whether the action is being prosecuted in the name of the real party in interest. See *Ex parte Sterilite*, 837 So. 2d at 819.
>
> In this case, the argument might have been made that M & N is not the real party in interest because of the provisions in the agreement

[68] *See* Ala. R. Civ. P. 17(a) (providing, in pertinent part, that "[e]very action shall be prosecuted in the name of the real party in interest") (alteration supplied).

> purporting to assign to Vulcan [Construction] Materials [L.P.] M & N's right to "litigate, oppose or otherwise challenge an event constituting Operation of Law." However, no argument has been made in this case regarding who is the real party in interest.
>
> > "The burden of establishing a clear legal right to the relief sought rests with the petitioner. [*Ex parte*] *Cincinnati Insurance* [*Cos*.], 806 So. 2d [376,] 379 [(Ala. 2001)]. *It is not this Court's function to do independent research to determine whether a petitioner for a writ of mandamus has established a clear legal right*."
>
> *Ex parte Metropolitan Prop. & Cas. Ins. Co.*, 974 So. 2d 967, 972 (Ala. 2007) (emphasis added). Arguments not made as a basis for mandamus relief are waived. *Ex parte Navistar, Inc.*, 17 So. 3d 219, 221 n.1 (Ala. 2009).
>
> M & N has alleged a post-sale injury sufficient to create standing. Moreover, because the petitioners have not invoked the principle of real party in interest, we decline to consider it. See *Ex parte Sterilite*, supra (declining to consider the argument that plaintiff is not a real party in interest as a basis for mandamus relief when the petitioner had confined its arguments to standing). We now turn to the various issues regarding immunity.

Ex parte Simpson, 36 So. 3d at 25 (alterations added to second paragraph, all other alterations and emphasis in original).

4. Remand to the trial court and jury trial

Following resolution of the petitions for *mandamus*, the case was remanded to the trial court, and the case proceeded to a jury trial on February 14, 2011.[69]

[69] *See Town of Gurley*, 143 So. 3d at 9. Following remand from the Alabama Supreme Court, M & N filed a third and then a fourth amended complaint. The Third Amended Complaint simply emphasized that the Vulcan defendants were made parties to the action "pursuant to Ala. Code § 6-6-

At the conclusion of trial on M & N's inverse condemnation claims based upon a regulatory taking under Article I, § 23 and Article XII, § 235 of the 1901 Alabama Constitution, the trial court entered judgment as a matter of law in favor of the Town on the first claim, but allowed the claim based upon § 235 to go to the jury, which returned a verdict in favor of M & N and against the Town.

5. Appeal to the Alabama Supreme Court

The Town appealed the jury verdict in favor of M & N on the inverse condemnation claim based upon § 235. M & N filed a cross-appeal contesting the trial court's entry of judgment as a matter of law in favor of the Town on the inverse condemnation claim based upon § 23.

a. Inverse condemnation claims under § 235

The Alabama Supreme Court reversed the trial court for allowing M & N's claim based upon § 235 to go to the jury. The pertinent part of that provision reads as follows:

> Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, *for the*

227 (1975) which requires that all persons be made parties to actions brought pursuant to Ala. Code § 6-6-222, *et seq*." Doc. no. 63-2, at ECF 31. The Fourth Amended Complaint amended paragraph 14 of the original complaint filed on April 14, 2005, to allege that "Such actions by the Town of Gurley constitute a taking without just compensation in violation of the [*sic*] Article I, Section 23 and Article 12, Section 235 of the Constitution of Alabama (1901), and Ala. Code Section § [*sic*] 18-1A-1, *et seq*." Doc. no. 64-4.

> *property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements*, which compensation shall be paid before *such taking, injury, or destruction*. . . . .

Ala. Const. art. XII, § 235 (1901) (emphasis supplied). That sentence contains two clauses which materially restrict its scope. In order for a taking to be compensable, the landowner must prove two *prima facie* elements: (1) his property must have been "taken, injured or destroyed"; and (2) the taking, injury, or destruction must have been caused by "construction or enlargement" of the municipality's "works, highways, or improvements." *See, e.g.*, *City of Birmingham v. Graves*, 200 Ala. 463, 76 So. 395 (1917) ("The right of recovery of compensation by the property owner, under the provisions of section 235 of the Constitution, is confined, of course, *to where the municipality is engaged in the construction or enlargement of the works, highways, or improvements of the city*.") (emphasis supplied) (citing *City Council of Montgomery v. Maddox*, 7 So. 433 (Ala. 1889)).

For such reasons, the Alabama Supreme Court held that M & N's inverse condemnation claim based upon the Town's administrative or regulatory actions in, *e.g.*, annexing the property and zoning it in a classification that did not permit quarrying operations, was not compensable under § 235. *Town of Gurley v. M & N Materials, Inc.*, 143 So. 3d 1, 13 (Ala. 2012), *modified on reh'g* (Ala. 2013) (holding that "the taking, injury, or destruction of property must be through a physical invasion

or disturbance of the property, specifically 'by the construction or enlargement of [a municipal or other corporations'] works, highways, or improvements,' not merely through administrative or regulatory acts") (alteration in original).

b. Inverse condemnation claims under § 23

On the other hand, the Alabama Supreme Court affirmed the trial court for granting the Town's motion for judgment as a matter of law on M & N's inverse condemnation claim based upon § 23 of the State Constitution. The pertinent part of that provision states that "private property shall not be *taken for*, *or applied to public use*, unless just compensation be first made therefor. . . ." Ala. Const. art. I, § 23 (1901) (emphasis supplied).[70] The Supreme Court's decision was based upon its prior

[70] The full text of that constitutional provision reads as follows:

> That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.

Ala. Const. art. I, § 23 (1901). The Alabama Supreme Court observed in a footnote to its opinion in *Town of Gurley* that

opinion in *Willis v. University of North Alabama*, 826 So. 2d 118 (Ala. 2002), which construed the emphasized portion of the preceding quotation from § 23.

The plaintiff in *Willis* owned property located across the street from land on which the University of North Alabama ("UNA") had constructed a multilevel parking deck. The plaintiff believed that the parking facility reduced the value of his property, and filed an inverse condemnation claim, based upon the allegation that UNA had "taken" his property without "just compensation" in violation of § 23. *See id*. at 119. The Alabama Supreme Court's decision held that, even if construction of the parking deck had reduced the value of the plaintiff's property, the property had not been "taken for, or applied to public use" as required by the language of that constitutional provision. *Id*. at 121.

Based upon *Willis*, the Alabama Supreme Court affirmed the entry of judgment as a matter of law in favor of the Town on M & N's § 23 claim, saying that:

> It is undisputed that there was not an actual taking in this case and that

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> the plain language of § 23 prevents the State, not municipalities, from taking property without just compensation. See Art. I, § 36, Ala. Const. 1901 ("[W]e declare that everything in this Declaration of Rights is excepted out of the *general powers of government*, and shall forever remain inviolate.") (emphasis added). In this case, the legislature enacted Act No. 2004-19, which annexed [or enabled the Town to conduct a public referendum on annexation of] the at-issue property. *Therefore, § 23 is applicable* [*to M & N's claim*] *because of the legislature's involvement with the Town's annexation of the at-issue property*.

143 So. 3d at 14 n.6 (first alteration and emphasis in original, second alteration and emphasis supplied).

> M & N has complained only of administrative and/or regulatory actions taken by the Town. *Willis* makes clear that § 23 applies [only] when a physical taking of the property in question has occurred. In the present case, M & N does not allege that there was a physical taking of the property in question. . . .

Town of Gurley, 143 So. 3d at 15 (footnotes omitted, alteration supplied).

M. The Present Action

The Alabama Supreme Court's modified opinion in *Town of Gurley v. M & N Materials* was entered on September 27, 2013, and this action was commenced on February 3rd of the following year.

III. DISCUSSION OF THE TOWN'S MOTION FOR SUMMARY JUDGMENT

A. Real Party in Interest

The Town picks up the point that was not decided by the Alabama Supreme Court in either of its opinions, and argues that this action is due to be dismissed pursuant to Federal Rule of Civil Procedure 17(a)(1), which requires that "[a]n action must be prosecuted in the name of the real party in interest." (alteration supplied). In other words, the action must be prosecuted by "the person who possesses the rights sought to be enforced." *Greer v. O'Dell*, 305 F.3d 1297, 1303 (11th Cir. 2002).

The Town contends that M & N surrendered its right to prosecute the claims alleged in this action when it executed the Royalty Agreement with Vulcan

Construction Materials L.P., and assigned the right to litigate either a taking, or zoning and other land use restrictions, to Vulcan Construction Materials L.P. The pertinent provisions of the Royalty Agreement provide that

> Vulcan shall be relieved from the obligation to make any payments to [M & N] . . . or otherwise perform any obligation to [M & N] hereunder *if Vulcan* (*or any of its affiliates*) *is prevented from conducting Quarrying Operations on the Property . . . for any of the following reasons*:
>
> (a) Quarrying Operations are prohibited because the applicable property is condemned, taken for any public or quasi-public use under any statue or by right of eminent domain, or by private purchase in lieu thereof by a body vested with the power of eminent domain (collectively, a "Taking");
>
> (b) Quarrying Operations are prohibited due to an order or ruling of any court, administrative or governmental body or agency;
>
> (c) *Quarrying Operations are prohibited due to any zoning or land use restrictions on the applicable property*;
>
> (d) Quarrying Operations are prohibited due to any other governmental rule, regulation or law; or
>
> (e) Quarrying Operations cannot be conducted because it is determined that Vulcan does not own the rights to recover the Stone reserves on or under the Property.
>
> The matters set forth above in (a)-(d) are collectively referenced herein as the "Operation of Law." . . . . Vulcan, *in its sole discretion, shall determine what action (if any) shall be undertaken to litigate, oppose or otherwise challenge an event constituting Operation of Law*. [M & N] agrees to reasonably cooperate with Vulcan in the course of any such

challenge:

> *In the event of a Taking of the Property . . .,* [*M & N*] *hereby assigns to Vulcan its claim, interest or right (if any) in any award that may be made in such proceeding. Further,* [*M & N*] *agrees that Vulcan shall have the sole right and obligation to seek compensation and retain damages caused by the Taking.*

Doc. no. 78-10 (Royalty Agreement) at ECF 5-6 (alterations, emphasis, and ellipsis supplied). The Town argues that the foregoing provisions of the Royalty Agreement dictate that, "without Vulcan as the **plaintiff** in this action, *there can be no judgment entered by the Court*, except one dismissing this action pursuant to [Federal Rule of Civil Procedure] 17(a)." Doc. no. 91 (Town's Response to Motion to Dismiss of Vulcan Defendants) ¶ 4 (emphasis in original, alteration supplied). In addition, the Town argues that *Vulcan Lands, Inc.*, and not M & N, held title to the property on the date it was zoned for agricultural use, and has retained title since that date.

In response, M & N argues that it assigned to Vulcan Construction Materials L.P. only its right to litigate a "Taking," as that term is defined in subsection (a). It is undisputed that the subject property was not "condemned, taken for any public or quasi-public use under any statute or by right of eminent domain, or by private purchase" by a governmental body "vested with the power of eminent domain." M & N therefore argues that the clause, "In the event of a Taking . . ., [M & N] hereby assigns to Vulcan its claim, interest or right (if any) in any award that may be made

in such proceeding," does not eradicate its status as the real party in interest.

M & N's argument overlooks the significance of the preceding paragraph of the Agreement, which states that, in the event of the occurrence of one of the circumstances constituting an "Operation of Law" — one of which is *the prohibition of quarrying operations due to "any zoning or land use restrictions"* — "Vulcan, in its sole discretion, shall determine what action (if any) shall be undertaken to litigate, oppose or otherwise challenge" such a governmental action. Vulcan Construction Materials L.P. has not decided to "litigate, oppose, or otherwise challenge" the Town's zoning decision for the M & N property. Instead, the Vulcan defendants collectively state in their motion to dismiss that they "are not intending to, and do not, ratify the commencement or continuation of this action, or any part of it, nor do they authorize [M & N] or any party to prosecute this action or any claims on their behalf."[71]

Thus, under the plain language of the Royalty Agreement, M & N is not the "real party in interest" with regard to any monetary damages related to that Agreement and, accordingly, is not due relief for any frustration of that Agreement caused by the Town's zoning decision.

That is not the end of the discussion of the loss of royalties under the Royalty

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[71] Doc. no. 70 (Motion to Dismiss by Vulcan Defendants) ¶ 3 (alteration supplied).

Agreement, however, because M & N also argues that its claims for monetary damages under 42 U.S.C. § 1983 are *tort claims* which (according to it) are *not assignable* under Alabama law.[72]

> Even if the Royalty Agreement could be read to assign to Vulcan the right to pursue the claims M&N asserts in this case, that assignment would be invalid. M&N has brought this action pursuant, in part, to 42 U.S.C. § 1983. Claims pursuant to § 1983 are considered tort claims. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727-28 (1999); *Owens v. Okure*, 488 U.S. 235, 240-41 (1989); *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985). Under Alabama law, tort claims also may not be assigned. *Miller v. Jackson Hosp. & Clinic*, 776 So. 2d 122, 125 (1999); *Rice v. Birmingham Coke & Coal Co.*, 608 So. 2d 713, 715 (Ala. 1992) (refusing to change the longstanding common law prohibition against assignments of causes of action in tort); *All States Life Ins. Co. v. Jaudon*, 154 So. 798, 799 (Ala. 1934) ("[A] right of action arising from tort is nonassignable."); *Lowe v. Fulford*, 442 So. 2d 29, 32 (Ala. 1983); *Holt v. Stollenwerck*, 174 Ala. 213, 215, 56 So. 912 (1911).

Doc. no. 101 (M & N's Responsive Brief in Opposition to Summary Judgment), at 25 (alteration in original).

M & N overstates the significance of the cited authorities. For example, the Alabama Supreme Court's opinion in *Miller v. Jackson Hospital & Clinic* held that "'one cannot assign a *personal injury action* to another or appoint an agent . . . to bring a personal injury lawsuit on his behalf.' To the extent that statement deals with an assignment of the right to recover for a *purely personal* tort, it correctly expresses

[72] Doc. no. 101 (M & N's Responsive Brief in Opposition to Summary Judgment), at 25.

the general rule." 776 So. 2d at 125 (emphasis and ellipsis supplied). Similarly, the Court held in *Rice v. Birmingham Coke & Coal* that "a chose in action for recovery of converted [chattel] property [a personal tort] is not assignable." 608 So. 2d at 715 (alterations supplied). Moreover, *All States Life Insurance v. Jaudon* held that "a right of action arising from tort is nonassignable, and this rule has been applied to actions for fraud and deceit, *where the wrong is regarded as one to the person*." 154 So. at 799 (emphasis supplied, internal quotation marks omitted).

In contrast, any tort that can be asserted in this action is not a "personal tort." Accordingly, the cases relied upon by M & N do not stand for the proposition that a claim seeking recovery for damages caused by the Town's "zoning or land use restrictions on the applicable property" is not assignable.

Even if M & N cannot recover damages for lost royalties under the terms of its Royalty Agreement, it arguably retains standing to assert — and, it is the entity that possesses the right to enforce — a claim for the $2.75 million diminution in the market value of its property: a loss sustained when Vulcan Lands, Inc., declined to exercise its option to purchase M & N's property for the stated consideration of $3.75 million. Accordingly, this court now will address that aspect of a takings claim.

B. M & N's Fifth Amendment Takings Claim

The "Takings Clause" of the Fifth Amendment to the United States

Constitution provides that private property cannot be taken for public use "without just compensation." U.S. Const. amend. V (1791). That prohibition was applied to the states through the Due Process Clause of the Fourteenth Amendment in *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 238-39 (1897); *see also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978) (same).

Even so, the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), held that, if a state procedure existed that might provide compensation for an alleged taking of private property, then a federal court plaintiff under 42 U.S.C. § 1983 could not claim that he had been denied just compensation until he had exhausted state avenues for relief. *Id.* at 195. Thus, *Williamson County* requires potential federal-court plaintiffs to pursue any arguably-available state-court remedies that might lead to just compensation before bringing suit in federal court under the Fifth and Fourteenth Amendments.

As noted in Part II.L. of this opinion, *supra*, M & N's original state-court complaint alleged that the Town's actions constituted "a taking without just compensation in violation of the Fifth Amendment to the United States Constitution,"

as well as several provisions of the Alabama Constitution and Code.[73] The Town removed the action to this court based upon federal question jurisdiction, at which point M & N indicated its intent to withdraw all references to the Fifth Amendment.[74]

Further, as discussed in Part II.L.5.a., *supra*, the Alabama Supreme Court reversed the jury verdict in favor of M & N based upon Ala. Const. art. XII, § 235 (1901), holding that § 235 did not support the inverse condemnation claim because M & N's property had not been "taken, injured, or destroyed by the construction or enlargement of [the Town's] works, highways, or improvements." *Id*. (alteration supplied); *see also Town of Gurley v. M & N Materials, Inc.*, 143 So. 3d 1, 13-14 (Ala. 2012), *modified on reh'g* (Ala. 2013) (same). The State Supreme Court also affirmed the trial court's entry of judgment as a matter of law on M & N's claim based upon Ala. Const. art. I, § 23 (1901).[75]

The Town now argues that M & N's Fifth Amendment takings claim is barred by the doctrine of *res judicata* or, in the alternative, that the claim should be dismissed because M & N failed to make a so-called "*Jennings* reservation."[76] *See Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976).[77]

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[73] *See, e.g.*, doc. no. 63-1, at ECF 28, ¶ 14; doc. no. 67-2, at ECF 16, ¶ 14.

[74] *See* Parts II.L.1 and 2. of this opinion, *supra*.

[75] *See* Part II.L.5.b. of this opinion, *supra*.

[76] *See* doc. no. 57 (Town's Brief in Support of Summary Judgment), at 36.

[77] The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit

1. ***Williamson County*, *res judicata*, and the "*Jennings* reservation"**

When explaining how the *Williamson County* "exhaustion of state law remedies" principle has been reconciled with state *res judicata* doctrines, the Eleventh Circuit wrote the following in *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992):

> [P]otential federal court plaintiffs [must] pursue any available state court remedies that might lead to just compensation before bringing suit in federal court under section 1983 for claims arising under the Fourteenth and Fifth Amendments for the taking of property without just compensation. . . . On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court; most state courts recognize res judicata and collateral estoppel doctrines that would require a state court litigant to raise his federal law claims with the state claims, on pain of merger and bar of such federal claims in any attempted future proceeding. Thus, when a would-be federal court litigant ventures to state court to exhaust any potential avenues of obtaining compensation, in order to establish that a taking "without just compensation" has actually occurred as required by *Williamson County*, he finds himself forced to raise the federal law takings claim even though he would prefer to reserve the federal claim for resolution in a section 1983 suit brought in federal court.
>
> This Circuit has already resolved this dilemma. . . . . In *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir.), *cert. denied*, 429 U.S. 897, 97 S. Ct. 260, 50 L.Ed.2d 180 (1976), the Court held that one need only "reserve her constitutional claims for subsequent litigation in federal court" by "*making on the state record a reservation as to the disposition of the entire case by the state courts*" *to preserve access to*

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handed down prior to the close of business on September 30, 1981, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

> *a federal forum*. *Id.* at 1332.

Fields, 953 F.2d at 1303 (ellipsis, alterations, and emphasis supplied). Thus, the so-called "*Jennings* reservation" provides a means of circumventing the doctrine of *res judicata*.

During oral argument, the Town's attorney argued that M & N had not preserved its Fifth Amendment takings claim because, following remand of its amended complaint to state court on June 30, 2005,[78] M & N failed to file any pleading in the state record clearly stating "a reservation as to the disposition of the entire case by the state courts" for the purpose of preserving its ability to later return to federal court, in the event "just compensation" was not obtained in state court. *See Fields*, 953 F.2d at 1303 (citing *Jennings*, 531 F.2d 1332).

That argument has great appeal, and it would be dispositive of plaintiff's Fifth Amendment takings claim if not for the following statements in the last footnote on the last page of the *Fields* opinion:

> The homeowners' attorney filed in state court seeking relief on state grounds, but never made a *Jennings* reservation on the record or in his filings with the state courts. At oral argument, homeowners' counsel suggested that because he believed Florida state takings law was identical to federal takings law, he neither raised federal claims nor made a *Jennings* reservation at the time he filed his state court action. If a state court litigant with a takings clause claim has any wish to

[78] See the discussion in Parts II.L.1. and 2., *supra*.

> preserve access to a federal forum, then he must make a *Jennings* reservation at the time he files his state law claims in state court. *Jennings* is an exception to well-settled doctrines of res judicata that promote finality and the conservation of scarce judicial resources. Exceptions to traditional merger and bar principles should be strictly construed; we decline to further weaken res judicata and collateral estoppel rules to accommodate state court parties who are taken unawares by changes in state law announced for the first time incident to their case. *State court litigants in circumstances similar to the homeowners must* ***either*** *raise both their federal and state law claims in their state court complaint* ***or*** *make a* Jennings *reservation of their federal constitutional claims on the record*.

Fields, 953 F.2d at 1309 n.10 (italicized and boldface emphasis supplied). That footnote appears to say that a formulaic *Jennings* reservation is not the only way for a state-court litigant to preserve a Fifth Amendment takings claim for later federal review. Instead, the litigant has the option of asserting "*both their federal and state law claims in their state court complaint . . . .*" *Id.*

Laying aside the criticisms that might be expressed about tucking an alleged holding into a footnote — *e.g.*, *United States v. Bobo*, 419 F.3d 1264, 1269 (11th Cir. 2005) (observing that "courts generally do not make a habit of hiding away important holdings in afterthought footnotes") — the Eleventh Circuit offers no further instruction as to whether a litigant must explicitly state in some pleading filed in the state-court record that he is asserting a Fifth Amendment claim solely to preserve it for later federal review in the event "just compensation" is not obtained in the state-

court proceedings, or whether, as in the present case, the initial "raising" of a Fifth Amendment claim in the original state-court complaint is sufficient to preserve that claim, even when the litigant later voluntarily dismisses the Fifth Amendment claim.

In short, there are no clear guideposts for decision in this area. Attorneys face the possibility of malpractice when attempting to map a course for litigating a Fifth Amendment takings claim that complies with both the *Williamson County* exhaustion requirement and state *res judicata* principles. If this court were writing upon clean sheets of paper, it would promulgate a clear rule, whereby takings litigants could preserve their Fifth Amendment claims for federal review only by explicitly stating in either their state-court complaint, or some other pleading filed in the state record, that such claims were alleged only for the purpose of preserving them for federal review, in the event "just compensation" was not obtained in state court.

M & N's original state-court complaint asserted a Fifth Amendment takings claim, but, as noted in Part II.L.2., *supra*, that claim was voluntarily dismissed. Under footnote 10 of the *Fields* opinion, *supra*, M & N's initial pleading of that claim *arguably* was sufficient to prevent it from being barred by the doctrine of *res judicata*. Accordingly, this court will assume that M & N effectively preserved its Fifth Amendment claim, and will proceed to analyze the merits of M & N's substantive claims.

2. The merits of M & N's takings claim

The Supreme Court has identified three factors that are of particular significance when attempting to determine whether economic injuries caused by inverse condemnations (or "regulatory takings") should be compensated:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. *See Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *see United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952).
>
> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The *economic impact of the regulation on the claimant* and, particularly, *the extent to which the regulation has interfered with distinct investment-backed expectations* are, of course, relevant considerations. *See Goldblatt v. Hempstead*, *supra*, at 594. So, too, is *the character of the governmental action*. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e. g.*, *United States v. Causby*, 328 U.S. 256 (1946), *than when interference arises from some public program adjusting the benefits and burdens of economic life to promote*

the common good.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-24 (1978) (emphasis supplied, alterations in original); *see also Horne v. Department of Agriculture*, – U.S. –, 135 S. Ct. 2419, 2437 (2015) ("Most takings cases . . . proceed under the fact-specific balancing test set out in *Penn Central Transp. Co. v. New York City*") (ellipsis supplied). The *Penn Central* factors are analyzed in the following subsections.

(a) Economic impact

The Town argues that no economic loss resulted from the sale of M & N's property to Vulcan Lands, Inc. That contention is based upon the fact that the aggregate cost basis for the property was $553,500: *i.e.*, M & N's founders (McCord and Nelson) paid a total of $303,500 for the original 250 acres,[79] and M & N paid $250,000 for the remaining nineteen acres.[80] Thus, the sale of the property to Vulcan Lands, Inc., for $1 million caused M & N and its incorporators to realize a profit of $446,500 (an 80.6% return on the cumulative $553,500 investment).

M & N responds that this approach, which takes into consideration the "book

[79] $83,500 (amount Country Places, Inc. paid for the 160 acres) + $220,000 (amount Nelson and McCord paid for ninety acres) = $303,500.

[80] $250,000 is the amount M & N paid for a house and sixteen acres on the western side of the ninety-acre tract. As the Town notes in its brief, due to the fact that M & N was not incorporated until June 27, 2003, it was not obligated on the February 3, 2003 note and mortgage to Community Bank of Huntsville, Alabama. *See* doc. no. 57, at 2.

value" of M & N's property, is not appropriate to determine the economic impact of the Town's regulatory actions. M & N suggests that this court should, instead, consider the "market value" of M & N's property at the time of the taking: "Except where valuation of property is essentially unpredictable, the default standard should be a measure of the property's market value."[81] The United States Supreme Court has defined "market value" as the price "a willing buyer would pay in cash to a willing seller" at the time of the taking. *United States v. Miller*, 317 U.S. 369, 374 (1943). M & N contends that this court should consider the $3.75 million price recited in its option contract with Vulcan Lands, Inc. At least in part due to the controversy surrounding the Town's denial of a business license to M & N, Vulcan Lands declined to exercise that option, and M & N ultimately sold the property for the lesser amount of $1 million. M & N therefore claims a loss of $2.75 million under the market value approach.

In response, the Town cites several cases in which the United States Supreme Court declined to find a taking when even greater percentages of a property's alleged market value were lost. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (a decrease in property value from $10,000 per acre to $2,500 per

[81] Doc. no. 101 (M & N's Responsive Brief in Opposition to Summary Judgment), at 47 (boldface emphasis omitted) (citing *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-14 (1979); *Southern Natural Gas Co. v. Approximately 1.06 Acres*, No. 2:11-cv-00191-AKK-CSC, 2012 U.S. Dist. LEXIS 38760, at *6-7) (M.D. Ala. March 22, 2012)).

acre (75% reduction) upheld as not constituting a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 406 (1915) (upholding constitutionality of government action that prevented brick-making on the subject property, which would have rendered that property worth approximately $800,000, whereas the use of the property "for residential purposes or for any purposes other than the manufacture of brick" rendered the property worth only about $60,000 — *i.e.*, a 92.5% reduction in the property's alleged highest and best market value).

As the Eleventh Circuit has observed, "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied *all* or *substantially all* economically viable use." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073-74 (11th Cir. 1996) (alteration and emphasis supplied). This court accordingly finds that, even if it adopts the "market value" approach advocated by M & N, the company was not deprived of "all" or "substantially all" economically viable use of its property.

(b) Interference with reasonable, investment-backed expectations

M & N's incorporators were aware of the controversy surrounding the company's use of its property for quarrying operations at the time they made plans to begin operating a quarry. Nelson testified that he knew the operation of a quarry

would be a "political matter."[82] McCord testified that he had other options in mind for the property, such as residential development (at least as a back-up plan). Moreover, the Town points out that, during the hearing held by the Alabama Department of Environmental Management in July of 2003 — almost *a year* before the Town annexed the property, and almost *a year and a half* before M & N sold the property to Vulcan Lands, Inc., in November of 2004 — McCord and Nelson heard numerous citizens voice concerns about the effects quarrying operations would have on surrounding areas. Based upon those facts, the Town argues that M & N's investment expectations were not "reasonable."

The Town also contends that M & N did not sustain a compensable economic loss under this Circuit's precedent. In *Baytree of Inverrary Realty Partners v. Lauderhill*, 873 F.2d 1407, 1410 (11th Cir. 1989), the Eleventh Circuit affirmed the district court's dismissal of the plaintiff's claim that its property was taken without just compensation. When applying the *Penn Central* factors to the facts of that case, the Eleventh Circuit made the following findings: (1) the plaintiff was "only" told that it could not build a residential apartment complex on its property; (2) the plaintiff was not told "that no development of its property [was] allowed"; (3) *the fact that the plaintiff "may not be able to develop exactly what it originally wanted [did] not mean*

[82] Doc. no. 65-8 (State Trial Transcript), at 349.

that its investment-backed expectations [were] eradicated"; and (4) a zoning decision necessarily implicates the "general welfare." *Id.* at 1410 (alterations and emphasis supplied).

In light of M & N's "awareness" of opposition to the quarry prior to its sale of the M & N property to Vulcan Lands, Inc., and the fact that M & N still realized a profit from that transaction, the court finds, as a matter of law, that M & N's investment-backed expectations were not eradicated by the Town's conduct.

Moreover, this court concluded in Part III-A, *supra*, that M & N contracted away its right to claim damages pursuant to the Royalty Agreement, incurred because of governmental zoning activity. Therefore, even if *all* of M & N's expectations of monetary compensation pursuant to the Royalty Agreement have been eradicated, M & N is due no relief.

(c) The character of the government action

The "character of the government action" is a factor that requires several inquiries, such as: whether the action serves important public interests; whether the government acted in a purely regulatory capacity, and did not profit from its actions; and whether a use restriction on real property has an unduly harsh impact upon the owner's use of the property. *See Vesta Fire Insurance Corp. v. Florida*, 141 F.3d 1427, 1433 (11th Cir. 1998); *Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir.

1989); *McNulty v. Indialantic*, 727 F. Supp. 604, 612 (M.D. Fla. 1989) (quoting *Penn Central*, 438 U.S. at 127). Another district court within this Circuit declined to find a taking when Georgia's so-called "Residence Act"[83] forced a registered sex offender to move from his existing home to a different residence, saying that:

> A "taking" is *unlikely to be found where the state is merely adjusting the benefits and burdens to promote the common good*. *See Penn Cent. Transp. Co.*, 438 U.S. at 124. Here, the purpose of this residency restriction is to *protect the public*, and specifically minors, from sex offenders who have a higher rate of recidivism than any other type of offender. *See Smith*, 538 U.S. at 103. The statute does so by preventing this type of offender from residing within 1,000 feet of any place where children congregate. The statute aims "to lessen the potential for those offenders inclined toward recidivism to have contact with, and possibly victimize, the youngest members of society." *Mann*, 278 Ga. at 444. Although not every sex offender will repeat his offense, this statute's aim is to minimize this potential danger by decreasing the likelihood that these individuals will come into regular contact with children. *Id.*

Doe v. Baker, No. 1:05-cv-2265-TWT, 2006 U.S. Dist. LEXIS 67925, at *25-26 (N.D. Ga. Apr. 6, 2006) (emphasis supplied).

This court does not find that the "character of the government action" factor favors the finding of a "taking" because the Town's actions in annexing the property,

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[83] The statute referenced in text provided, in relevant part,

> No individual required to register under Code Section 42-1-12 shall reside within 1,000 feet of any child care facility, school, or area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, school, or area where minors congregate at their closest points.

O.C.G.A. § 42-1-13 (b).

enacting moratoria on the issuance of a business license for the property, conducting a land use study on the property, and zoning the property for agricultural use served important public interests and were reasonably necessary to effectuate those interests. The Town provided the following explanation for its conduct, in support of its motion for summary judgment:

> The record shows that, to the extent that the Town acted to prevent quarrying on the property, such action was *motivated by an intent to promote the health, safety, morals, and general welfare of the Town's residents*. As early as June 2003, the Town Council heard from residents concerned about a quarry. An entire citizens' coalition formed around quarry opposition, gaining more than 500 signatures on petitions and commanding large attendance figures at public events concerning the quarry. In July 2013, after numerous concerns were received from residents and after Brian McCord had held a public meeting to discuss his plans, the Town Council enacted Resolution No. 216, which explicitly stated that the Town had
>
>> serious concerns regarding the effects a rock quarry would have on (1) *air quality*, (2) *damage from blasting to homes and businesses*, (3) *large volumes of traffic* on Gurley Pike (the main service road for Madison County Elementary School), (4) *damage to existing streets* by heavy trucks and (5) *damage to the Town's water storage tank* located on Gurley Pike.

Doc. no. 58-2 (Exhibits to Bryant Affidavit), at ECF 98 (emphasis supplied). The Town also offered the expert testimony of Jim Ludwiczak and Dennis Key, which this court previously admitted.[84] Important excerpts from Ludwiczak's affidavit include

[84] *See* doc. no. 120 (Memorandum Opinion and Order).

the following statements:

> With regard to the property at issue in this case — *i.e.*, the eastern face of Gurley Mountain, *facing the Town of Gurley* — it is my professional opinion, within a reasonable degree of blasting and geologic certainty, that flyrock is *likely to occur* and will be *difficult to control*.
>
> . . . .
>
> I have seen flyrock occur in hundreds of other cases where conditions were similar to those encountered on Gurley Mountain. Some of these flyrock occurrences had some of the best blast designs I have ever seen, but flyrock still occurred. *In some of [those] cases, flyrock traveled as far as 3,000 feet, and frequently traveled 2,000 feet*. Because there is a high risk of flyrock, it is necessary to evaluate the potential associated hazards. To begin, the topography of the area is very significant in that the face of the mountain proposed for quarrying *directly faces the Town of Gurley and rises above the Town and associated structures*. It also *faces U.S. Highway 72*, a major roadway with four lanes of traffic. The topography of the quarry zone therefore directs all adverse effects of blasting toward the Town of Gurley and its residents and motorists.
>
> . . . .
>
> Among the structures in the Town of Gurley that would be within [2,000 to 3,000 feet of where I would anticipate blasting would likely occur] are a *public housing complex* . . ., *numerous private apartments and numerous private residences (many of which are designated historic), the Town of Gurley's water tank, two propane distribution operations, a restaurant, a gas station, an electrical substation, and the Madison County Elementary School and its playground and activity field. . . . . Moreover, there exist . . . TVA high voltage power lines running directly through the middle of the subject property*, carrying high amounts of electricity at all times. I personally inspected these lines during my site visit; these TVA towers and lines appear to be

> located within less than 250-500 feet from the area where blasting could be anticipated to occur.
>
> . . . . When flyrock comes into contact with the lines, it can cause "arcing" and swaying of the lines, which will result in fires and explosions, and can even result in tower failures.
>
> . . . .
>
> [I]t is my judgment that residents of Gurley Gardens, nearby apartments, Elementary School students, and Town residents as a whole have a significant risk of exposure to flyrock if this quarry is operational. If such contact were to occur, it could well be fatal, and in several cases I have investigated, it has been.
>
> . . . .
>
> [I]t is my opinion as the former Chair of a Zoning Board of Adjustment and as an expert in the area of quarry operations and blasting that the Town properly enacted moratoria on the property in order to study the potential impact of a quarry, and ultimately zoned the property for "agricultural" use.

Doc. no. 58-10 (Ludwiczak Affidavit) ¶¶ 11, 13-16, 20 (alterations, emphasis, and ellipsis supplied).

Even if Ludwiczak's expert opinion does not, alone, evidence important public interests protected by the Town's conduct, Dennis Key opined that property values near the area would likely have decreased by up to 12.2 percent, *if* the operation of a quarry had been permitted under the zoning classification.[85]

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[85] Doc. no. 58-4 (Key Affidavit) ¶ 13.

In summary, after balancing the *ad hoc* factual inquiries under the Supreme Court's *Penn Central* factors, this court finds that a compensable taking has not occurred, and the Town is due summary judgment on M & N's takings claim.

C. M & N's Substantive Due Process Claim

The Town argues that M & N's substantive due process claim is due to be dismissed for the following reasons: (1) it is barred by *res judicata*; (2) the Fifth Amendment takings claim and substantive due process claim are duplicative of each other; (3) the statute of limitations has expired; (4) the Town's conduct was a "non-legislative deprivation" of a "state-created" property right and, therefore, M & N's interest in the property is not afforded due process protection; and (5) even if M & N's property right *is* afforded due process protection, the Town's conduct satisfies "rational basis" review. The court will only discuss the last argument.

For M & N to survive summary judgment on its substantive due process claim, it must show that the Town's conduct does not satisfy rational basis scrutiny. M & N's main argument regarding the Town's lack of a "rational basis" for its conduct is that the Town's conduct was pretextual, as evidenced by the Town's non-interference with a "full-scale" quarry adjacent to the M & N property. The Town responds:

> The other Vulcan quarry recently opened, is outside the Gurley Town limits, and is *located on the other side of Gurley Mountain*, *over 5,000 feet* [0.95 of a mile] *away* from the Gurley Gardens public housing

> complex, the Madison County Elementary School, and other central Town improvements. The other Vulcan quarry *does not face the Town or its homes and businesses*, and due to topographic features of Gurley Mountain, it cannot even be seen from downtown Gurley.

Doc. no. 114 (Town's Reply Brief), at 1 (emphasis and alteration supplied). Moreover, pretext is not dispositive.

> The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose — a goal — which the enacting government body *could* have been pursuing. The *actual* motivations of the enacting body are entirely irrelevant . . . . The second step of rational basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose. The proper inquiry is concerned with the *existence* of a conceivably rational basis, not whether that basis was actually considered by the legislative body.

Greenbriar Village v. City of Mountain Brook, 202 F. Supp. 2d 1279, 1293 (N.D. Ala. 2002) (alteration omitted, emphasis and ellipsis in original) (citing *Georgia Manufactured Housing Association, Inc. v. Spalding County*, 148 F.3d 1304, 1307 (11th Cir. 1998) (in turn citing *Haves v. City of Miami*, 52 F.3d 918, 921-22 (11th Cir. 1995)). The *Greenbriar Village* opinion emphasized the deference given to government actions when stating that

> the Eleventh Circuit requires a plaintiff to show more than an improper motive for a substantive due process violation. The Eleventh Circuit [has] stated that the plaintiff must demonstrate all of the following for the court to find a substantive due process violation: deprivation of a property interest for an improper motive **and** by means that were pretextual, arbitrary and capricious, **and** . . . without any rational basis.

> *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (emphasis added) (quoting *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982)). Thus, the test for substantive due process is conjunctive, not disjunctive. In short, an improper motive is insufficient to create a substantive due process violation when a conceivable rational basis exists. *See Georgia Manufactured Housing Association, Inc. v. Spalding County*, 148 F.3d 1304, 1307 (11th Cir. 1998).

Greenbriar Village, 202 F. Supp. 2d at 1295 (alterations supplied, internal quotation marks omitted, ellipsis and boldface emphasis in original).

The evidence presented in this case, including the expert testimony of Jim Ludwiczak and Dennis Key, shows that conceivable rational bases existed for: annexing the M & N property; enacting moratoria on business licenses for that property; conducting a land use study of that property; and ultimately zoning the property for agricultural use. The reasons included preventing the diminution of nearby property values, preventing dangers such as flyrock and ground vibration, and avoiding interference with high-voltage TVA power lines. Thus, the Town's conduct passes constitutional muster under the rational basis test. Accordingly, summary judgment is due to be granted in favor of the Town on M & N's substantive due process claim.

D. Declaratory Judgment and Injunction Claims

Count III of M & N's complaint (for a declaratory judgment under the federal statute) seeks a judgment invalidating the Town's annexation and zoning of the

property.[86] Count IV (for a declaratory judgment under Alabama law) asks this court to enter a judgment "declaring the annexation of the subject property and/or the zoning restrictions placed on the property, as well as the other actions described herein to be void, invalid, and/or unconstitutional."[87] Finally, Count V requests "an injunction preventing the Town from continuing to exercise authority or control over the subject property."[88]

Because those requests for relief are necessarily dependant upon this court's finding a constitutional violation under Count I and/or Count II of M & N's complaint, and this court has determined that summary judgment should be granted as to those claims, M & N's claims for a declaratory judgment and/or injunction are due to be dismissed.

IV. DISCUSSION OF VULCAN DEFENDANTS' MOTION TO DISMISS

The parties agree that the Vulcan defendants were named as parties for the sole purpose of complying with the state and federal declaratory judgment statutes. *See* Ala. Code § 6-6-227 (1975); 28 U.S.C. § 2201 *et seq.* As the Vulcan defendants state in their motion to dismiss, "no claims for relief are pleaded against any of the Vulcan

[86] Doc. no. 1 (Complaint) ¶ 48.
[87] *Id.* ¶ 60.
[88] *Id.* ¶ 67.

Defendants nor do the Vulcan Defendants assert any claims against the parties."[89]

Because this court has concluded that M & N's declaratory judgment claims are due to be dismissed, the Vulcan defendants' motion is due to be granted.

V. DISCUSSION OF M & N'S MOTION FOR PARTIAL SUMMARY JUDGMENT

M & N moves for partial summary judgment on its claim for declaratory relief, under 28 U.S.C. § 2201. In support of that motion, M & N states as follows:

> There is no genuine issue of material fact as to Count III of the Complaint. The actions of Gurley through its Town Council were arbitrary and capricious, and were designed at all times not to protect or advance the general welfare of the Town, but to pull M & N into the Town in order to prevent its operation of a lawful business that the Town did not like. Because Gurley violated M & N's substantive due process rights through that conduct, there is no genuine issue of material fact on the declaratory relief requested in Count III, and M & N is entitled to a declaratory judgment invalidating the Town's actions beginning with the annexation of the property through the present, as well as further relief as this Honorable Court deems appropriate.

Doc. no. 75 (Brief in Support of Motion for Partial Summary Judgment), at 24.

As the court discussed in Parts III.B.2, and III.C. of this opinion, *supra*, the Town is due summary judgment on M & N's takings and substantive due process claims. The court finds that M & N is not entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). Accordingly, M & N's motion is due to be denied.

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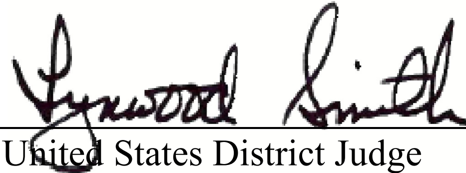
[89] Doc. no. 70 (Motion to Dismiss), at 2 ¶ 1.

VI. CONCLUSION AND ORDER

In accordance with the foregoing, it is ORDERED that the Town's motion for summary judgment, and the Vulcan defendants' motion to dismiss, are GRANTED. It is further ordered that M & N's motion for partial summary judgment is DENIED. Costs are taxed to plaintiff. The clerk is directed to close this file.

DONE and **ORDERED** this 13th day of November, 2015.



United States District Judge