AlaFile E-Notice

01-CV-2026-902889.00

Judge: JAVAN PATTON CRAYTON

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

ROBERT SANSOME ET AL V. HOAR CONSTRUCTION, LLC ET AL
01-CV-2026-902889.00

The following matter was FILED on 7/9/2026 11:29:33 AM

C001 SANSOME ROBERT

C002 HILLEY JOHN

PLAINTIFFS' MOTION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANT HOAR CONSTRUCTION, LLC SHOULD NOT BE HEL

[Filer: PARNELL KENNETH MARK]

Notice Date: 7/9/2026 11:29:33 AM

JACQUELINE ANDERSON SMITH
CIRCUIT COURT CLERK
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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

BIRMINGHAM DIVISION

ROBERT B. SANSOME and JOHN BENJAMIN HILLEY,	)	
Plaintiffs,	)	
v.	)	
HOAR CONSTRUCTION, LLC; LAKESHORE DATA CENTER, LLC; NEBIUS, INC.; THE CITY OF BIRMINGHAM, ALABAMA; and FICTITIOUS DEFENDANTS A-E,	)	**CIVIL ACTION NUMBER: CV-2026-902889**
Defendants.	)	

PLAINTIFFS' COMBINED RESPONSE AND OBJECTION TO DEFENDANTS' JOINT BRIEF ON THRESHOLD DISPOSITIVE ISSUES (DOC. 59) AND DEFENDANTS' BRIEF ON THE THRESHOLD REQUIREMENT OF A BOND (DOC. 62)

Plaintiffs Robert B. Sansome and John Benjamin Hilley respectfully submit this combined response to the two threshold briefs the Court authorized Defendants to file (Doc. 50): Defendants' Joint Brief Regarding Threshold Dispositive Issues (Doc. 59, the *"Exhaustion Brief"*) and Defendants' Brief Regarding the Threshold Requirement of a Bond (Doc. 62, the *"Bond Brief"*). Both ask the Court to end this matter without finishing what it has already begun. Both should be denied.

This is a resumption, not a beginning. This preliminary-injunction hearing is already underway. The Court has received sworn testimony from four witnesses and partial testimony from the City's own Director of Planning, Engineering and Permits, Katrina Thomas.[1] Under Rule 65, Ala. R. Civ. P., that testimony is evidence now before the Court; it did not disappear when the

[1] Notwithstanding this, the Plaintiffs are ready to represent their case upon the resumption of testimony.

matter was reassigned and continued. Yet the *Exhaustion Brief* asks the Court to rule "without an evidentiary hearing" (Doc. 59 at 2), and the *Bond Brief* asks the Court to test Plaintiffs' "capacity" to bond "before launching into" a hearing (Doc. 62 at 4). The hearing is not something to be launched; it is something to be completed. Neither motion supplies a reason to withhold the relief the evidence — including admissions from Defendants' own witness — already supports.

These are not new questions — and this is not the first time the defendants have pressed them. The exhaustion and security objections these two briefs advance are the same threshold objections the defendants urged before the predecessor court, and that court declined to treat either as a basis to withhold a hearing. Over those objections it convened a hearing on Plaintiffs' application for a temporary restraining order, and then a two-day preliminary-injunction hearing; it received Plaintiffs' evidence, allowed Defendants to cross-examine, admitted exhibits, and was hearing Defendants' own first witness when the proceedings were interrupted. A court does not take two days of testimony on a case it believes it lacks the power to hear for failure to exhaust, and it does not carry a plaintiff's evidentiary presentation to completion while treating an unposted bond as a bar to being heard. The threshold objections did not stop the hearing then, and the reassignment does not revive them now.

What changed is not the law but the judge.

Plaintiffs state their position on the merits in summary form, because the merits are not what these two motions actually decide. Plaintiffs' position is straightforward: the Birmingham Zoning Ordinance is a permissive, enumerated-use ordinance under which a use it does not affirmatively list is prohibited; "data center" appears nowhere in it, a point Defendants concede (Doc. 59 at 2, 16); the Director's power to categorize an unlisted use "according to the most comparable land use classification *established by this title*" is an "administrative" power to sort a

use into a classification that already exists, not a "legislative" power to create one the Ordinance never contained; and the permits issued for an unauthorized use are therefore void. The Alabama Supreme Court applied that reading to Birmingham's own ordinance in *Jefferson County v. City of Birmingham*, 256 Ala. 436, 55 So. 2d 196 (1951), holding that a facility the Code did not affirmatively permit could be built neither as a permitted use nor as an accessory use, because the principal use itself was not permitted; an accessory use cannot attach to a principal use the Ordinance never authorized. That is the case, and Plaintiffs will *prove* it — on the Ordinance's text, on the City's own admissions (its December 2025 application pause, its moratorium, and its June 9, 2026 amendment adding "data center" to the use scheme for the first time), and on Director Thomas's own testimony — at the preliminary-injunction hearing now in progress.

The point for present purposes is narrower. The two threshold motions do not ask the Court to decide that merits question; they ask the Court to avoid it — with the *Exhaustion Brief* by sending Plaintiffs away to an administrative body, and with the *Bond Brief* by pricing them out of a hearing. Whether the use was ever authorized will be established by evidence at the hearing. What follows explains why neither threshold motion justifies denying Plaintiffs that hearing, and why the record already received defeats both.

I. THE BOND MOTION (DOC. 62) — THE "GOLIATH v. DAVID" DEFENSE — FAILS.

Stripped of citation, the *Bond Brief* asks the Court to make a defendant's wealth a gate to the courthouse. Its logic is that the larger and more expensive the project, the larger the claimed daily loss, and the larger the bond two homeowners must post before the Court will even complete the hearing — so that they cannot afford to be heard at all. That is the Goliath-versus-David defense: a party with the resources to build at $500,000 a day insists that the very scale of its

spending immunizes it from being stopped, however clearly it is building something it had no right to build. If that were the law, the wealthiest violators would be the least accountable, and ordinary citizens' access to the courts would exist only for those who could match the violator's checkbook. Alabama law is not that.

A. *Anderson* — this circuit's own governing authority — commits the amount to the Court's discretion and recognizes the very exceptions this case presents.

The amount of any Rule 65(c) security is committed to this Court's discretion, and this Court's own appellate authority makes that plain. In *Water Works & Sewer Bd. of the City of Birmingham v. Anderson*, 530 So. 2d 193, 198 (Ala. 1988) — a Jefferson County case — the Supreme Court held that Rule 65(c) "empowers a trial court with the discretion to set security at an appropriate amount," and affirmed a $10,000 bond even though the enjoined parties swore their damages would run "substantially in excess of" that figure. *Id.* (reviewing only for "abuse of discretion," *quoting Willowbrook Country Club, Inc. v. Ferrell*, 286 Ala. 281, 239 So. 2d 298 (1970)). A defendant's insistence that its losses dwarf the bond therefore does *not* compel a large bond — the deferential standard protects a modest bond as surely as a large one. And *Anderson* reaffirmed the settled rule that cases "involving impecunious litigants or issues of overriding public concern" warrant "no security or only nominal security." *Id.* (*quoting Lightsey v. Kensington Mortg. & Fin. Corp.*, 294 Ala. 281, 315 So. 2d 431, 434 (1975)). That rule remains current: the Alabama Supreme Court restated the same three exceptions as recently as 2024. *Coan v. Championship Prop., LLC*, 404 So. 3d 237 (2024) (Mendheim, J., concurring in part and concurring in the result).

B. The bond secures only wrongful-enjoinment damages — which the merits at the hearing will show approach zero — and Defendants' "circularity" objection is unsound.

Rule 65(c) security compensates only a party "found to have been *wrongfully* enjoined or restrained," and Alabama defines that narrowly: a party is wrongfully enjoined only if it "had the right all along to do what it was enjoined from doing." *Ex parte Waterjet Sys., Inc.*, 758 So. 2d 505, 511–12, 513 (Ala. 1999). The bond does not secure "such sum as the court may decree … on the merits," and does not reach the project's carrying cost or the wages of third-party crews. *Myrick v. Finance Am. Credit Corp.*, 404 So. 2d 700, 704–05 (Ala. Civ. App. 1981). The controlling question is thus not the size of the claimed loss but whether Defendants had the legal right to build as configured — and, as the Introduction explains, Plaintiffs will prove at the hearing that they did not. A party stopped from building what it had no right to build suffers no *wrongful*-enjoinment loss, so the exposure the bond secures approaches zero, and a bond securing a near-zero exposure is, by definition, nominal.

Defendants protest that this reasoning is "circular" because it "assumes Plaintiffs will win." (Doc. 62 at 8–9.) It does not. It assumes only what *DeVos* itself requires — that the bond be measured against *wrongful*-enjoinment exposure, which necessarily turns on the merits. *DeVos v. Cunningham Grp., LLC*, 297 So. 3d 1176, 1187 (Ala. 2019). Defendants' objection proves too much: if a court could never look to the merits in sizing a bond, it could never set a low one, contradicting *Anderson*. This is precisely why the merits belong at the hearing now in progress, not in a threshold demurrer. And *DeVos*'s instruction to "err on the high side" presupposes a genuine exposure to secure; where the enjoined party had no right to the conduct, **there is nothing in this case to err on the high side of.**

C. Even taken at face value, the $500,000 figure measures categories the bond excludes.

Defendants' own affidavit defeats their number. It swears the $500,000 per day is a loss "to Hoar *and its subcontractors.*" (Doc. 62, Ex. A ¶ 4 (emphasis added).) Subcontractor wages are third-party losses, and the enterprise's daily carrying cost is a project-and-merits figure — both outside a Rule 65(c) bond under *Myrick*. The larger the number Defendants press, the more it measures the scale on which they proceeded without authority, not the price of a wrongful restraint. The hardship is also self-created: Defendants raced to secure a "grandfathered" position ahead of the City's moratorium and built during litigation, and "progress" achieved that way "does not aid the wrongdoer." *Dendy v. Ryan*, 2025 Ala. LEXIS 142, at *37–*38, *41–*42 (Ala. Dec. 19, 2025); *J & M Bail Bonding Co. v. Hayes*, 748 So. 2d 198, 199 (Ala. 1999). Self-created hardship earns no equitable weight and cannot inflate the bond.

D. The impecunious-litigant and overriding-public-concern exceptions apply, and the hearing is where the required findings are made.

The nominal-security exceptions are no mere technicality; they exist to keep a disparity of wealth from closing the courthouse door — to prevent a party with the means to build at half a million dollars a day from pitching security so high that the homeowners it has injured cannot afford to be heard. Both recognized exceptions fit this case. This litigation seeks to hold the City to its own zoning law and to protect the Plaintiffs that live in a residential community beside an ongoing construction site for a 300-megawatt industrial facility — the paradigm of "overriding public concern," and a far cry from the private road-access dispute Defendants invoke. *Cf. Milton v. Haywood*, 393 So. 3d 1156, 1158 (Ala. 2023) (cited at Doc. 62 at 11).

The second hook fits no less well. Two individual homeowners cannot post security scaled to a $500,000-per-day enterprise burn; the very disparity Defendants press is the impecuniosity the exception addresses. *DeVos* does not counsel otherwise. Beyond the legal-right point already made (*supra* Part I.B), *DeVos* is distinguishable on a second, independent ground: it arose between comparably situated commercial actors — an established pathology practice group and two board-certified physicians — and the party that sought a *larger* bond was the *enjoined* party, protecting its own documented professional income. *DeVos v. Cunningham Grp., LLC*, 297 So. 3d 1176 (Ala. 2019). Here the party demanding a bond it knows its adversary cannot post is the multi-billion-dollar *enjoined* enterprise, invoking Rule 65(c) not to secure a genuine wrongful-enjoinment loss but to convert security into a toll. A decision protecting an enjoined party's provable income supplies no warrant for a well-capitalized enjoined party's manufacture of an unreachable bond against homeowners of modest means.

E. The "bond first, hearing later" gambit has no basis in Rule 65(c).

Defendants' request that the Court gauge Plaintiffs' "capacity" to bond *before* completing the hearing inverts the Rule, which fixes the *amount* of security *after* the Court determines relief is warranted. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 297 F.R.D. 633 (N.D. Ala. 2014), was one district court's discretionary case-management choice in a $780 million NEPA case; it is federal and non-binding, and *DeVos* cited it only for the adequacy principle, not for a mandatory pre-hearing bond gate. Defendants concede the amount is a matter "for another day" (Doc. 62 at 1) — yet ask the Court to deny relief based on an amount not before it. That is incoherent, and doubly so where the hearing has already begun.

II. THE EXHAUSTION MOTION (DOC. 59) FAILS.

A. Exhaustion is a prudential doctrine, not a jurisdictional bar, and this is a declaratory-judgment and enforcement action properly filed in circuit court.

Exhaustion in zoning matters is a judicially created, prudential limitation — not a component of subject-matter jurisdiction — so the Court retains discretion to reach the merits, and the recognized exceptions apply. *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154 (Ala. 2000) (cited by Defendants at Doc. 59 at 5). "The doctrine does not apply when (1) the question raised is one of interpretation of a statute, (2) the action raises only questions of law and not matters requiring administrative discretion or an administrative finding of fact, (3) the exhaustion of administrative remedies would be futile and/or the available remedy is inadequate, or (4) where there is the threat of irreparable injury." *Ex parte Lake Forest Prop. Owners' Ass'n*, 603 So. 2d 1045, 1046-47 (Ala. 1992)

More fundamentally, Alabama law has long permitted adjacent and neighboring owners to bring declaratory-judgment and injunction actions directly in circuit court to establish that a use violates the zoning ordinance and to restrain it — without first proceeding through the Board of Adjustment. *City of Tuscaloosa v. Bryan* is directly in point: owners of residential property adjoining the tract at issue filed suit directly in the circuit court for a declaratory judgment and an injunction, alleging that the City had violated its own zoning ordinance by approving a development that did not meet the ordinance's requirements — approving an apartment complex as a "planned unit development" for which it did not qualify. 505 So. 2d 330, 331 (Ala. 1987). After an *ore tenus* hearing the trial court declared the City's approval illegal and enjoined the project, and the Supreme Court affirmed. *Id.* Plaintiffs stand where the *Bryan* plaintiffs stood: adjoining owners asking a circuit court, on a full evidentiary record, to declare a use unauthorized

under the ordinance and to enjoin it. The Declaratory Judgment Act supplies the authority: any person "whose rights … are affected by a … ordinance" may obtain a declaration. Ala. Code § 6-6-223. And *Town of Stevenson v. Selby*, 839 So. 2d 647 (Ala. Civ. App. 2001), squarely rejected a municipality's attempt to recharacterize such a declaratory action as "essentially an appeal" of a zoning decision — the precise recharacterization Defendants attempt here.

The Supreme Court's decision in *Ex parte Chesnut* is this dispute in miniature. There, as here, neighboring homeowners challenged building permits issued for construction next door, contending that a city administrative official had misread the zoning ordinance to authorize what its text did not allow; there, as here, they filed a civil action directly in circuit court rather than first appealing the permits to the board of adjustment; and there, as here, the City moved to dismiss on the ground that they had failed to exhaust their administrative remedies. *Ex parte Chesnut*, 208 So. 3d 624, 627–28, 634 (Ala. 2016). The Court rejected the exhaustion defense. Exhaustion in zoning matters, it held, is "a judicially imposed prudential limitation, not an issue of subject-matter jurisdiction," subject to exceptions that apply, among other circumstances, where the challenge turns on the interpretation of the ordinance or raises "only questions of law and not matters requiring administrative discretion or an administrative finding of fact." *Id.* at 634 & n.1. Because the homeowners' challenge "involve[d] an interpretation of a zoning ordinance and present[ed] a question of law," the Court held that "the trial court had jurisdiction over the [homeowners'] complaint, and the defense of the exhaustion of administrative remedies did not apply"; their resort to the board, it added, had been "unnecessary." *Id.* And on the merits the Court supplied the rule that governs the Director's classification here: where the ordinance's language is plain, a court "will not blindly follow an administrative agency's interpretation but will interpret the [ordinance]

to mean exactly what it says." *Id.* at 640. Plaintiffs stand where the Chesnuts stood, and the same result follows.

B. No appealable written "determination" ever issued, so no appeal period ever began — as the Director conceded and as Defendants' own brief admits.

Notwithstanding the previous arguments, Defendants' theory requires an appealable "order, requirement, decision, or determination" of the Director that Plaintiffs let expire. There was none. The Ordinance requires that the Director "make [her] decision ***in writing***" and that the written decision fix the time to appeal. Tit. 1, Ch. 9, Art. V, § 5 (quoted at Doc. 59 at 3, 6). Director Thomas conceded that no such formal written determination ever issued. Thomas Tr. (approx. pp. 426–432). An appeal period also cannot run against a party never given notice of the decision; charging Plaintiffs with a determination the City never issued or served offends basic due process.

C. Even if a determination existed, resort to the Board would be futile — and the Board route the project did trigger was run and finally denied.

Exhaustion is excused where the administrative body cannot grant the relief sought or decide the question presented. Two features place this dispute beyond the Board's competence. First, the Board cannot authorize a use the Ordinance does not list; Alabama's enabling acts confer no power to grant ***use*** variances. Ala. Code §§ 45-37A-56, 11-52-80. Second, the Board cannot adjudicate the validity of a Council amendment or the Director's asserted authority to introduce a ***new use***; those are declaratory-judgment questions for this Court. *Kennon & Assocs., Inc. v. Gentry*, 492 So. 2d 312, 315 (Ala. 1986).

D. Tort counts are outside exhaustion entirely.

Plaintiffs' nuisance, trespass, and negligence-*per se* counts are common-law and statutory tort claims to which zoning exhaustion is simply irrelevant; "standing" and its exhaustion analogue are confined to public-law claims. *Ex parte BAC Home Loans Servicing, LP*, 159 So. 3d 31 (Ala. 2013). Two adjoining owners testifying to noise, vibration, and dust are the real parties in interest, and those counts independently support preliminary relief — so the "no hearing needed" request fails even if any zoning count were vulnerable, which none is.

E. Exhaustion is an affirmative defense the City must prove, and Rule 65 forecloses its "no hearing" premise.

Failure to exhaust is an affirmative defense on which Defendants bear the burden, and they cannot carry it with a determination the City never made in writing, never announced, and cannot fix in time. Finally, the premise that the Court should rule "without an evidentiary hearing" is no longer available: the hearing occurred, and under Rule 65 the testimony — including the City's own witness's concessions — is part of the record. Defendants cannot use a "threshold" label to erase testimony from their own witness that establishes the exceptions to their own defense.

III. LAKESHORE DATA CENTER, LLC IS NOT A STRANGER TO THIS PROJECT; TO THE EXTENT IT IS ONE AND THE SAME AS HOAR, IT IS PROPERLY ENJOINED.

Both briefs bury Lakeshore in a footnote: it "has no involvement or stake," they say, and "merely acquired and sold one parcel of land" before dissolving. (Doc. 59 at 1 n.1; Doc. 62 at 2 n.1.) That tidy sentence cannot survive Lakeshore's own recorded deeds. What the footnote calls acquiring and selling "one parcel of land" was, on the face of the public record, a sixteen-minute paper flip of the project's anchor parcel, engineered by the very people building this project — and the verified complaint, itself evidence for purposes of preliminary relief, lays it bare.

On September 30, 2025, Lakeshore took title to Lot 1-A — the 201 Milan Parkway parcel at the heart of the site — from Regions Bank for **$17,200,000**. (Inst. No. 2025089695.) **Sixteen minutes later**, by the recorder's own timestamp, Lakeshore conveyed the identical parcel to its affiliate 201 Milan Birmingham, LLC for **$27,000,000 — a $9,800,000** markup, fifty-seven percent, booked in sixteen minutes of recordation time on land Lakeshore never used, improved, entitled, or touched except to hold it for those sixteen minutes. (Inst. No. 2025089723.) The person who signed that flip for Lakeshore was Robert O. Burton — the same Robert O. Burton who was, throughout, the Chief Executive Officer of Hoar Construction, the general contractor building this project. It was Hoar's chief executive selling to a Hoar affiliate, for a markup that appeared in sixteen minutes.

Lakeshore was built for that single office and no other. It was organized roughly a year in advance as a single-purpose shell; it shares Hoar's principal place of business; it never operated a data center, or anything else; and its entire corporate existence reduces to the sixteen-minute hold of Lot 1-A and the **$9.8 million** it captured passing that parcel to an affiliate. Then, its work done, attempts have been made for Lakeshore to disappear: Burton personally filed its dissolution on December 30, 2025 — two weeks after the City issued its December 16 moratorium notice, and precisely as the project's legality came under scrutiny. An entity that flips the project's anchor parcel for a same-day **$9.8 million markup**, under the signature of Hoar's own chief executive and then attempts to dissolve on the eve of the moratorium, is not a bystander to this project. It is an instrument of it — and it is the same enterprise that now asks this Court to treat its construction spending as a hardship.

Lakeshore and Hoar operate under Robert Burton's common control and, on this record, act as one; an injunction against Hoar therefore reaches Lakeshore.

IV. THE WATSON AFFIDAVIT IS ENTITLED TO NO WEIGHT AND CANNOT ANCHOR ANY BOND.

The only evidentiary support for the $500,000-per-day figure is the affidavit of William Watson, Hoar's Senior Vice President (Doc. 62, Ex. A). It cannot bear that weight. It is due to be stricken. It is **conclusory** — the figure appears as a bare number, with no records, methodology, or breakdown, and the party seeking a specific bond amount bears the burden of a rational, evidence-based basis for it. It exceeds the affiant's **personal knowledge** and offends the best-evidence rule, purporting to quantify *subcontractors'* losses without foundation. It **proves the wrong thing**, aggregating losses "to Hoar *and its subcontractors*" — the third-party wages and enterprise carrying costs that *Myrick* excludes. An affidavit the movant's own subsequent stipulation contradicts cannot be credited on the current record.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court deny both threshold motions and complete the preliminary-injunction hearing already in progress; and, if any security is required upon entry of relief, that the Court fix it in a nominal amount and state its basis on the record, with Plaintiffs' formal no-bond position preserved. Plaintiffs further request that any injunction expressly run to Hoar Construction, LLC and its affiliates, alter egos, and those in active concert with it, including Lakeshore Data Center, LLC, under Rule 65(d).

Respectfully submitted this 9th day of July, 2026.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July 2026, a copy of the foregoing has been served on all counsel of record through the AlaFile Electronic Filing System.

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