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

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

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

DEFENDANTS' JOINT BRIEF REGARDING THRESHOLD DISPOSITIVE ISSUES PRECLUDING PRELIMINARY INJUNCTIVE RELIEF

Defendants Hoar Construction, LLC, Nebius, Inc, the City of Birmingham, and Lakeshore Data Center, LLC[1] move to dismiss all claims supporting Plaintiffs' Motion for Preliminary Injunction for failure to exhaust administrative remedies.

Plaintiffs ask this Court to halt Nebius's construction project based entirely on the premise that the project is not authorized under the Birmingham Zoning Ordinance (the "Ordinance"). *See* Plaintiffs' Memorandum in Support of PI, Doc. 29, at 1 ("Defendants hold no lawful authorization for the use they are constructing, their permits are a nullity, and they have no legal right to continue building."). But Alabama law does not permit Plaintiffs to litigate those claims in the first instance in Circuit Court. Challenges to zoning classifications or permitting decisions must first proceed

[1] Lakeshore Data Center has no involvement or stake in any ongoing operations at the site; instead, it merely acquired and sold one parcel of land ("Lot 1-A") to 201 Milan Birmingham, LLC on October 1, 2025, and later dissolved on December 30, 2025, making it an improper subject of this action.

through the administrative review process established by the Alabama Code and the Ordinance. Fundamentally, that requires an aggrieved party to first submit his or her challenges to the Zoning Board of Adjustment (the "ZBA"). But Plaintiffs did not invoke that process. Instead, they skipped the ZBA and filed this collateral attack, seeking to invalidate the permits validly issued by the Department of Planning, Engineering & Permits. Because Plaintiffs failed to exhaust the exclusive administrative remedies available to them, all permitting- and zoning-related claims, including declaratory judgment counts in the Complaint, are not properly before this Court. The Motion for Preliminary Injunction therefore should be denied without an evidentiary hearing.

The applicable administrative remedy regime is memorialized first in Ala. Code 45-37A-56, which provides:

> ***Appeals to the zoning board of adjustment may be taken by any person aggrieved***, or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer or other officer as is charged with the enforcement of the zoning ordinance of the city. ***The appeal shall be taken within a reasonable time as provided by the rules of the board by filing with the officer from whom the appeal is taken and with the zoning board of adjustment a notice of appeal specifying the ground thereof.***

Ala. Code § 45-37A-56 (emphasis added). Implementing this authorizing legislation, the Birmingham Zoning Ordinance (the "Ordinance") establishes a clear, sequential administrative pathway through the Zoning Board of Adjustment (the "ZBA") for any person who wishes to challenge a classification or permitted land use.

The Ordinance does not use the words "data center." But it explicitly vests the Director of the Department of Planning, Engineering & Permits (the "Director") with the power — subject to appeal to the ZBA — to classify land uses not explicitly enumerated:

> The Director is empowered to categorize new land uses not enumerated in this title according to the most comparable land use classification established by this title. ***The Director's decision may be appealed to the Board***.

Ordinance, Tit. 1, Ch. 2, Art. II, § 3 (emphasis added); *see also* Ordinance, Tit. 1, Ch. 4, Art. V, § 7 ("Any use not specifically listed in these Land Use Groups . . . may be allowed in groups with similar uses as determined by the Director."). This goes to the core of Plaintiffs' Complaint: the data center should not have been permitted because the Ordinance does not literally say "data center." But the Director determined otherwise and concluded the permits should issue. A party who wishes to challenge a decision of the Director must first seek the Director's formal written determination:

> The Director shall make his decision in writing in which he shall indicate the time in which an appeal to the Board shall be filed. A copy of this written decision shall be sent to the person in charge of the Planning Division of the Department. ***A copy of such written decision shall also be sent to any party or group representative who has made known to the Director of his opposition to the decision***.

Ordinance, Tit. 1, Ch. 9, Art. V, § 5 (emphasis added). That written determination triggers a ***15-day period to file an appeal with the ZBA***. *Id.* Neither the Ordinance nor the Department imposes any time limit on when a party may request that determination. If Plaintiffs believe that Nebius's data center project was improperly permitted because the Director erroneously concluded that the project was properly classified in the applicable zoning category, the administrative pathway was open when the permits issued, remained open when Plaintiffs filed suit, and remains open today. They have chosen not to use it.

Even if the Court concluded that the permits themselves constituted the Director's appealable decision, the result is the same: Plaintiffs did not appeal them to the ZBA. Under any reading of the Ordinance, the ZBA — the body the Legislature designated to review the Director's decisions — has never been asked to weigh in. That undisputed gap is fatal to the current challenge.

Importantly, this process also contemplates judicial review — ***but only after the ZBA has weighed in***. *See* Ala. Code § 11-52-81(a) ("Any party aggrieved by any final decision of a board of zoning adjustment may appeal the final decision of the board by filing an appeal in the circuit

court in the county where the board convenes. The aggrieved party shall first file a written notice of appeal with the board within 15 days after the final decision, specifying the decision from which the appeal is taken.").

Plaintiffs' own briefing confirms this framework. In their brief, Plaintiffs describe the Director's authority as a power of "categorization, not creation" and acknowledge that "[a] determination under § 3 is, moreover, an administrative interpretation subject to appeal — not unappealable City fiat." (Plaintiffs' Memorandum in Support of PI, Doc. 29 at 3-4.) ***By their own account, the Director's classification decision was subject to ZBA review.*** Plaintiffs cannot maintain on the papers that the decision was reviewable by the ZBA yet argue they may skip that process before seeking an injunction.

Because Plaintiffs failed to exhaust the administrative remedies available to them, their permitting-related claims are barred. As a matter of law, a party that has not pursued the ordinary administrative process cannot establish the likelihood of success on the merits required for a preliminary injunction. *See City of Gadsden v. Entrekin*, 387 So. 2d 829, 835 (Ala. 1980) ("Because the appellee failed to exhaust administrative remedies, the Circuit Court . . . lacked jurisdiction to entertain her claim; therefore, the judgment of that court granting appellee's prayer for a permanent injunction is due to be reversed and remanded.").

ARGUMENT

Plaintiffs' challenge to the propriety of Nebius's permits is currently barred as a matter of law. Alabama's exhaustion doctrine requires that parties aggrieved by a zoning official's decision first pursue available administrative remedies before seeking relief in circuit court. The Birmingham Zoning Ordinance provides a clear, sequential process: appeal to the ZBA, and only then seek judicial review. Plaintiffs availed themselves of none of these remedies. Instead, they

leapfrogged the administrative process and raced directly to this Court — an end-run that Alabama law does not permit.

1. Alabama Law Mandates Exhaustion of Administrative Remedies Before Zoning Challenges May Proceed in Court.

"It is well settled in Alabama that the general principle of 'exhaustion of administrative remedies' applies to zoning matters." *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154, 157 (Ala. 2000); *Entrekin*, 387 So. 2d at 833 ("Many decisions attest the rule that the exhaustion of administrative remedies is a prerequisite to court action in zoning matters."). This doctrine requires that "where a controversy is to be initially determined by an administrative body, the courts will decline relief until those remedies have been explored and, in most instances, exhausted." *Hodges v. Gulf Highlands Dev. L.L.C.*, 965 So. 2d 795, 799 (Ala. Civ. App. 2007). As Chief Justice Torbert explained, "[i]f a mechanism exists to resolve a controversy, that mechanism should be given a full opportunity to operate." *Ex parte Graddick*, 495 So. 2d 1367, 1372 (Ala. 1986) (Torbert, C.J., concurring). Put another way:

> The exhaustion doctrine allows an agency to fully develop technical issues and factual records within its particular area of expertise prior to judicial review. The agency can thereby have the first opportunity to correct any errors it may have made, and further judicial action may become unnecessary.

Talton Telecommunication Corp. v. Coleman, 665 So. 2d 914, 919 (Ala. 1995) (quoting *Hall v. City of Dothan*, 539 So. 2d 286 (Ala. Civ. App. 1988)).

There is no question the exhaustion principle applies in the permitting context. *See*, *e.g.*, *Bd. of Adjustment of City of Guntersville v. Baker*, 587 So. 2d 341, 342 (Ala. Civ. App. 1991) (neighbor's failure to timely appeal permit to board of adjustment precluded challenge); *Cook v. City of Columbiana*, 961 So. 2d 835, 838 (Ala. Civ. App. 2007) (affirming dismissal for failure to exhaust in zoning permit dispute). A party who bypasses the administrative process forfeits the right to judicial relief until that party avails itself of the proper process.

The statutory framework is unambiguous. Alabama Code § 45-37A-56 establishes procedures by which persons aggrieved by an administrative officer's decision — or the decision of any other officer charged with enforcement of the Ordinance — may seek review before a board of zoning adjustment. Alabama Code § 11-52-81 then provides that "[a]ny party aggrieved by any final decision of a board of zoning adjustment may appeal the final decision of the board by filing an appeal in the circuit court." The statute's plain language, which is implemented in turn in the Ordinance, is sequential: first the ZBA, then the court.

2. The Ordinance Provided Claimants a Clear Administrative Pathway They Chose To Ignore.

The applicable Ordinance established a comprehensive administrative framework for challenging the Director's land-use determinations — a framework Plaintiffs disregarded. The Ordinance distinguishes between the issuance of a building permit and the Director's formal decision on a use-classification question. Chapter 9, Article V, Section 5 provides that "[p]ersons appealing decisions of the Director shall have 15 days from the date of such decision to submit a letter or other writing to the Department," and requires that "[t]he Director shall make his decision in writing in which he shall indicate the time in which an appeal to the Board shall be filed." Ordinance, Tit. 1, Ch. 9, Art. V, § 5. Permit issuance alone is not the triggering event. *Cf. Hodges v. Gulf Highlands Dev., L.L.C.*, 965 So. 2d 795, 800 (Ala. Civ. App. 2007) (zoning administrator's informal opinion did not constitute appealable "decision or determination"); *Bedgood v. United Methodist Children's Home*, 598 So. 2d 988, 991 (Ala. Civ. App. 1992) (applicant "never requested any administrative officer for a decision or determination"). A written Director's decision — not permit issuance — triggers the 15-day appeal period. If the aggrieved party wishes to challenge that decision, he or she may file an appeal with the ZBA.

Plaintiffs have not sought a Director's decision, and they have not appealed to the ZBA. *See* Ala. Code § 45-37A-56(a); Ala. Code § 11-52-81(a); *Cook*, 961 So. 2d at 838. To the extent Plaintiffs claim the Nebius project constitutes a "new" use, the Ordinance empowers the Director to "categorize new land uses not enumerated in this title according to the most comparable land use classification." Ordinance, Tit. 1, Ch. 2, Art. II, § 3. The Director exercised that authority in determining that Nebius's data center falls within Commercial Use Group 2. *See also* Ordinance, Tit. 1, Ch. 4, Art. V, § 7, Subsec. 5.A ("Any use not specifically listed in these Land Use Groups, including accessory structures and uses, but excluding, except as herein provided, Accessory Use Child Care Centers, ***may be allowed in groups with similar uses as determined by the Director***. (emphasis added)). The zoning classification and use group at issue for the Nebius site permits a wide variety of uses, including retail, restaurants, hotels, conference centers, non-manufacturing research and development, parking garages, cinemas, taverns, and "other like uses." Ordinance, Tit. 1 Ch. 4, Art. V, § 7.B, Subsec. 4.a; *see also id.* Tit. 1, Ch. 4, Art. V, § 7, Subsec. 5.A.

The Ordinance does not leave the Director's determination unchecked. It expressly provides that the Director's decision "may be appealed to the [ZBA]." Ordinance, Tit. 1, Ch. 2, Art. II, § 3. The ZBA — the agency here with the "particular area of expertise," *see Talton*, 665 So. 2d at 919 — is authorized to "hear and decide appeals from any order, requirement, decision or determination made by the Director in carrying out the enforcement of this Ordinance." Ordinance, Tit. 1, Ch. 9, Art. IV, § 2A.

Plaintiffs' briefing acknowledges this framework. They describe the Director's authority as the power to "slot an unlisted use into its most comparable existing land-use classification — after which the use takes on that classification's treatment, district by district, and remains subject to appeal to the Board." (Plaintiffs' Memorandum in Support of PI, Doc. 29 at 3–4.) They further

acknowledge that "[a] determination under § 3 is, moreover, an administrative interpretation subject to appeal — not unappealable City fiat." (*Id.*) By Plaintiffs' own account, the Director's classification is an administrative interpretation subject to ZBA review — the remedy they chose to ignore.

The administrative pathway available to Plaintiffs was — and remains — clear:

- **Step 1**: Request a decision from the Director. Ordinance, Tit. 1, Ch. 2, Art. II, § 3; Tit. 1, Ch. 9, Art. IV, § 3.A. No deadline applies.
- **Step 2**: Appeal to the ZBA within 15 days of the Director's written decision. Ordinance, Tit. 1, Ch. 9, Art. V, § 5; Ala. Code § 45-37A-56(a).
- **Step 3**: Only after the ZBA's final decision, appeal to Circuit Court. Ala. Code § 11-52-81.

Plaintiffs skipped Steps 1 and 2. The absence of any time limit on Step 1 means their failure to engage the administrative process is a deliberate choice, not an expired deadline. The exhaustion doctrine exists to prevent this shortcut.

3. Ignorance of the Law is Not a Defense: The Ordinance's Administrative Remedy Provisions Were Publicly Available and Accessible.

Plaintiffs cannot plead ignorance of the available administrative remedy. Zoning ordinances carry the force of law, and every person is presumed to know the law. *See Swann v. Bd. of Zoning Adjustment of Jefferson Cnty.*, 459 So. 2d 896, 898 (Ala. Civ. App. 1984). The density or complexity of an ordinance does not excuse a party from knowledge of its administrative-remedy provisions.

The City went beyond mere publication. The Planning, Engineering, and Permits Department maintains a publicly available FAQ on its official website expressly informing the public of the ZBA's role:

> The Zoning Board of Adjustment (ZBA) is a quasi-judicial board comprised of seven members, appointed by the City Council . . . . The ZBA has four main responsibilities: . . . *3. To hear and decide*

> *appeals of the zoning ordinance when it has been alleged that there is an error in any order, requirement, decision or determination made by a city official in the administration of the zoning ordinance.*

See City of Birmingham, *Planning, Engineering & Permits FAQ*, https://www.birminghamal.gov/government/city-departments/pep/about-pep/pep-faq (emphasis added).[2]

The administrative appeal process was not hidden. It was published in the Ordinance, the Alabama Code, and on the City's public website. Plaintiffs, who are represented by able counsel, deliberately decided to skip it.

4. The Issued Permits are Also Public Notice of the City's Determination.

A building or use permit is a public document. The Ordinance does not require the City to provide notice or additional notice for permitting uses or issuing permits that do not require a rezoning, variance, special exception, and changes to legal nonconforming uses before issuing a permit. See Ordinance, Tit. 1, Ch. 9, Art. IV, § 3; id. at Tit. 1, Ch. 9, Art. III, § 2. In other words, the Ordinance does not require notice for use determinations or permits for uses that conform to the existing zoning classification. A permit's issuance is public notice that the responsible authority found the proposed use satisfies applicable zoning criteria.

The Nebius Building Permit, which is included in the attached Exhibit A, states that it is "issued in accordance with the laws, ordinances and regulations enforced by the Department of Planning Engineering and Permits of the City of Birmingham, Alabama." (Mar. 30, 2026 Building Permit, Ex. A, at 3.) The permit's language places any reader on notice that the City evaluated the proposed use and determined it satisfies applicable zoning criteria:

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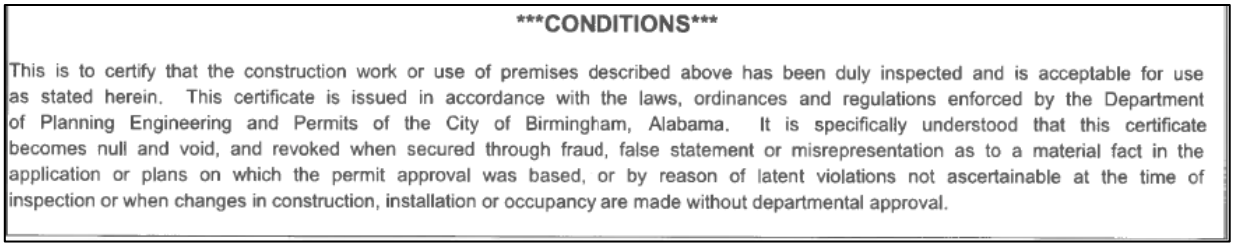
[2] The Court may take judicial notice of the PEP FAQ as a public document published by a government agency. *See* Ala. R. Evid. 201. The FAQ is published on the City's official website and its accuracy is not subject to reasonable dispute.



CONDITIONS

This is to certify that the construction work or use of premises described above has been duly inspected and is acceptable for use as stated herein. This certificate is issued in accordance with the laws, ordinances and regulations enforced by the Department of Planning Engineering and Permits of the City of Birmingham, Alabama. It is specifically understood that this certificate becomes null and void, and revoked when secured through fraud, false statement or misrepresentation as to a material fact in the application or plans on which the permit approval was based, or by reason of latent violations not ascertainable at the time of inspection or when changes in construction, installation or occupancy are made without departmental approval.

Id. The project's permits are public records available for inspection. Any aggrieved person had both the ability and the obligation to challenge the City's determination through the administrative process, as spelled out in the Ordinance. *See Baker*, 587 So. 2d at 342. Having failed to do so, Plaintiffs cannot first raise the matter in this Court.

5. Claimants Cannot Skip Step 1 To Get To Step 3: Exhaustion Is Not Optional.

The Ordinance establishes a mandatory, sequential process: (1) challenge the Director's determination by appealing to the ZBA; (2) obtain a final decision from the ZBA; and (3) seek judicial review. Ala. Code § 11-52-81; Ordinance, Tit. 1, Ch. 9, Art. V, §§ 5—6. There is no allegation, argument, or evidence that Plaintiffs ever sought ZBA review. They did not file a notice of appeal, request a determination letter, or appear before the ZBA. That undisputed gap is fatal to their permitting-related claims.

A. The Pure-Question-of-Law Exception Does Not Apply.

The Supreme Court's decisions in *Entrekin* and *City of Graysville v. Glenn* are controlling. In *Entrekin*, the Court recognized that exhaustion bars judicial review except where a dispute "rais[es] questions of law only and not matters requiring administrative findings of fact or an exercise of administrative discretion." 387 So. 2d at 831. The *Entrekin* Court held that the exception did *not* apply because the plaintiff alleged "that she was wrongfully denied a building permit by the City of Gadsden," and that "decision was clearly a matter of administrative discretion." *Id.* at 833. Therefore, the plaintiff should have filed an appeal with the board and "allow[ed] the board to hear evidence and reach a factual determination on the issue." *Id.* at 833–

34. Similarly, in *Graysville*, the Court drew a "'clear difference'" between "'the authority of [an official] to lawfully act,'" which is a true question of law, and "'whether an act of a public official . . . is supported by evidence as the basis for official action,'" which is not. 46 So. 3d 925, 928 (Ala. 2010). Only the former can bypass exhaustion; challenges going to "the sufficiency of the evidence" require administrative review. *Id.* at 931-32. Plaintiffs' challenge falls in the second category.

Plaintiffs contend that the narrow exception recognized in *Entrekin* for disputes raising pure "questions of law." 387 So. 2d at 831; (Plaintiffs' Memorandum of Law in Support of PI, Doc. 29 at 9.) That exception does not apply here to Plaintiff's fact-intensive challenge to the Director's evaluation and determination.

In fact, the *Graysville* Court confronted exactly this type of claim. There, plaintiffs challenged permit issuance, arguing the agency failed to obtain a required consistency report. The Court held such claims "do not seek the interpretation of a statute but, instead, seek a review of [the administrator's] issuance of the permit through an inquiry into the sufficiency of the evidence to support that action." *Id.* at 932. Because the claims went to sufficiency rather than authority, they did "not fall within any exception to the exhaustion-of-administrative-remedies doctrine." *Id.*; *see also Cook*, 961 So. 2d at 838.

The same goes here. Plaintiffs do not challenge the Director's *authority* to classify unenumerated uses, which is expressly conferred by the Ordinance. *See* Ordinance, Tit. 1, Ch. 2, Art. II, § 3; Tit. 1, Ch. 4, Art. V, § 7, Subsec. 5.A. Rather, Plaintiffs dispute whether the Director *correctly applied* that authority for *this project*. (Plaintiffs' Memornadum of Law in Support of PI, Doc. 29 at 4, 7.) In other words, Plaintiffs challenge whether the evidence supports the determination that Nebius's data center falls within Commercial Use Group 2. The Director

exercised discretion after fact-finding and evaluation to determine that the project falls within Commercial Use Group 2. *See Entrekin*, 387 So. 2d at 831. This is a prime example of the "sufficiency of the evidence" inquiry that *Graysville* held does not excuse exhaustion.

B. There is No Irreparable Harm to Justify Skipping the Administrative Steps Either.

In addition, Plaintiffs cite no authority for their proposition that the alleged violation of the Ordinance or a similar ordinance constitutes irreparable harm sufficient to invoke another exception to Alabama's exhaustion principles. *Entrekin*, 387 So. 2d at 833; *see* Doc. 29 at 7; Doc. 2 ¶ 77; *see also Cook*, 961 So. 2d at 838 (recognizing no exceptions to the exhaustion principle applied despite the ongoing enforcement of a zoning decision against the property at issue).

Simply put, a party cannot create irreparable harm by failing to pursue the very administrative remedies that could have prevented the alleged harm from materializing or continuing. Plaintiffs chose not to pursue Ordinance- and ZBA-provided remedies. Having skipped over the administrative process that would have arrested the alleged harm at its source, they cannot point to the consequences and label them "irreparable."

Moreover, the law does not "anticipate the misuse of a projected structure or operation" on the chance it might become harmful. *Jackson v. Downey*, 42 So. 2d 246, 247 (Ala. 1949); *Parker v. Ashford*, 661 So. 2d 213, 218 (Ala. 1995). A building not yet built cannot be assumed to produce the imminent, irreparable harm the exception requires. *See Marshall v. TY Green's Massage Therapy, Inc.*, 332 So. 3d 413, 418 (Ala. 2021). The Complaint's concerns about the alleged negative effects of the Nebius project, as completed, are merely anticipatory and speculative (Doc. 2 ¶¶ 110, 114), and Plaintiffs admit that the harms they seek to enjoin now are time-limited construction-related concerns. (Motion for Temporary Restraining Order, Doc. 6, at 14.)

C. The Need to Prove Likelihood of Success to Receive an Injunction Reinforces the Need for Exhaustion.

Plaintiffs' failure to exhaust is doubly fatal in the preliminary-injunction context. To obtain a preliminary injunction, a movant must demonstrate likelihood of success on the merits. Because Plaintiffs' permitting-related claims are barred by exhaustion, they cannot establish *any* likelihood of success. The injunction must be denied on this ground alone.

Standard judicial deference to administrative zoning decisions reinforces this conclusion. Alabama courts afford weight and deference to administrative agencies charged with enforcing zoning ordinances. *Homewood Citizens Ass'n v. Homewood*, 548 So. 2d 142, 143-44 (Ala. 1989); *see also Barnes v. Town Council of Perdido Beach*, 375 So. 3d 1, 18 (Ala. 2022). The Court's review is "severely limited." *City of Alabaster v. Shelby Land Partners, LLC*, 148 So. 3d 697, 703-05 (Ala. 2014) (discussing tests). The "fairly debatable" standard used in reviewing zoning decisions means courts generally should not second-guess zoning decisions absent evidence of arbitrary, capricious, or irrational decision-making. *Barnes*, 375 So. 3d at 18. Adding to that, Plaintiffs never gave the ZBA a chance to weigh in as the Alabama Legislature intended.

The exhaustion doctrine ensures that administrative bodies with specialized expertise first weigh in on challenges within their domain, which also aids the court by creating a factual record that becomes part of the judicial review. *See Ex parte Graddick*, 495 So. 2d at 1372 (Torbert, C.J., concurring). Plaintiffs have deprived this Court of both by their attempted shortcut.

D. The Undisputed Absence of Any ZBA Involvement in the Project Use Determination, Let Alone a ZBA Appeal, Is Independently Fatal.

At base, one fact is undisputed and dispositive: Plaintiffs never sought ZBA review at all. There is no allegation, argument, or evidence that Plaintiffs ever invoked the ZBA's appellate

jurisdiction. The ZBA has not been asked to weigh in on whether the Director's classification was correct.

This omission is fatal. The Legislature vested the ZBA with power "[t]o hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official." Ala. Code §§ 45-37A-56(a)(1), 11-52-80(d)(1). The Ordinance mirrors this grant. Ordinance, Tit. 1, Ch. 9, Art. IV, § 2A. The Alabama Code then provides that "[a]ny party aggrieved by any final decision of a board of zoning adjustment may appeal the final decision of the board by filing an appeal in the circuit court." Ala. Code § 11-52-81(a). A final ZBA decision is thus a statutory prerequisite to judicial review. *City of Prattville v. S&M Concrete, LLC*, 151 So. 3d 295, 303 (Ala. Civ. App. 2013) (time requirements of Ala. Code § 11-52-81 are "jurisdictional").

Again, there is no ZBA decision — no hearing, no record, no ruling. This is not a case where Plaintiffs sought review and were denied or are appealing an adverse ruling. Plaintiffs bypassed the ZBA entirely and asked this Court to perform, in the first instance, the function the Legislature assigned to the ZBA. *See, e.g.*, *Cook*, 961 So. 2d at 838 ("The Cooks filed their complaint asserting that King improperly denied the building permits to improve the mobile-home park; that decision was a matter of administrative discretion. . . . Thus, we conclude that the Cooks' failure to exhaust their administrative remedies bars this appeal.").

The significance of this administrative precondition cannot be overstated. The ZBA possesses the institutional authority to assess whether the Director's determination was factually supportable. It has authority to reverse, affirm, or modify the Director's decision. Ordinance, Tit. 1, Ch. 9, Art. V, § 5.C; Ala. Code §§ 45-37A-56(b), 11-52-80(e). And its proceedings create an administrative record on which meaningful judicial review can rely. Plaintiffs deprived the ZBA

of the opportunity to exercise these functions, and that choice to skip the administrative process is fatal to their permitting-related claims and to any preliminary injunctive relief predicated on those claims.

6. The Moratorium Does Not Excuse Plaintiffs' Failure to Exhaust Administrative Remedies

Plaintiffs weave throughout the Complaint references to the City's March 3, 2026 data-center moratorium (Ordinance No. 26-25) (the "Moratorium"). Plaintiffs contend the Moratorium demonstrates that the project and the permits issued for the project were unlawful. Not so. As shown below, the public notice that preceded the Moratorium had no legal effect on the project, and the Moratorium itself contained an express exemption that applied to the project.

Plaintiffs allege that Defendants "were on notice of the City's impending data-center moratorium no later than December 16, 2025, when the City issued its first public notice of intent to implement a data-center ordinance and overhaul the applicable regulatory framework." Doc. 2 ¶ 70. But public notice of the City's mere intent to consider or pursue an ordinance is not itself an ordinance and has no legal effect. The City acts through duly enacted ordinances adopted in accordance with procedures prescribed by law, not through announcements of what it may do in the future. Thus, no legal moratorium existed on December 16, 2025. Nor did any moratorium exist on January 7, 2026 or February 25, 2026, when the demolition permit and soil erosion permit for clearing and grading, respectively, were issued for the project. (*See* Demolition and Soil Erosion Permits, Ex. A, at 1–2.) As Plaintiffs themselves acknowledge, the Moratorium was not adopted until March 3, 2026. (Doc. 2 ¶ 63.) During the intervening months between December 16, 2025 and the March 3, 2026 adoption, the existing Ordinance governed, and any permit applications filed during that period were duly required to be evaluated under the law as it then existed.

Plaintiffs further contend that each permit issued after March 3, 2026 violated the Moratorium and was void. (Doc. 2 ¶ 65.) That contention fails because the Moratorium, as adopted, did not apply to the project. The City Council chose to include several exemptions in the Moratorium, which is attached as Exhibit B, including one applicable to:

> ***Any data center development***, including new facilities, expansions, or modifications to existing Enterprise or Colocation Data Centers, ***for which, prior to the effective date of this ordinance***, the applicant has formally ***filed an application*** with the City of Birmingham that ***has been accepted for processing*** by the Department of Planning, Engineering, and Permits. This includes, but is not limited to, applications for ***demolition, grading, site work*****,** building permits, ***or other required development approvals***.

Ordinance No 26-25, Ex. B, at 5–6 (emphasis added). By its plain terms, the Moratorium exempted any data center development for which an application — including an application for demolition, grading, or site work — had been filed and accepted for processing before the Moratorium's effective date. Here, before the Moratorium was adopted, applications for both a demolition permit and a soil erosion permit had not only been filed and accepted for processing, but had been approved and issued for the project, on January 7, 2026 and February 25, 2026, respectively.

The project therefore fell within the Moratorium's express exemption. Because the project was exempt, it was not subject to the Moratorium's permitting suspension, and the permits issued for the project, whether before or after March 3, 2026, were not prohibited, suspended, or rendered void by the Moratorium. Nor was any construction activity undertaken pursuant to any permits precluded by the Moratorium. Plaintiffs cannot override the City's legislative judgment or rewrite the Moratorium's exemption to include limitations the City Council did not enact.

Importantly, the existence of the Moratorium refutes Plaintiffs' arguments concerning the Ordinance. Plaintiffs contend that any "land use that is not affirmatively authorized . . . is prohibited." Doc. 2 ¶ 2. Plaintiffs appear to entirely disregard the clear statement in the Ordinance that "[a]ny use not specifically listed in these Land Use Groups . . . may be allowed in groups with

similar uses as determined by the Director." Ordinance, Tit. 1, Ch. 4, Art. V, § 7. But it is not in dispute that the applicable Ordinance did not expressly define the terms "data center," "hyperscale data center," or "AI factory." Doc. 2 ¶ 85. If Plaintiffs' assertion is correct, the City would have had no need to impose a moratorium. A moratorium is a "suspension of a specific activity." Black's Law Dictionary (12th ed. 2024). One cannot suspend what is already prohibited. If data centers were already barred under the existing Ordinance, the City could have denied any application pertaining to a data center without the Moratorium. The City's adoption of the Moratorium therefore cannot be reconciled with the central premise of Plaintiffs' claim: that the project was prohibited because the words "data center" did not appear in the Ordinance.

CONCLUSION

For the foregoing reasons, the Court should dismiss all permitting- and zoning-related claims, including all declaratory judgment counts, for failure to exhaust administrative remedies and deny the Motion for Preliminary Injunction on the same grounds.

Respectfully submitted this 8th day of July, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2026, I electronically filed the foregoing with the Clerk of the Court using the AlaFile system, which will send notification of such filing to all counsel of record, incuding:

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