IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

TIAQUONTA FULLER, SHEDRICK DAY and SHAMEL SMALLS — **PLAINTIFFS**

VS. — **CIVIL ACTION NO.: 3:16-cv-111-HTW-LRA**

CITY OF RIDGELAND, MISSISSIPPI — **DEFENDANT**

MEMORANDUM OF AUTHORITIES
OF THE CITY OF RIDGELAND, MISSISSIPPI IN SUPPORT OF ITS
MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

COMES NOW the City of Ridgeland, Mississippi ("Ridgeland" or "the City"), by and through undersigned counsel and without waiving any objection, immunity, or defense it may have in response to or in connection with the Complaint, affirmative or otherwise, hereby submits this its Memorandum of Authorities in Support of its Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6).

I. INTRODUCTION

The Plaintiffs, Tiaquonta Fuller, Shedrick Day and Shamel Smalls, are tenants at the Baymeadows Apartments ("Baymeadows") in Ridgeland, currently residing under one-year leases. The Baymeadows complex is owned by BBC Baymeadows, LLC ("BBC").

On February 12, 2016, Plaintiffs filed a one-count Complaint for Declaratory Judgment and Injunctive Relief ("Complaint") against Ridgeland for alleged violation of the Fair Housing Act ("FHA"). [Dkt. #1]. The Complaint arises out of the City's adoption of a comprehensive zoning ordinance and map in 2014 ("2014 Ordinance" or "Ordinance"). The Ordinance requires nonconforming properties, including those that do not meet density limitations, to bring an end to their nonconformity at the end of an amortization period specifically calculated for each property under a formula included in §40 of the Ordinance. The amortization formula was designed in such a manner as to allow property owners an opportunity to recoup their investment. The Ordinance also changed the zoning status of the area where Baymeadows and four other apartment complexes are located from Multifamily Residential (R-5) to

Mixed Use (MU-1), which does not allow apartment complexes. Under the terms of the Ordinance, the complexes are allowed an amortization period in which to comply with the change in zoning status.

BBC and the owners of the other four apartment complexes have filed suit against Ridgeland challenging the legality of the 2014 Ordinance.[1] BBC has also filed two petitions under the Ordinance, one under §11 for reconsideration of the change in zoning for Baymeadows from R-5 to MU-1, and another under §40 for Class A Status, which would allow Baymeadows to continue operating at its current density (collectively referred to herein as "the Petitions"). The Petitions are currently pending before Ridgeland's Mayor and Board of Aldermen.

An expert in the BBC Lawsuit has opined that the amortization period, based on the factors and formula identified in the Ordinance, is 6.87 years. However, at the present time, the specific amortization period for Baymeadows has not been assigned by the Board of Aldermen.[2]

Plaintiffs allege that the adoption and enforcement of the 2014 Ordinance was and is racially motivated and has a disparate impact on minorities in violation of the FHA. Plaintiffs ask the Court to preliminarily and permanently enjoin Ridgeland from "(i) implementing, applying or enforcing in any manner or to an extent the rezoning provisions of the 2014 Zoning Ordinance and (ii) evaluating applications for or refusing building permits to the owners of the Baymeadows Apartments under the terms of the 2014 Zoning Ordinance." [Dkt. #1, p. 37].

The Court does not have subject matter jurisdiction to adjudicate Plaintiffs' FHA claim inasmuch as Plaintiffs have failed to satisfy the standing criteria established by Article III of the United States Constitution. The Complaint does not allege an "injury in fact" because there is no "actual or imminent" threat of harm. Instead, Plaintiffs complain about speculative or possible harm years down the road, which may or may not occur. Further, since the Plaintiffs possess only a one-year lease, they may not even be tenants when and if the amortization period is applied. The timing and/or application of the

[1] *See BBC Baymeadows, LLC v. City of Ridgeland, Mississippi*, in the United States District Court for the Southern District of Mississippi, Civ. Action No. 3:14-cv-00676-HTW-LRA ("BBC Lawsuit"); *Sunchase of Ridgeland, LTD, et al. v. City of Ridgeland, Mississippi*, Civ. Action No. 3:14-cv-0938-HTW-LRA.

[2] An amortization period has not been assigned for the other four apartment complexes at this time.

amortization period is also speculative because (1) the Mayor and Board of Aldermen have not even assigned an amortization period to Baymeadows; (2) there has been no ruling on BBC's Petitions for reconsideration and/or Class A Status; (3) BBC's Lawsuit challenging the Ordinance is pending; and (4) the issue as to whether Ridgeland should be allowed to require nonconformities to cease through application of the amortization formula in the 2014 Ordinance was recently appealed to the Mississippi Supreme Court on January 8, 2016, in *Jackson Residential Associates One, L.L.C. d/b/a Van Mark Apartments v. The City of Ridgeland, Miss*, Civil Action No. 2014-0276, in the Circuit Court of Madison County, Mississippi. Success by BBC or the plaintiffs in any of those matters would render the instant action moot.

The Court therefore lacks jurisdiction to hear this case entitling the City to dismissal as a matter of law. Further, even if this Court finds that it has jurisdiction to hear Plaintiffs' FHA claim, the claim should be dismissed pursuant to Rule 12(b)(6) because Plaintiffs executed lease agreements subsequent to the adoption of the 2014 Ordinance and had constructive notice of the change in zoning status of Baymeadows. Therefore, Plaintiffs waived any potential injury they may have possibly had as a result of the passage of the Ordinance and thus have no potential claim under the FHA.

II. FACTUAL BACKGROUND

A. History Leading Up to and Legitimate Governmental Need for the Adoption of the 2014 Zoning Ordinance.

For over twenty-five years, as part of its obligation to provide for the health, safety and welfare of its citizens, the City has attempted to identify and address the increasing impact of high density, multi-family residential dwellings. Additionally, over the last two to three decades, Ridgeland has experienced increased blight and deterioration in the area which encompasses Baymeadows. Unfortunately, despite continual and ongoing efforts, Ridgeland has continued to experience increasing blight, blighting influence, and deterioration in the Southeast Ridgeland East area of the City. Plaintiffs' Complaint alleges that Ridgeland "never substantiated its claim of decline. Nor does any substantiation exist." [Dkt. #1, ¶60]. This is contrary to findings in the Official Minutes of the City, as well as the thousands of code

violations issued over the years in response to the deteriorating, unmaintained, and in some cases dangerous conditions of the properties.[3] These efforts to resolve or remedy the continual deterioration, which directly affects the health, safety and welfare of the City and its residents, especially residents of Baymeadows, failed.

The Ordinance was preceded by years of ongoing efforts of the City to reduce and control density, and by extension the effects of uncontrolled and unreduced density. Such actions included the development of commercial business to help provide a tax base to support the costs of services needed for public safety and the provision of public utilities, including the substantial demands imposed by the high density multifamily properties in Southeast Ridgeland. The City additionally made efforts to encourage redevelopment of the area. These ongoing efforts were all for the legitimate governmental purpose of identifying and addressing issues directly impacting the quality of life for all residents in Ridgeland.

Only a few years after the City annexed territory containing Baymeadows, the City began taking steps to reduce and control density in multi-family properties. Recognizing that it had a disproportionally higher amount of multi-family housing than any other comparable cities in Mississippi, the City, with long term planning in mind, identified a need for regulation to control the effect on the City's resources. In 1988, the City adopted a comprehensive plan that recommended a reduction of density of multi-family housing to ten (10) units per acre. Because the area was annexed in 1981, the 1988 Comprehensive Plan was the first plan to specifically include the land containing Baymeadows.

In 1992, the City adopted an ordinance that permitted multi-family residences in two zones, R-5 and R5-A. Zone R-5 limited the maximum density to ten (10) units per acre, while R5-A limited density to seventeen (17) units per acre. In 1994, Ridgeland commissioned an urban planner to conduct a land use study for the purpose of evaluating the City's concerns regarding the impact that multi-family housing was having on traffic congestion, police protection, fire protection, public works, and the continued well-

[3] As early as 1999, an apartment complex across the street from Baymeadows was declared blighted pursuant to the Urban Renewal Laws of the State of Mississippi. The Official Minutes show a finding that one or more slum or blighted areas existed and that the rehabilitation, conservation, redevelopment, or a combination thereof, of such area or areas was necessary and in the interest of the public health, safety, morals or welfare of the residents.

being, livability, and sustainability of the community. This Preliminary Land Use Study, commonly referred to as "the Bridge Report," warned that the City's failure to decrease the maximum density requirements in accordance with the adopted 1988 Comprehensive Plan was contrary to the public health, safety and welfare of the City. According to findings in the Bridge Report:

> 2) The City of Ridgeland has a significantly greater percentage of total housing stock in apartments than other cities in the State of Mississippi;
>
> 3) High density multiple family housing requires greater levels of municipal services than lower density residential properties. The streets serving apartment complexes carry significantly more traffic and require greater city expenditure for street maintenance. The larger number of dwelling units in apartment complexes demands greater fire and police protection. The sizing of utilities, including sewer, water and storm drainage, is normally greater when serving apartment developments thereby requiring not only greater investment but greater maintenance costs over time.
>
> 4) Existing high density multiple family housing has contributed to significant traffic problems within the City of Ridgeland particularly on County Line Road and Old Canton Road north to the Natchez Trace.

The Bridge Report also included a finding that it was "imperative for the City to modify the existing zoning ordinance, both text and map, to insure that both conform to the City's adopted Comprehensive Plan" reducing density to ten (10) units per acre. In 1995, in response to these identified concerns, the City amended the maximum density in R-5A zones to ten (10) units per acre. The recommendations of the Bridge Report were incorporated into subsequent ordinances, including the 2001 and 2014 Zoning Ordinances, as well as the City's comprehensive plans.

Both the 2001 and 2009 Comprehensive Plans recognize that the City carries a disproportionate share of renter-occupied housing for its population and its location in the Jackson Metro Area. Both Plans state a goal to establish "a residential density pattern that will produce desirable concentration of residences and will not overburden the local community facilities or cause traffic congestion."

In August 2006 Ridgeland initiated work on the Ridgeland Area Master Plan ("RAMP"). Contrary to Plaintiffs' contention, RAMP was not initiated because of racial animus. Rather the project included all areas within the city limits and a large area to the west of the City designated as an additional study area. The RAMP was a well-recognized, award-winning urban planning tool that engaged

Ridgeland residents in an asset-based planning process to identify opportunities to further strengthen the quality of life for its citizens. It also provided a tool that would enable city leaders to adopt appropriate land use and transportation plans and a zoning ordinance and map.

Approximately 500 citizens participated in the RAMP process. Participation included an on-line survey which was completed by some renters in apartment complexes. One of the managers of the subject complexes personally participated. The visioning sessions of the RAMP were open to the public and there is no reason to believe that tenants of apartment complexes did not participate in that process. Out of RAMP came several focus areas. Some of those focus areas were obvious based upon the observation and experiences of citizens and the Mayor and Board of Aldermen. *One* of those focus areas was Southeast Ridgeland East.[4] The RAMP called for redevelopment of Southeast Ridgeland East with single-family homes. One of the greatest concerns expressed during the RAMP process was the lack of affordable homes for work force families. "Affordable" was generally defined as homes between $100,000 to $300,000 that were affordable to policemen firemen, teachers, small business owners, etc.

A separate but related issue to the blighting influence was the continued decline of the condition of the apartment complexes. Code enforcement is one of the recognized methods of attempting to address blight as well as addressing health and safety concerns for the occupants of slum-like properties. One of the apartment complexes, Northbrook, had already been declared a blighted area in order to obtain tax-free municipal bonds. The money obtained from the tax-free municipal bonds was ostensibly to purchase and renovate the property for the benefit of the tenants. Fifteen years later, it is still considered one of the worst apartment complexes in terms of its conditions.

[4] The other focus areas were Sunnybrook, West Jackson Street Overlay District, Highway 51 Corridor, City Center and Freedom Ridge Park, Southeast Ridgeland Development-West, Northpark District, and Costas Lake.

B. Ridgeland's Adoption of the 2014 Zoning Ordinance.

Prior to the adoption of the Ordinance, the City sought and obtained input from professional planners, as well as public input. In the planning stage, it was determined that a major problem that continues to confront the City is all of the nonconforming uses and structures, which continued existence poses an actual threat to the health, safety, and welfare of the citizens of the City, as well as to property values within the City. The Ordinance's identification of nonconformities was not limited to apartment complexes, or to the Southeast Ridgeland area, but to all nonconformities within the City. This is reflected in the Preamble which "identified unsafe, densely populated and/or non-code compliant dwelling units in the City" that are inconsistent with the newly adopted comprehensive plan and future land use plan, and "resulted in overcrowded, slum-like conditions, urban blight and a general deterioration of residential areas." [Ex. A, Ordinance].[5]

The Ordinance specifically states that one of its purposes was to establish a mechanism for terminating nonconforming uses and structures. During the public hearing, no objection was raised or evidence entered in opposition to, or that was inconsistent with, the findings of the City regarding then-existing nonconformities, the detrimental effects of the nonconformities, the need to address the nonconformities, or the manner in which the City proposed to address the nonconformities through amortization.

On December 26, 2013, consistent with Mississippi law, Ridgeland noticed the public hearing for consideration of the Ordinance, and the hearing was held on January 21, 2014. Beginning December 17, 2013, and continuing through to adoption, the City's proposed Zoning Ordinance and Map were made available for public inspection, review and comment. During the public hearing, the City received a request from a representative for a property owner for additional time to review the Ordinance. In

[5] The 2014 Zoning Ordinance was specifically referenced and incorporated into Plaintiffs' Complaint.

response, the City announced that it would delay the vote until February 4, 2014.[6] On February 4, 2014, the City adopted the Zoning Ordinance.

The minutes from the January 21, 2014, public hearing reflect that during a presentation made by the City's Director of Community Development, there was a discussion on the need to revise the City's zoning ordinance to encourage redevelopment of older areas in a state of decline to stop the progressive increase of blight and dilapidation. [Ex. D, minutes]. There is no discussion or reference, or any comments that were made during the adoption of the Ordinance that reference the racial composition of any portion of the City or any desire to reduce the minority population.

C. Denial of BBC's application for building permits for buildings abandoned by the prior owner.

Subsequent to BBC's acquisition of Baymeadows in 2013, BBC submitted applications for building permits seeking approval to make repairs to vacant buildings 1, 2, 4 and 5, which contained a total of 76 units. ***Since 1973***, the City has had in place ordinances which do not allow a nonconformity to be resurrected after abandonment for 6 months. BBC's building permit applications were denied by Ridgeland's Building Official because all of the units in the four buildings had been continuously unoccupied since ***at least*** June 13, 2013 (and most likely since 2010). As a result, the buildings lost their legal nonconforming status by ***at least*** December 13, 2013. BBC did not appeal the denial of the permit applications to the Mayor and Board of Aldermen, as specifically allowed in Ridgeland's ordinances. BBC's applications for building permits were properly denied, whether considered under the terms of the 2001 Ordinance or the 2014 Ordinance, which both state that if a nonconformity has been discontinued for a continuous period of at least six months, it is not allowed to resume.

D. The Allegations of the Complaint.

Plaintiffs allege they live at Baymeadows Apartment, a complex comprised of 17 buildings for a total of 264 units. [Dkt. #1, ¶33]. Plaintiffs moved into Baymeadows ***after*** the City's adoption of the

[6] Plaintiffs erroneously contend that the City did not publish notice of the continued hearing. [Dkt. #1, ¶118]. However, the record evidence shows otherwise. The published Agenda for the February 4, 2014, Meeting of the Mayor and Board of Alderman of Ridgeland notified the public that the City would "Consider Adoption of the New Zoning Ordinance and Zoning Map." [Ex. C, agenda].

2014 Zoning Ordinance. Plaintiffs have not asserted that they resided in any other multi-family rental location in the City of Ridgeland prior to the adoption of the Ordinance. The Complaint alleges that Plaintiffs Day and Fuller moved into Baymeadows in 2015, while Plaintiff Smalls moved into Baymeadows in 2014. [Dkt. #1 ¶¶ 19, 20].

The Plaintiffs assert only one count in the Complaint, violation of the FHA. The Plaintiffs, borrowing heavily from the allegations contained in the pleadings filed in the BBC Lawsuit, assert a number of facts which they contend support their claim that the motivation for rezoning from R-5 to MU-1 was a result of racial animus. Additionally, they contend that if the City is allowed to enforce the amortization provision that brings nonconformities to an end, it will have a disparate impact on racial minorities because it will "create, perpetuate and exacerbate racially segregated housing patterns in Ridgeland and the Jackson, MS [Metropolitan Statistical Area]." [Dkt. #1, ¶149]. Furthermore, although the Plaintiffs are not property owners of Baymeadows and have not ever been denied an opportunity to rent an apartment at Baymeadows, they assert an FHA claim arising out of the City's denial of BBC's applications for building permits for the four buildings that had been abandoned even prior to the date that BBC purchased Baymeadows.

The Plaintiffs seek declaratory and injunctive relief. The Plaintiffs do not seek a declaration that the amortization provision is unconstitutional or that the density restrictions in the Ordinance constitute violations of the FHA. Instead, the Plaintiffs seek only injunctive and declaratory relief regarding the enforcement of the change in zoning status from R-5 to MU-1 and as to the City's decision denying building permits requested by BBC.

III. DISCUSSION AND AUTHORITIES

A. Standard of Review

Ridgeland seeks dismissal pursuant to Rules 12(b)(1) and 12(b)(6). The motion to dismiss pursuant to Rule 12(b)(1) challenges the federal court's subject matter jurisdiction. Lack of subject matter jurisdiction may be found in any one of three ways: "(1) the complaint alone; (2) the complaint

supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citation omitted). "It is well settled that on a 12(b)(1) motion the court may go outside the pleadings and consider additional facts, whether contested or not and may even resolve issues of contested facts." *Sandifer ex rel. Sandifer v. Lumberton Pub. Sch. Dist.*, at *1 (S.D. Miss. July 16, 2007). In the event "the court considers external matters to the pleadings the allegations of the complaint need not be taken as true." *Id.* The burden of proof for a Rule 12(b)(1) motion to dismiss rests on the party asserting jurisdiction. *Ramming*, 281 F.3d at 161. As a result, the Plaintiffs herein "constantly bear the burden of proof that jurisdiction does in fact exist." *Id.*

In regard to Ridgeland's Rule 12(b)(6) motion, the court "must assess whether the complaint contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face...." *Chiles v. Craig*, 2015 WL 541699, at *1 (S.D. Miss. Feb. 10, 2015) (quoting *Spitzberg v. Hous. Am. Energy Corp.*, 758 F.3d 676, 683 (5th Cir.2014)).[7]

B. The Complaint Must Be Dismissed Pursuant to FED. R. CIV. P. 12(b)(1) Because the Plaintiffs Do Not Have Standing.

For this Court to have jurisdiction over Plaintiffs' claims, Plaintiffs must satisfy the standing requirements established in Article III of the United States Constitution- injury, causation and redressability. The Fifth Circuit has stated that in order to have standing, a plaintiff must satisfy the well-established three-prong test pronounced by the Supreme Court in *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992):

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of

[7] Documents attached to a Rule 12(b)(1) or 12(b)(6) motion to dismiss "which are referred to in a complaint and are central to the plaintiff's claims may be considered in assessing a motion to dismiss," and the "Court may also take judicial notice of public records under Federal Rule of Evidence 201." *Glass v. City of Gulfport, Miss.*, 2015 WL 4093953, at *2 (S.D. Miss., July 7, 2015) (citing *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) and *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2001)).

> some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

N.A.A.C.P. v. City of Kyle, Tex., 626 F.3d 233, 237 (5th Cir. 2010) (quoting *Lujan*, 504 U.S. at 560-61).

The Plaintiffs have the "burden of showing that [they] have standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). Further, "no presumptive truthfulness attaches to [P]laintiffs' allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of [the] jurisdictional claims." *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 n.3 (3rd Cir. 2006) (citation omitted). Plaintiffs cannot establish that burden for the reasons stated below.

Article III limits judicial power to "cases and controversies," restricting it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. *Summers*, 555 U.S. at 492. The importance of Article III's "case and controversy" requirement is particularly acute when a decision of a governing body is called into question. The requirements of Article III flow from the constitutionally identified separation of powers between the Judicial, Executive and Legislative branches of the government. Limitations on judicial authority are purposefully placed to prevent the Court from being asked to rule on matters where there is no legitimate "case or controversy." Courts have consistently recognized the inherent benefit to the public in balancing the functions of the judicial branch with legislative authority, specifically a governmental entity's ability to govern its citizens. "Where [the need for judicial intervention] does not exist, allowing courts to oversee legislative or executive action 'would significantly alter the allocation of power…away from a democratic form of government.'" *Summers*, 555 at 493 (2009) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974)); *see also Coalition for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1278 (D.C. Cir. 2012) (internal quotations and citation omitted) (allowing "courts to oversee legislative or executive action without regard to the plaintiff's personal stake in the litigation would significantly alter the allocation of power away from a democratic form of government."); *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (standing

"helps ensure that the Judicial branch does not perform functions assigned to the Legislative or Executive Branch and 'that the judiciary is the proper branch of government to hear the dispute.'").

1. Plaintiffs Have Suffered No Injury in Fact.

For this Court to have jurisdiction over Plaintiffs' FHA claims, Plaintiffs must show that they have sustained an injury in fact. Plaintiffs are asking this Court for prospective relief which they are only entitled to if 1) there is existence of an injury, and 2) that injury is of "sufficient immediacy and ripeness to warrant judicial intervention." *Warth v. Seldon*, 422 U.S. 490, 516 (1975). Plaintiffs have asserted claims for relief of two injuries: displacement at the closure of Baymeadows and detriment as a result of the City's denial of building permits to Baymeadows. [Dkt #1, ¶152].

First, the Complaint does not allege an "actual" injury as a result of the City's change in zoning from R-5 to MU-1. Plaintiffs' lease is one year. [Ex. B, sample lease]. Significantly, Plaintiffs make no assertion or claim that they possess a leasehold interest that will be in effect at the expiration of the amortization period. Additionally, Plaintiffs do not allege that they have been constructively evicted or received notice from Baymeadows that the lease is terminated or will be terminated prior to the term of the lease.

The same is true with regard to the four vacant buildings for which the Plaintiffs seek to order the City to issue building permits. Inasmuch as the Plaintiffs are not the owners of Baymeadows, they have no pecuniary interest in the operation of the apartments and have not suffered an economic injury or harm as a result of the City's denial of BBC's requests for the building permits. They do not allege a need to occupy one of those buildings or that the enforcement of the abandonment provision by Ridgeland denies them housing opportunities or the right to associate with other minorities. Accordingly, there is no "actual" injury alleged by the Plaintiffs, and their FHA claim should be dismissed. *See, e.g.*, *Boswell v. Rosemont Realty*, 2015 WL 2406148, at *5 (W.D. La. May 19, 2015) (court held apartment manager lacked standing to assert FHA claim because she did not allege any injury specific "to *her*") (original emphasis).

Second, the Plaintiffs' alleged injury is not "imminent." Black's Law Dictionary (5th Ed.) defines imminent as "near at hand." Imminent means "likely to occur at any moment; impending." www.dictionary.com. Plaintiffs' alleged injury is not imminent, inasmuch as they may no longer be tenants if and when the amortization period is applied to Baymeadows.

Plaintiffs claim that in the near future the enforcement of the amortization provision will require them to look for housing outside of the City. Plaintiffs make this claim even though they make no allegation as to a specified amortization period. As stated above, one expert has calculated it at 6.87 years. More importantly, the amortization period must be assigned by the Board of Aldermen, and it has not assigned an amortization period. Plaintiffs' lease is at most one year. Plaintiffs do not and cannot claim any future leasehold interest beyond the current lease. Thus, Plaintiffs have no standing because the potential application of the amortization period, which has been initially calculated for in excess of six years, is not "imminent," "near" or "likely to occur at any moment." *See McConnell v. FEC*, 540 U.S. 93, 107 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (Court held that plaintiff lacked standing because earliest date plaintiff could be affected by statute causing alleged injury was at least five years away; thus, injury was not imminent); *Sandcrane v. Martinez*, 2015 WL 736895, at *5 (D. Mont. Feb. 20, 2015) (prisoner lacked standing to make challenges to governmental legislative and policy decisions affecting Native Americans because any injury he would allegedly suffer resulting from legislation was not imminent since he would not be released from prison for over 30 years).

In *Lujan*, *supra*, the Supreme Court made clear that "some day" allegations are not sufficient to support a finding of actual or imminent injury. The court recognized that while imminence is a "somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Lujan*, 504 U.S. at 564 n. 2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotations omitted)). Thus, the court held that "'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or

imminent' injury." *Id.* at 564; *see also Summers*, 555 U.S. at 499-500 (court reaffirmed "imminent" requirement emphasized in *Lujan* and expressly rejected dissenting justices' notion that it should be replaced with the requirement of "a realistic threat" that would cause the plaintiff harm "in the reasonably near future"); *Brown v. Fauver*, 819 F.2d 395, 399-400 (3rd Cir. 1987) (plaintiff must establish a real and immediate threat, and injury that may occur some day in the future does not support a finding of actual or imminent injury); *Pollack v. U.S. Dept. of Justice*, 577 F.3d 736, 739 (7th Cir. 2009) (plaintiffs failed to show that they were "concretely affected" by decaying bullets in Lake Michigan discharged from government gun range because plaintiffs' fear of future water contamination and intent to drink water did not give rise to standing).

Plaintiffs have not affirmatively pled that they intend to, or will be, living at Baymeadows at the end of the amortization period, or even through the full duration of their current one-year lease agreement, but even if they had, such allegations would not be sufficient to make their injury actual or imminent since an amortization period has not even been formally assigned to Baymeadows. The court in *In re Campbell*, 2009 WL 2762716, at *2-3 (Bankr. W.D. Mo. Aug. 25, 2009) found that even a two-year period of time was not considered imminent. *Campbell* did not involve standing; however, the issue of imminence was important to the bankruptcy court's determination as to whether the plaintiffs were entitled to a homestead exemption. In that case, the court found that the debtors' stated intention that they would occupy the property within two years, after their son graduated from high school, was "too tenuous to qualify as an intent to occupy," and the debtors' "anticipated date" was "certainly not imminent." *Id.* The court found that even "two years at a minimum" was not "reasonably close in time." *Id.* The court pointed out that a lot can happen in the span of a two-year period of time which could completely change the debtors' intentions to move. *Id.*; *see also Lapham v. Porach*, 2007 WL 1224924, at *11 (S.D.N.Y. Apr. 25, 2007) (in finding that plaintiff had not met his burden for injunction for copyright and trademark protection, court found that "the passage of two years' time" was prima facie evidence that harm from misuse of the trademark was "not imminent," and thus was not irreparable); *Lewert v. P.F. Chang's*

China Bistro, Inc., 2014 WL 7005097, at *3 (N.D. Ill. Dec. 10, 2014) (allegations that identity theft may not happen for years did not constitute imminent harm).

The chance that Plaintiffs will still be residing at Baymeadows at the end of an amortization period to be assigned at some point in the future for some unknown period of time, but at least in excess of six years, is too speculative to satisfy Article III standing. For example, in *Shea v. Brister*, 26 F. Supp. 2d 943 (S.D. Tex. 1998), the court held that the plaintiff, an attorney, lacked standing to challenge a judge's decision to hang a copy of the Ten Commandments in his courtroom, upon finding that the possibility that the plaintiff could be randomly assigned to his court out of twenty-five district courts was "too speculative to satisfy standing as a matter of law." *Shea*, 26 F. Supp. 2d at 946. The court stated that the chance the plaintiff "might be required to appear as an attorney, litigant, or juror in [the] courtroom anytime in the near future is certainly not 'imminent' and is hypothetical or conjectural." *Id.*

Since the Plaintiffs cannot overcome the first prong of Article III, "injury in fact," there is no need to analyze the second and third prongs. *See Boswell*, 2015 WL 2406148, at *5 ("As claimant cannot establish this initial element of standing, her claim under the FHA must fail."). Although Plaintiffs' failure to satisfy the injury prong should end the Court's analysis, Plaintiffs nevertheless cannot establish the other two prongs required for standing as explained below.

2. Plaintiffs Cannot Show a Causal Connection.

Plaintiffs must still show that there is a causal connection between their alleged injury and the change in zoning status of Baymeadows. *City of Kyle*, 626 F.3d at 237 (5th Cir. 2010) (quoting *Lujan*, 504 U.S. at 560). In other words, Plaintiffs must be able to show that they have been denied housing as a result of the City's rezoning. However, as stated above, Plaintiffs have not pled and cannot show that they have been denied housing as a result of the Ordinance or the denial of BBC's requests for building permits. The Plaintiffs entered into their leases ***after*** the adoption of the Ordinance; therefore, as a matter of law, Plaintiffs possessed constructive knowledge that the zoning was mixed use and subject to amortization. Plaintiffs do not plead that their leases have been altered or terminated as a result of the change in the zoning status from R-5 to MU-1. Moreover, Plaintiffs have not attempted to find

alternative rental housing in Ridgeland, in either another multi-family complex that is not in an area zoned MU-1, or in a single family home. In addition, there is absolutely no causal connection between their FHA claim and the City's denial of building permits to BBC for the four vacant buildings.

3. Alleged Injury is Speculative and Not Likely to be Redressed by a Favorable Decision.

Under this prong, Plaintiffs must show that it is "likely" as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." In other words, redressability is an identifiable remedy to a defined injury. Plaintiffs not only have not been denied housing, but preventing the City from enforcing its Ordinance will in no way guarantee housing to the Plaintiffs. First, Plaintiffs reside at Baymeadows by virtue of a one-year lease agreement. Plaintiffs must renew this lease every year. The City's Ordinance does not control or regulate Baymeadows' lease renewals. Additionally, Plaintiffs reside at one of a number of multi-family housing options in Ridgeland. Plaintiffs have not alleged in their Complaint that they intend to reside at Baymeadows beyond the current lease. Even if they were to make this assertion, it would not be supported by their past rental history and, at best, would merely be intent. [*See* Ex. E, address history reports; Ex. F, judgment against Smalls]. Intent is not enough. *See Summers*, discussed *supra*. Without a long term lease interest, Plaintiffs cannot show that preventing the City from enforcing its Ordinance would have any effect on their future, potential residency. More importantly, Plaintiffs have not been asked to vacate their units as a result of the City's Ordinance; nor have they asserted that they have been refused a future lease.

Finally, Plaintiffs' FHA claim should be dismissed because it is not ripe under general ripeness principles and is also speculative because the resolution of BBC's pending Petitions and Lawsuit discussed herein could affect the long term operation of Baymeadows, and by extension any future claims to housing asserted by Plaintiffs. In *Berry v. Jefferson Parish*, 326 Fed. Appx. 748 (5th Cir. 2009), the Fifth Circuit addressed a similar issue and dismissed the plaintiffs' FHA claim for lack of standing. The court found the injury asserted by the plaintiffs was speculative at that time due to an unresolved pending lawsuit that could have an effect on the outcome of the matters presently before the court. *Berry*, 326 Fed. Appx. At 750 (2009).

C. The Complaint Must Be Dismissed Pursuant to FED. R. CIV. P. 12(b)(6) Because the Plaintiffs Have Failed to State a Cognizable FHA Claim.

To survive a motion to dismiss under Rule 12(b)(6), the Complaint must contain sufficient facts, when taken as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555).

Courts have consistently recognized that dismissal is proper "for failure to state a claim upon which relief may be granted when the affirmative defense clearly appears on the face of the complaint." *White v. Padgett*, 475 F.2d 79, 81 (1973) (citations omitted); *see also Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2nd Cir. 1998) ("An affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6), without resort to summary judgment procedure, if the defense appears on the face of the complaint.")

When a plaintiff has constructive notice of a law and subsequently acts with that notice, the plaintiff is precluded from claiming injury resulting from the law of which he had notice. *Sadeghian v. City of Aubrey, Texas*, 2002 WL 32319046, at *3 (Tex. Dist. Ct. Oct. 28, 2002). Further, as recognized by the court in *Murphy v. DCI Biologicals Orlando, LLC*, 2013 WL 6865772, at *8 (M.D. Fla. Dec. 31, 2013), *aff'd*, 797 F.3d 1302 (11th Cir. 2015), a plaintiff cannot complain about an injury that would not have occurred but for the plaintiff's voluntary participation in a situation or event that caused the injury.

1. Constructive Notice Prior to Action Constitutes a Waiver.

A Plaintiff waives his right to assert a claim when he has "full knowledge of a right existing" and acts with an "intentional surrender or relinquishment of that right." *Taranto Amusement Co., Inc. v. Mitchell Associates, Inc.*, 820 So.2d 726, 729 (Miss. Ct. App. 2002). Mississippi Courts have defined "constructive notice" as "information or knowledge of a fact imputed by law to a person (although he may or may not actually have it), because he could have discovered the fact by proper diligence, and his

situation was such as to cast upon him the duty of inquiring into it." *Doe ex rel. Brown v. Pontotoc Cty. Sch. Dist.*, 957 So. 2d 410, 417 (Miss. Ct. App. 2007) (citations omitted).

A city's zoning regulations are public record, and the public has the right to review and consider those regulations prior to the purchase or rental of a property. Courts have examined the availability of public information and have found that a plaintiff's constructive notice of local laws precluded recovery. *Sadeghian*, 2002 WL 32319046, at *3. In *Sadeghain*, the Plaintiff purchased a parcel of land with the intent to build a mobile home park. The city denied his permit based on the city's zoning regulations in effect at the time the plaintiff acquired an interest in the property. The plaintiff appealed the denial, asserting a claim for lost revenue based on his failure to use the land as desired. The court held in favor of the city, finding that "even if [the plaintiff] could prove he lost money when the City denied his mobile home park permit, [plaintiff] had constructive notice of the ordinances through the land records and should have considered their application before purchasing the land." *Id.*

Courts have routinely denied a plaintiff recovery when the plaintiff had constructive notice of existing regulations. *Hepner v. Zoning Bd. of Appeals of City of Mount Vernon*, 152 N.Y.S.2d 984 (Sup. Ct. 1956). In *Hepner*, the purchasers acquired property and subsequently applied for a use variance. The city's zoning board denied the variance, and the plaintiff appealed. In finding in favor of the city, the court found that the purchasers were "presumed to have knowledge of the provisions of the zoning ordinance then in effect, and that the hardship complained of was self-created, thus requiring denial [of the requested relief]." *Id.* at 986.

2. Plaintiffs' Constructive Notice of Baymeadows Zoning Prior to Executing a Lease Agreement Constitutes Waiver.

Plaintiffs' Complaint acknowledges that Baymeadows is nonconforming and under the terms of the Ordinance must come into conformity at the end of an identified amortization period. [Dkt. #1, ¶¶ 123, 126]. Plaintiffs specifically acknowledge the City's public notice of hearing for consideration of the Ordinance, including the fact that the notice was published in the Madison County Journal. [Dkt. #1, ¶ 114]. Plaintiffs further acknowledge the Ordinance adoption date of February 4, 2014 [Dkt. #1, ¶ 119],

and that they executed lease agreements after the date the Ordinance was adopted, which changed the zoning status of Baymeadows. [Dkt. #1, ¶¶19-20].

After adoption, the Ordinance was published and made a part of the Official Minutes and Record for the City of Ridgeland. The City's public notice, along with the published Meeting Agendas, and published minutes all provide constructive notice to the public, including current and future residents of the City. Plaintiffs cannot deny having constructive notice of the change of Baymeadows from R-5 to MU-1, even if they assert that they never read the Ordinance, or reviewed the City's regulations governing Baymeadows.

As evidenced by multiple prior residencies, Plaintiffs have not been long term, consistent residents in Ridgeland. [Ex. E; Ex. F]. Plaintiffs elected to enter into lease agreements at Baymeadows after the published change in zoning status. [Dkt. #1,¶¶19-20] Whenever an individual acquires interest in property in a city without reviewing the applicable zoning regulations, he is later precluded from asserting a claim for injury as a result of the effect of those regulations. *See Sadeghain, supra*. It cannot be disputed that Ridgeland's zoning regulations were in effect and available for Plaintiffs' review. [Dkt. #1, ¶ 114] Plaintiffs are not entitled to recover from injuries allegedly sustained as a result of the change in zoning when the change was in place at the time they elected to live at Baymeadows.

Plaintiffs seek to enjoin the City from enforcing its zoning map as it affects Baymeadows. Plaintiffs are therefore asking this Court to undo or change legislation that was in effect for the property at the time Plaintiffs moved into Baymeadows. Because this is a hardship that was "self created," Plaintiffs are not entitled to the relief requested. *Hepner* 152 N.Y.S.2d at 986. The same holds true for Plaintiffs' claims regarding the four vacant buildings. Although there is no causal connection between Plaintiffs' FHA claim and the City's denial of BBC's building permit requests, the buildings were nevertheless vacant and subject to the City's Ordinance at the time Plaintiffs executed their respective lease agreements. [Dkt. #1, ¶129]

The Plaintiffs' constructive notice of the existing zoning regulations and their subsequent voluntary choice to reside at Baymeadows have resulted in a waiver of their right to pursue a claim

arising out of the City's change in zoning status of Baymeadows from R-5 to MU-1. The City is therefore entitled to dismissal of Plaintiffs' Complaint.

This, the 11th day of April, 2016.

Respectfully submitted,

CITY OF RIDGELAND, MISSISSIPPI

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to the following:

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So certified, this the 11th day of April, 2016.

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