

Support documents for May applications

July 22, 2010

Danielle-

Since I am not in the area, I will not be able to attend this evening's meeting. I think it is most important that the views expressed here are read at the meeting and entered into the notes/minutes of the meeting to be presented to the Planning Board. I'd appreciate your doing all that is necessary to have this done. Thank you.

While I totally support the intention of defining rental conditions that assure the safety, health and welfare of neighbors and neighborhoods, I strongly oppose any rules or requirements that make the obtaining of a renting license difficult and/or overly costly for no justifiable reason other than to appease vocal interfering neighbors.

The constitution of the United States only allows regulation of real threats to safety, health and welfare – not perceived, unfounded threats.

Can you show that more citations are issued to vacation renters than to home owners?

Can you show that there are more police incidents with vacation renters than with home owners?

What studies have been conducted to determine how much additional traffic flow, noise, debris, criminal activities etc. arise from renters as opposed to other people who vacation at the lake?

What studies have been done to determine how and why the length of a renters stay affects the safety, health and welfare of the community?

Why address any ADA compliance issues in a rental policy when it is not legal to force an existing property to adhere to today's ADA standards?

How can renting a private residential property be deemed a commercial property? It is a business run from a residential home.

Would music teachers having students come to their home also have their residences deemed commercial properties with the same restrictions?

How could you possibly enforce this equitably?

Why is trespassing more of a problem with renters than with neighbor children and other guests of home owners?

What studies show that trespassing of renters is so great a problem that it requires a rental property to put up boundary markings of any kind.

Repeated trespassing of anyone may need to have a monetary fine.

Requiring only rental properties to define property line is unreasonable, in my opinion.

Georgia Power lake front property is not private property so trespassing rules do not apply here.

I would like to recommend that the Planning Board address specific restrictions on undesired behavior of all persons affecting the safety, health and welfare of all residents and not impose unwarranted requirements only on vacation rental properties. It is prejudicial.

Our United States constitution assures the right to life, liberty and property. I would think that Morgan County would not be wise to pass legislation in violation of it.

Christine May
Property owner, Buckhead, Georgia

STATEMENT OF CONSTITUTIONAL OBJECTIONS

Christine May
72 Blackburn Road

Submitted by:

Kathryn M. Zickert *Well known zoning authority*
Dennis J. Webb, Jr.
Smith, Gambrell & Russell, L.L.P.
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STATEMENT OF CONSTITUTIONAL OBJECTIONS BY CHRISTINE MAY

Any application of Morgan County codes so as to prohibit Christine May's ability to rent the premises located at 1361 Grayson Pointe Drive on a short or long term basis would be unlawful, arbitrary, capricious, irrational and a manifest abuse of discretion; all in violation of the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States, and Article I, Section I, Paragraph I and Article I, Section III, Paragraph I of the Constitution of the State of Georgia.

Enforcement of the Morgan County codes to prohibit this use constitutes selective enforcement and would discriminate unfairly between this Owner and others similarly situated, in violation of the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States, and Article I, Section I, Paragraph I and Article I, Section III, Paragraph I of the Constitution of the State of Georgia.

Enforcement of the Morgan County codes as requested would amount to a taking of property without just compensation and without due process, in violation of the Fifth and Fourteenth Amendment of the Constitution of the United States, and Article I, Section I, Paragraph I, and Article I, Section III, Paragraph I of the Constitution of the State of Georgia.

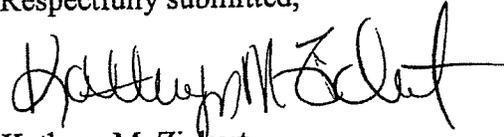
There is no rational basis to distinguish between rental use of a single family home for less than 30 days as opposed to 30 days or more, which means the Morgan County code as written denies substantive due process in violation of the same constitutional provisions set forth above.

Morgan County cannot retroactively apply its Ordinance. The Morgan County Zoning Ordinance was not adopted in compliance with the Zoning Procedures Law, O.C.G.A. § 36-66-1

et seq., (“ZPL”) and would represent an action in violation of the ZPL and the minimum procedural due process standards guaranteed by the Constitutional provisions set forth above.

This 28th day of September, 2011.

Respectfully submitted,



Kathryn M. Zickert
Dennis J. Webb, Jr.
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COPY

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

CHRISTINE B. MAY

Plaintiff

v.

MORGAN COUNTY, GEORGIA

Defendant

CIVIL ACTION FILE NO.
2012-CA-145

**DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND,
MOTION FOR RECONSIDERATION, AND MOTION FOR NEW TRIAL**

COMES NOW Defendant, Morgan County ("the County"), and hereby files this Brief in opposition to Plaintiff's Motion to Amend this Court's Judgment, Motion for Reconsideration, and Motion for New Trial, showing the Court that: (1) the Court's judgment is factually and legally correct, requiring no amendment; (2) regardless of how Plaintiff attempts to characterize and frame her cause of action, her failure to exhaust administrative remedies and file her action within 30 days of the County's zoning decision bar her claims; (3) Plaintiff should not be allowed to offer new arguments now, for the first time, in a Motion for Reconsideration; (4) Plaintiff is not entitled to a new trial; and (5) dismissal without prejudice is not an appropriate option under the facts and law of this case.

Argument

1. Court's Judgment Already Contains the Fact Plaintiff Seeks to Add by Amendment.

Plaintiff moves the Court to amend the Finding of Facts in its Judgment "to state that she rented her home for periods of less than 30 days prior to the enactment of Regulation 15.35 of the

Morgan County Zoning Ordinance and to omit any contrary references in its April 1, 2014 final order and judgment.” This Court’s Judgment clearly states that Plaintiff has rented her house on a short-term basis since 2007 and that the County’s Short-Term rental ordinance was passed in 2010. Accordingly, Plaintiff’s Motion to Amend should be denied because it seeks to add or amend something that already exists.

2. Court Correctly Concluded that Plaintiff Failed to Exhaust Administrative Remedies and Initiate Her Action Within 30 Days.

(a) Regardless of How Plaintiff Attempts to Characterize her Claims, Her Failure to Exhaust Administrative Remedies and Initiate Her Action Within 30 Days Bars Her Claims.

Under well-established Georgia law, a claim that a zoning ordinance is unconstitutional “on its face,” or as it affects *everyone* and *all property*, is not subject to the requirement that a challenger must first exhaust administrative remedies. See e.g., Cooper v. Unified Gov’t of Athens Clarke County, 277 Ga. 360, 361, 589 S.E.2d 105, 107 (2003) However, a claim that a zoning ordinance is unconstitutional “as-applied” to the property of the plaintiff IS subject to this requirement. Id. See also, Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 178, 281 S.E.2d 522, 523 (1981)(“Before litigants seek a declaration by a court of equity that a zoning ordinance is unconstitutional as applied to their property, they must apply to the local authorities for relief by rezoning.”). In this case, one of Plaintiff’s arguments is that the County’s entire Short-Term Rental ordinance is unconstitutional on its face, but this Court did not rule in Plaintiff’s favor on this issue, and Plaintiff appears to have largely abandoned this argument. Thus, the majority of Plaintiff’s arguments revolve around her contention that the County’s ordinance is unconstitutional “as applied” to her property. No matter how hard Plaintiff attempts to rephrase and recast her claims, she cannot avoid this inescapable fact.

For instance, in her Motion for Reconsideration, she argues that her action against the County is not an “as applied” challenge to the County’s short-term zoning ordinance, but is instead an action to declare “that her vested grandfathered rights cannot be limited by the enactment of Regulation 15.35, regardless of whether it is a valid, constitutional ordinance.” This word-play does not change the fact that her claim (i.e. her short-term rentals are a grandfathered use to which the zoning ordinance does not apply) alleges that the ordinance is unconstitutional *as applied* to her. Throughout her many briefs filed in this Court and in the Court of Appeals, May argues that she has a *constitutional*, grandfathered right to continue using her property as she did before the enactment of the ordinance. Thus, according to her own argument, the County’s ordinance does not apply to her property because she is grandfathered. As such, she contends that the County’s ordinance is unconstitutional “as applied” to her property, and she cannot avoid these requirements by clever phrasing and semantics. See e.g., Marietta Properties, LLC v. City of Marietta, 319 Ga. App. 184, 187, 732 S.E.2d 102, 106 (2012)(claim of having vested rights under prior ordinances are “constitutionally-based zoning claims” that “cannot be raised for the first time in the Superior Court. . .”).

(b) Plaintiff Cites No Cases Directly Supporting Her Argument, While Cases Cited in Court’s Judgment Are Almost Directly On Point.

In her brief, Plaintiff further claims that none of the cases relied upon by the Court in its Judgment involve grandfathered rights, yet Plaintiff cites no cases whatsoever holding that a claim of having grandfathered rights is not subject to these requirements of filing an action within 30 days or exhausting administrative remedies. Conversely, the facts and law in the cases cited by the Court are virtually identical to those here.

A claim that a nonconforming use is “grandfathered” is essentially a claim that the property

owner has “vested rights” to continue using the property as before even though the use no longer conforms to the current zoning. See e.g., Greene County v. North Shore Resort at Lake Oconee, LLC, 238 Ga. App. 236, 242, 517 S.E.2d 553, 558 (1999)(“North Shore could have asserted a *vested interest* and substantial reliance upon the 1984 regulations so as to be treated as a *grandfathered*, nonconforming use under later regulations, provided that it made out a factual predicate for such *vested right*.”)(emphasis added); City of Duluth v. Riverbrooke Properties, Inc., 233 Ga. App. 46, 51, 502 S.E.2d 806, 811 (1998)(“Thus, the defendants acquired *vested property rights* under the preliminary developmental plan filed under the 1971 Regulations and, as a matter of law, such *vested rights* in the entire Riverbrooke Subdivision were ‘*grandfathered*’ from the effect of the subsequently adopted 1992 Regulations.”)(emphasis added).

Claims of having “vested rights” under a prior zoning ordinance must be brought within 30 days of the adoption of the new ordinance. Wilson v. City of Snellville, 256 Ga. 734, 352 S.E.2d 759 (1987). In Wilson, the plaintiffs’ property was zoned to legally allow multi-family dwellings, but the city adopted a new zoning map and ordinance which “down-zoned” the plaintiffs’ property, no longer allowing multi-family residences. Id. The plaintiffs did not file an action challenging the zoning until 3 years later, and the Supreme Court held that the plaintiffs were time-barred from maintaining their action because they did not file it within 30 days of the city’s zoning action, despite the fact that the plaintiffs claimed “vested rights.” Wilson, 256 Ga. at 735, 352 S.E.2d at 760 (“Appellants contend that their claim for mandamus based on *vested rights* is not barred by Village Centers v. DeKalb County, supra. . .”)(emphasis added).

Similarly, a claim of “vested rights” cannot be made for the first time in Superior Court, but the aggrieved party must first exhaust administrative remedies. Marietta Properties, LLC v. City of

Marietta, 319 Ga. App. 184, 732 S.E.2d 102 (2012). In that case, the plaintiff obtained a “Certificate of Approval” from the city to build a “sixty-six foot tall, five-story building” on its property, which was allowed under the city’s ordinances at that time. Id. Thereafter, the city amended its ordinance to limit the height of buildings such as the plaintiff’s to no more than “42 feet.” Marietta Properties, LLC, 319 Ga. App. at 185, 732 S.E.2d at 104. The plaintiff filed an action against the city, seeking injunctive relief and a declaration that the plaintiff “had a vested right to construct” the 66-foot-high, six story building. Id. The trial court dismissed the plaintiff’s action because it did not first exhaust administrative remedies by seeking a building permit and then appealing the denial of that permit to the appropriate city entity. Id.

The Court of Appeals affirmed the trial court, holding that regardless of the plaintiff’s claim of vested rights, it nevertheless had to exhaust administrative remedies before filing an action in Superior Court. Id. As the Court stated, “the long-standing procedure is to address these vested rights claims only after the local zoning authority has refused to issue the necessary permits for the proposed project, or has imposed unconstitutional restrictions on an existing project.” Marietta Properties, LLC, 319 Ga. App. at 187, 732 S.E.2d at 106 (citations omitted).

Just as the plaintiffs in Wilson, Plaintiff in this case filed her action claiming that she has a vested right to use her property as allegedly allowed under a previous zoning ordinance well more than 30 days after the new ordinance was adopted. Just as the plaintiff in Marietta Properties, LLC, Plaintiff here has not exhausted her administrative remedies by first seeking a rezoning and conditional use permit from the appropriate local authority before filing her action in Superior Court. As such, the Court’s judgment in the County’s favor on these two issues is legally correct and must stand.

(c) **Martin Case Relied Upon by Plaintiff Does Not Support Her Claim to be Exempt from Requirements of Exhausting Administrative Remedies and Filing Action Within 30 Days.**

The one case Plaintiff relies upon in support of her argument is inapplicable. She cites Martin v. Hatfield, 251 Ga. 638, 308 S.E.2d 833 (1983) for the proposition that her claim is somehow exempt from the requirements of filing within 30 days and after exhausting administrative remedies. However, that case did not involve a grandfathered use under a previous zoning ordinance. Id. Instead, that case dealt with a City council's refusal to issue a building permit to which the plaintiff was entitled under the *existing zoning ordinance*. Martin, 251 Ga. at 638, 308 S.E.2d at 834 ("The concept of exhaustion of remedies is inapplicable to a complaint seeking mandamus to compel issuance of a building permit in accordance with an *existing zoning ordinance*.")(emphasis added). In other words, that was not a situation like Marietta Properties, LLC, where the plaintiff qualified for a building permit under a *previous* zoning ordinance, but the governing authority amended the ordinance thereafter to disqualify the plaintiff from such a permit. 319 Ga. App. 184, 732 S.E.2d 102. Rather, in Martin, the plaintiff sought a writ of mandamus ordering the city to issue a building permit under the current ordinance.

In Martin, the plaintiff's property was rezoned, and the plaintiff represented to the city council that its proposed project would not have an entrance or exit on a certain street. 251 Ga. at 638-39, 308 S.E.2d at 834. After the rezoning was approved, the plaintiff applied for a building permit, submitting plans showing an entrance/exit on that certain street. Id. The city council refused to issue the permit, believing the rezoning was conditional in that it prohibited an entrance or exit on that certain street. Id. The Supreme Court held that the rezoning was unconditional because the conditions were not clearly set forth in the ordinance. Id. As such, the plaintiff was

entitled to mandamus ordering the issuance of the building permit under the existing zoning ordinance because the proposed plans were consistent with the unconditional zoning of the property. Martin, 251 Ga. at 639, 308 S.E.2d at 834.

In this case, unlike Martin, there was no rezoning of Plaintiff's property and no confusion whatsoever as to whether Plaintiff's rezoning was conditional or not. Plaintiff here, unlike the plaintiff in Martin, has not submitted plans for approval, nor sought the issuance of a permit. Similarly, in contrast to the plaintiff in Martin, Plaintiff here has not sought a writ of mandamus ordering the County to issue anything. As such, the language and reasoning in Martin relied upon by Plaintiff regarding mandamus is wholly inapplicable here. Most importantly, the plaintiff in Martin sought "to enforce a right (the issuance of a building permit) which was established by the" *existing zoning ordinance*, whereas Plaintiff here seeks to create a right that allegedly¹ existed under a *previous zoning ordinance* but vanished when the County adopted the Short-Term Rental regulations of its existing zoning ordinance. See Wilson v. City of Snellville, 256 Ga. at 735, 352 S.E.2d at 760.

In Wilson, a case much more analogous to this case, the Supreme Court rejected the same argument made by Plaintiff here based on the quoted language from Martin, holding that the plaintiffs' claims of vested rights had to be made within 30 days of the zoning action allegedly extinguishing those vested rights. In doing so, the Court stated as follows:

Appellants contend that their claim for mandamus based on vested rights is not barred by Village Centers v. DeKalb County, *supra*. In Martin v. Hatfield, 251 Ga. 638, 308 S.E.2d 833 (1983), we refused to extend the rule of Village Centers to a suit for mandamus to enforce a right (the issuance of a building permit) which "... will not

¹ Without re-arguing what it has set forth in its previous Briefs filed in this Court and in the Court of Appeals, the County maintains that Plaintiff was not legally entitled to rent her house on a short-term basis before the short-term rental ordinance was adopted, thereby precluding any claims of grandfathered vested rights.

be defeated by the expiration of thirty days from the date of the refusal of a governing body to do that which it is already under obligation to do.” Id. We made the distinction between asking the court to declare a zoning ordinance unconstitutional as to certain property and asking a court to grant a writ of mandamus to compel performance of a public duty. In the present case, appellants argue that they are entitled to mandamus to compel the city to issue permits for multi-family development; however, *this argument fails because any preexisting duty to issue such permits vanished when the zoning was changed so that multifamily units are no longer permitted.* Moreover, there is no indication that they have ever applied for a building permit, and it affirmatively appears from the record that no building permit has ever been sought since the zoning was changed. Appellants’ only remedy therefore is a declaration that the present zoning is unconstitutional, and mandamus will not lie. We affirm the ruling of the trial court that the complaint was not timely filed.

Wilson v. City of Snellville, 256 Ga. at 735, 352 S.E.2d at 760 (emphasis added). See also, Cooper v. Unified Gov’t of Athens Clarke County., 277 Ga. 360, 361, 589 S.E.2d 105, 106-07 (2003) (distinguishing Martin) (“The doctrine of vested rights is based on constitutional grounds. The existence of vested rights under zoning ordinances rests upon the same constitutional footing which precludes retroactive application of zoning ordinances. This Court has firmly adhered to the rule that constitutionally-based zoning claims, such as those asserted here by Cooper, cannot be raised for the first time in the Superior Court, but must first be brought before the local zoning authority.”)(internal citations and quotations omitted). Therefore, the Plaintiff’s grandfathering claim is not immune or exempt from the requirements that she file her action within 30 days of the zoning decision affecting her allegedly vested rights and that she first exhaust administrative remedies before raising these issues in superior court.

3. Plaintiff Should Not Be Allowed to Raise New Arguments in Her Motion for Reconsideration.

“Whether to permit a party to raise a new argument on motion for reconsideration filed

after judgment is entered lies within the discretion of the trial court.” Neely v. City of Riverdale, 298 Ga. App. 884, 888, 681 S.E.2d 677, 680 (2009)(trial court correctly refused to consider new constitutional argument raised for the first time in motion for reconsideration). Since it filed its Answer to Plaintiff’s Complaint (5/18/2012), the County has repeatedly and consistently argued that Plaintiff’s claims are barred because she failed to exhaust administrative remedies (See e.g., County’s Answer, p. 2, “Eighth Defense”) and did not file her action within 30 days of the zoning decision attacked (Id., “Tenth Defense”). In support of its arguments, in numerous briefs before this Court and the Court of Appeals, the County has cited multiple cases directly addressing these issues. In response, Plaintiff has failed to articulate an argument as to why these well-established rules do not apply to her, instead making excuses or attempting to distinguish her situation. For example, Plaintiff argued that she had no notice of the County’s adoption of the Short-Term rental ordinance, even though she claimed she submitted a letter in opposition to the ordinance while it was being considered and admitted receiving a letter shortly after the adoption. Plaintiff further contended that her assertion of a 42 U.S.C. § 1983 claim somehow relieved her of complying with these rules, even though no cases support this contention. Otherwise, Plaintiff simply argued that she did not have to first exhaust administrative remedies or file suit within 30 days without citations to any material cases and without any argument as to **WHY** she was exempt from such requirements.

Now, two years after the County first raised these issues, after the Court of Appeals ordered this Court to rule on these issues, and after this Court ruled in the County’s favor on these issues, Plaintiff finally attempts to articulate and support, although unsuccessfully, an argument as to why her claim of having a grandfathered vested right is supposedly immune and exempt from these

well-established rules. This Court should refuse to allow Plaintiff to make this new argument now in a motion for reconsideration, rather than at trial, in post trial briefs, or in the appellate courts. See e.g., Neely, 298 Ga. App. at 888, 681 S.E.2d at 680. See also, Cochran v. Emory Univ., 251 Ga. App. 737, 739, 555 S.E.2d 96, 99 (2001)(trial court properly refused to grant motion for reconsideration based on new issue raised by plaintiff “over two months after the motion for summary judgment was filed” and “over two weeks after the entry of the court’s order granting summary judgment.”).

4. Plaintiff Fails to Justify a New Trial.

Plaintiff argues that if the Court’s judgment is not amended (i.e. completely reversed), she is entitled to a new trial. However, Plaintiff fails to otherwise explain why she is entitled to such a new trial. Instead, she simply complains about the results of the trial, rather than any prejudice or error allegedly committed during the trial. As such, she is not entitled to a new trial.

5. Dismissal Without Prejudice Improper.

Plaintiff further argues that if all of her other post-judgment motions for relief are denied, the Court should simply dismiss her Complaint without prejudice. Plaintiff cites no law supporting this proposal--that the Court should, or even can, dismiss her Complaint without prejudice AFTER the case has been tried and appealed once to the Court of Appeals and after this Court has ruled against Plaintiff. Instead, Plaintiff claims that a denial of a rezoning application is the only trigger of the 30 day time limitation on filing an action in Superior Court, and since she has not applied for a rezoning and has therefore not been denied, her 30 days has not even begun to run. This argument misstates Georgia zoning law.

The denial of a rezoning is only one of several occurrences that triggers the 30 day limitation on filing a lawsuit challenging a zoning action. Any “zoning decision” under the

Georgia Zoning Procedures Law (ZPL) triggers this 30 day limitation. See e.g., Hollberg v. Spalding County, 281 Ga. App. 768, 637 S.E.2d 163 (2006). A zoning decision can be: (a) the adoption of a zoning ordinance; (b) the adoption of a text amendment; (c) the grant or denial of rezoning application; and (d) the grant or denial of a special or conditional use permit. O.C.G.A. § 36-66-3(4). For example, in Hollberg, which Plaintiff cites in support of her argument, the plaintiff filed suit challenging a zoning decision involving a neighboring landowner. 281 Ga. App. at 768-69, 637 S.E.2d at 165-66. That plaintiff was not appealing the denial of a rezoning. Id. Nevertheless, the Court of Appeals held that the plaintiff was challenging a zoning decision under the ZPL and all such challenges must be made within 30 days of the zoning decision. Hollberg, 281 Ga. App. 768, 637 S.E.2d 163. Similarly, in Fortson v. Tucker, neighboring landowners dissatisfied with a zoning decision allowing mobile homes on their neighbor's land filed an action challenging that county's zoning decision. 307 Ga. App. 694, 695-96, 705 S.E.2d 895 (2011). The Court of Appeals held that the plaintiffs' claims were untimely because they were not filed within 30 days of the decision challenged, even though those plaintiffs were not appealing the denial of rezoning of their property. Fortson, 307 Ga. App. at 696, 705 S.E.2d at 896.

In this case, as the County has pointed out consistently and repeatedly, the adoption of the Short-Term Rental Ordinance and its application to particular zones were "zoning decisions" under the ZPL. Any challenge to those decisions, whether called an appeal or otherwise, must have been filed in Superior Court within 30 days of those decisions. It is undisputed that Plaintiff did not file her action until over one-and-a-half years later. She cannot now claim that because she never applied to rezone the property and was never denied such a rezoning that she now has an unlimited amount of time to file her action challenging the zoning decision made in 2010. Nothing prevents

Plaintiff from applying to rezone her property now and appealing the denial of that decision to this Court within 30 days. In fact, that is precisely what the County has argued all along: Plaintiff has administrative remedies that she has failed to exhaust. Dismissing Plaintiff's Complaint now after she has already lost her case does not change this and is improper.

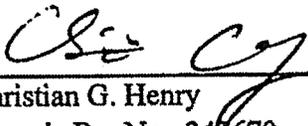
CONCLUSION

This Court's Judgment in the County's favor is factually and legally correct, and needs no amending. Plaintiff cannot call her claim something other than what it is to avoid the effects of her failure to comply with the well-established rules governing her cause of action. She failed to file her action within 30 days of the zoning decision she contends does not apply to her, and she failed to exhaust her administrative remedies before filing this case. Plaintiff's new argument attempting to articulate for the first time why these rules should not apply to her should not be heard now, after more than 2 years of litigation, a trial, multiple appeals, and a judgment against her. Plaintiff presents no facts or law supporting a new trial, but instead she is merely dissatisfied with the outcome. Finally, there is no legal or factual reason to allow Plaintiff to dismiss her complaint without prejudice after she has lost the case, particularly since she still has the option to apply to rezone her property and appeal a denial. Accordingly, Plaintiff's Motions must be denied.

WHEREFORE, Plaintiff's Motion must be DENIED.

Respectfully submitted, this 21st day of May, 2014.

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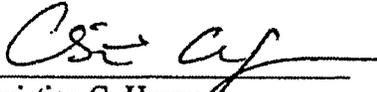

Christian G. Henry
Georgia Bar No. 347670
Morgan County Attorney

CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing party/counsel in the above-referenced matter with the foregoing **BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND, MOTION FOR RECONSIDERATION, AND MOTION FOR NEW TRIAL** by placing a copy in the U.S. Mail, in envelope(s) with adequate postage thereon, addressed as follows:

C. Wilson DuBose, Esq.
Jennifer Pridgeon, Esq.
DUBOSE LAW GROUP LLC
285 North Main Street
P.O. Box 192
Madison, GA 30650

This 21st day of May, 2014.



Christian G. Henry

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

CHRISTINE B. MAY,)
)
 Plaintiff,)
)
 v.)
)
 MORGAN COUNTY, GEORGIA,)
)
 Defendant.)
 _____)

CIVIL ACTION FILE NO. 2012CA145

COPY

POST-TRIAL REPLY BRIEF OF PLAINTIFF CHRISTINE B. MAY

This Reply to Defendant's Post-Trial Brief demonstrates that the factual and legal contentions contained in the County's Post-Trial Brief are insufficient to rebut the showing by Plaintiff that she is entitled to judgment in her favor for the following reasons: (1) her prior use of her property constitutes a valid non-conforming use that is not barred by the County's enactment in 2010 of Regulation 15.35 of its Zoning Ordinance; (2) the County's short-term rental ordinance is unconstitutional on its face; (3) Plaintiff's action is timely; (4) Plaintiff was not required to exhaust her administrative remedies; (5) Plaintiff's action is properly before this Court; (6) Plaintiff's damages calculation is properly supported by the evidence; and (7) emotional distress damages are a recognized component of the damages that Plaintiff is able to recover under Georgia law as well as under 42 U.S.C. §§ 1983 and 1988.

I. CORRECTION OF DEFENDANT'S STATEMENT OF FACTS.

Defendant's Post-Trial Brief includes a series of factual mischaracterizations and attempts to distort the evidence presented at trial. In the short section below, Plaintiff focuses on important facts on which she believes the Court should have a clear understanding when making a decision in this case.

Because Plaintiff relied heavily upon the anticipation of rental income in deciding to build her custom lakefront home in Morgan County, and because she had been successful in renting her home after it was completed in 2008, she was forced to file this suit against Morgan County in order to establish her right to continue using her home in the manner in which it had been used prior to the 2010 ordinance change, to obtain a judicial declaration that the amended ordinance was unconstitutional on its face, and to recover damages from the County for the losses, expenses and attorneys' fees she has incurred by reason of the County's deliberate and intentional deprivation of her due process and equal protection rights under the Constitutions of Georgia and the United States.

Based upon the proper application of relevant constitutional and other legal principles to the evidence presented at trial, Plaintiff is entitled to the following relief:

1. A declaration by this Court that the County's prohibition of "short-term" rentals of residential dwellings in certain zoning districts of the County under Regulation 15.35 of the County's zoning ordinance is inapplicable to Plaintiff because she is entitled to continue to use her property in the same lawful manner in which it had been used prior to the County's enactment of Regulation 15.35 in October 2010 and the County's subsequent designation of Plaintiff's zoning district as one in which short-term rentals would be prohibited in all circumstances.

2. A declaration by the Court that Regulation 15.35, along with the subsequent discriminatory application of that Regulation to certain disfavored zoning districts in Morgan County, is facially invalid as a violation of both the substantive due process and equal protection clauses of the 14th Amendment of the U.S. Constitution and the Constitution of Georgia.

3. An award of damages in the amount of \$86,892.61 (including \$25,000.00 for emotional distress damages) to compensate Plaintiff for the losses, expenses and attorneys' fees she has incurred by reason of the County's deprivation of her constitutional rights.

4. A permanent injunction prohibiting Morgan County from interfering with Plaintiff's right to rent her property as a valid non-conforming use, and from enforcing Regulation 15.35, to the extent it is found to be unconstitutional.

This post-trial brief will demonstrate that Plaintiff is entitled to each of the elements of relief she has requested in this suit.

II. FACTUAL SUMMARY.

This case presents a disturbing example of how easily local governments can abuse the police powers entrusted to them by cavalierly trouncing upon the rights of its citizens with little forethought, judgment or sense of fairness.

In a scene reminiscent of the police inspector's famous line in the movie *Casablanca*, the Morgan County government was suddenly *shocked* to learn in 2007 that lakeside homeowners had been renting their homes to others for the 25 years in which Lake Oconee had been in existence, just as homeowners in Greene and Putnam Counties had been doing and continue to do.¹

At the urging of a mere *handful* of "permanent" residents of two lake subdivisions, the County quickly determined – for reasons it could not rationally explain – that its zoning ordinance could – and must – be read to prohibit rentals of single family dwellings for less than 30 days, while inexplicably *permitting* rentals of such dwellings for more than 30 days. The County then charged the unfortunate Rev. Doug Nelms with the entirely undefined *crime* of

¹ Both Judy Gilbert and Butch Thompson testified to the long-standing practice of renting lake homes in the counties surrounding Lake Oconee. Chuck Jarrell also acknowledged the existence of lake rentals in Morgan County prior to the enactment of Regulation 15.35 and the continued right of homeowners in Greene and Putnam Counties to rent their lake properties without restriction.

“short-term rentals,” a full three years before the County Zoning Ordinance was amended to prohibit such rentals.²

Like Rev. Nelms, Ms. May was also the target of an obsessively nosy neighbor who testified that she, too, was *shocked* to learn that the County was tolerating the rental of lakeside homes in subdivisions such as hers, even though she had made no effort to determine when she bought her property in 1997 whether the County prohibited the short-term rental of single family dwellings, and even though she willingly tolerated another neighbor’s short-term rental of a lake house just next door.³

In the face of continued pressure from permanent residents of two lakeside subdivisions, the County summarily ordered Ms. May and two other lakeside homeowners to cease and desist from renting their respective homes in 2009 -- still without any basis under the zoning ordinance for doing so.⁴ Finally, in 2010 and in spite of a strong letter of protest from Ms. May,⁵ the County enacted Regulation 15.35,⁶ thereby prohibiting for the first time the rental of certain single-family dwellings for periods of less than 30 days. Regulation 15.35 was the poorly conceived product of constituent protests, coupled with the admitted recognition by County planning officials and the County Attorney that the existing zoning ordinance did not provide the County with sufficient authority to regulate and prohibit rentals of less than 30 days.⁷

Without any investigation, study or any other effort to determine whether an outright ban on short-term rentals in single family lakeside subdivisions would be likely to provide greater protection from excessive noise, traffic and other presumed problems than would exist in the

² Exhibits 6-9.

³ Testimony of Geraldine Sable. Mr. Thompson, her neighbor, testified that Ms. Sable’s three uncontrolled dogs inflicted bites upon him, his wife, his dog and his son’s dog.

⁴ Exhibits 11-15.

⁵ Exhibit 44.

⁶ Exhibit 40.

⁷ Exhibit 10, Bates no. 48; Exhibit 18 at p. 3 and numbered paragraphs 2 and 3 of attached Powerpoint presentation; Exhibit 20, p. 2; Exhibit 21, p. 4; Exhibit 22.

absence of such restrictions,⁸ the County precipitously declared “short-term” (less than 30 days) rentals of lakeside single family dwellings to be a crime and immediately targeted Ms. May as its first and (so far) only victim.⁹

Armed with the new Regulation 15.35 and prompted by her neighbor’s continued reports of unrecognized cars upon Ms. May’s property, some with “out-of-state license plates,” a County enforcement officer descended without prior notice or permission upon Ms. May’s property in August 2011 and surreptitiously recorded a conversation in which a person temporarily using the house admitted that she was renting it from Ms. May.¹⁰ Shortly thereafter, the same enforcement officer returned to the house – again without prior notice and using a hidden camera – and served Ms. May with a criminal citation for violating Regulation 15.35.¹¹ Ms. May earnestly explained that she had a pre-existing use and was therefore grandfathered from the prohibition of short-term rentals as defined in 15.35.¹² But rather than investigating whether Ms. May was correct in her assertion, the County issued a criminal citation on the spot.

Faced with the gloomy choice of foregoing needed rental income or risking fines and incarceration of up to six months, Ms. May reluctantly stopped renting her house for periods of less than 30 days after receiving the criminal citation. Since then, she has obtained only one legitimate rental of 30 days or longer, and has rented the house to a small number of other persons for nominally 30 days, even though those persons actually occupied the premises for seven days or less and paid Ms. May a rental charge commensurate with the duration of the actual occupation, rather than for 30 days.¹³

⁸ Testimony of Chuck Jarrell.

⁹ Exhibits 21, 23, 26, 40.

¹⁰ Testimony of Joseph Pritchett; Defendant’s Exhibit 3; Ex. 28.

¹¹ Exhibits 28-30.

¹² Defendant’s Exhibit 3; testimony of Christine May.

¹³ Testimony of Christine May; Exhibit 42.

From the time she completed her meticulously-designed “dream home” on a distinctive lakefront lot in Morgan County in 2008 until the moment she was charged with a criminal violation of the County’s zoning ordinance in 2011, Christine May had succeeded in her goal of renting the house during those long periods in which she was not personally occupying the home. During this period, Ms. May earned \$55,600.00 in rent from 28 rental engagements, exclusive of expenses that were paid in addition to the rent.¹⁴ Based upon the frequency of rentals prior to her receiving the citation in 2011, and upon her receipt of 368 internet inquiries for rental of the home in 2012, Ms. May has conservatively calculated that she has suffered lost profits of \$11,274.14 from lost rental opportunities since receiving the citation.¹⁵

Because of the County’s stubborn refusal to honor Ms. May’s grandfather rights, she has not only lost thousands of dollars of reasonably anticipated rental income, but has also been forced to hire attorneys to advise her of her rights and, ultimately, to file this suit to vindicate those rights. Even in the face of this lawsuit, and of its admitted inability under the pre-15.35 zoning ordinance to prohibit Ms. May from renting her lake house, the County has continued with its obstreperous stance and has forced Ms. May to bring this case to trial.

It should not require a judicial declaration for the County to acknowledge Ms. May’s obvious right to continue renting her house as a valid non-conforming use under Chapter 14.3 of the revised zoning ordinance.¹⁶ But instead of voluntarily recognizing Ms. May’s rights, the County Commission made what appears to be a blatantly political decision to require a court to order it to abide by its constitutional obligations in order to avoid the appearance of capitulation in the eyes of its favored constituents. The County’s unprincipled decision has caused Ms. May

¹⁴ Exhibit 42.

¹⁵ Exhibits 43, 44, 47.

¹⁶ Exhibit 39.

to incur more than \$50,000 in legal expenses.¹⁷ When those expenses are combined with the profit she has lost from being prohibited from renting her house for less than 30 days, Ms. May has suffered compensable damages in excess of \$60,000 at the hands of the County. She is entitled to recover those damages in this action, in addition to damages for the emotional distress she has suffered by reason of the County's illegal and heavy-handed actions over the past three years. While the amount of damages for emotional distress is determined through the enlightened conscience of the trier of fact, Ms. May requests a minimum of \$25,000.00 in damages for the emotional distress she has suffered, separate and apart from the attorneys' fees and lost income she has incurred.

III. ARGUMENT AND CITATION OF AUTHORITY.

In construing the merits of the various claims and defenses that have been asserted in this suit, the Court should be mindful of several important legal presumptions that apply to this dispute. First,

“[t]he construction of a zoning ordinance is a question of law for the courts. In construing such an ordinance, we consider the general rule that the owner of land in fee has the right to use the property for any lawful purpose. Since zoning ordinances restrict an owner's right to freely use his property, they are in derogation of common law. Thus, they must be strictly construed in favor of the property owner and never extended beyond their plain and explicit terms. Any restrictions must be clearly established, and “ambiguities in the language of zoning ordinances should be resolved in favor of the free use of property.”

Cherokee County v. Martin, 253 Ga. App. 395, 396, 559 S.E.2d 138, 140 (Ga. Ct. App. 2002).

¹⁷ Affidavit of C. Wilson DuBose, filed contemporaneously with permission of the Court.

Further, “it is the general rule that the owner of land has the right to use it for any lawful purpose, and restrictions upon its use must be clearly established and strictly construed. Doubt as to restrictions and use will be construed in favor of the grantee.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Statham*, 243 Ga. 448, 451, 254 S.E.2d 833, 835 (1979). Finally, a “county has the duty and obligation to work with property owners to allow them the highest and best use of their property.” *DeKalb County v. Flynn*, 243 Ga. 679, 680, 256 S.E.2d 362 (1979). The application of these principles to the case at hand plainly supports Plaintiff’s position that her property is grandfathered and not subject to Regulation 15.35, and that 15.35 itself is unconstitutional on its face.

A. MS. MAY IS LEGALLY ENTITLED TO RENT HER HOUSE FOR LESS THAN THIRTY DAYS AS A NONCONFORMING USE.

1. Ms. May’s Lawful Rental of Her House Prior to the Enactment of 15.35 Qualifies as a Nonconforming Use.

Ms. May has rightfully insisted that she had the absolute right to rent her property prior to the passage of 15.35 on October 5, 2010, and that she is entitled to continue doing so following that date by virtue of her grandfathered prior conforming use.¹⁸ “In order to establish a claim for grandfathered, nonconforming use, it is necessary to show that the land was used for the nonconforming purpose prior to the enactment of the zoning ordinance.” *Flippen Alliance for Community Empowerment, Inc. v. Brannan*, 267 Ga. App. 134, 136, 601 S.E.2d 106, 109 (Ga. Ct. App. 2004). Ms. May’s numerous rentals of her home for less than 30 days prior to the passage of 15.35 constituted a valid conforming use prior to the amendment and establish her

¹⁸ Chapter 14.3 of the County’s Zoning Ordinance (Exhibit 39 at p. 14-3) codifies the principle of non-conforming use that is recognized by Georgia case law and required by the Due Process clause of the 14th Amendment. See *Flippen Alliance for Community Empowerment, Inc. v. Brannan*, 267 Ga. App. 134, 136, 601 S.E.2d 106, 109 (Ga. Ct. App. 2004) *Mator v. City of Ecorse*, 301 Fed. Appx. 476 (6th Cir. 2008).

vested right to continue her rental activity after the passage of 15.35 as a lawful nonconforming use.

Section 11.1.1 of the Morgan County Zoning Ordinance prior to the amendment in October of 2010 described the purpose and intent for which land zoned LR-1 was to be used. “The purpose of the LR-1 District is to encourage the development of low density, single family residential neighborhoods, and certain uses allied to or customarily incidental to traditional residential developments while stressing the preservation of the natural beauty of the lakeshore line and surrounding land.”¹⁹ Moreover, the table of permitted uses in section 11.1 describes “Dwelling, single family detached” as a permitted use in LR-1.²⁰ And the definition of “Dwelling, single family detached” in Article 3 of the Zoning Ordinance is not limited to, and does not require, owner-occupied residences.²¹

A review of other definitions contained in Article 3 of the Zoning Ordinance reveals that the County took pains to define “owner occupancy”²² but did not include that term within the scope of the definition of “Dwelling, Single family detached.” The County also used the definitional section of its Zoning Ordinance to prohibit rentals of certain properties. Under the definition of “Guesthouse” on page 3-10 of Article 3, the County *expressly prohibits a guesthouse from being rented*,²³ yet, it did not similarly prohibit the rental of the main house of a single family detached dwelling prior to the passage of 15.35. **By explicitly forbidding the rental of a guesthouse, but not a principal dwelling, the Zoning Ordinance unmistakably sanctioned the rental of single family detached dwellings prior to the passage of Regulation 15.35.**

¹⁹ Exhibit 37, Section 11.1.1.

²⁰ Exhibit 37 at p. 11-12.

²¹ Exhibit 33 at pp. 3-7 and 3-8.

²² Exhibit 33 at p. 3-16.

²³ Exhibit 33 at p. 3-10. (“[N]o guesthouse shall be rented or otherwise used as a separate dwelling.”)

In addition to there being no prohibition of rentals of detached single family dwellings prior to the effective date of 15.35, there is no inherent characteristic of the rental of a home for less than 30 days that is inconsistent with the stated purpose and intent of the LR-1 zoning district. Whether a home is being used by its owner every day of the year, by its owner occasionally on weekends, by guests of the owner for a week at a time, by a renter for six months, or by a renter on a weekly or even daily basis, the home is being used as a single family residence and **there was nothing in the Zoning Ordinance that prohibited that use prior to the passage of 15.35.**

As the County itself acknowledged in section 11.6.1 of the Zoning Ordinance, the Morgan County portion of Lake Oconee had become the location of a “unique type of resort, recreational, and second-home development”²⁴ The lack of any rental prohibition under the LR-1 zoning district before the enactment of 15.35 is entirely consistent with the County’s recognition that second homes, and the implicit ability to rent those second homes for the use and enjoyment by others, would constitute an important element of the “unique” resort, recreational and “second-home development” that is occurring in the Morgan County side of the lake.²⁵

The inclusion of rentals for less than 30 days within the implied uses permitted in a single family residential area is supported not only by the language of the Zoning Ordinance, but also by the evidentiary record and by case law. Chuck Jarrell, the County’s director of zoning enforcement, testified that a person renting Ms. May’s house for a period of 28 days could be considered to be residing in her home, just as Ms. May would be, even if Ms. May physically stayed in the home only two weekends a year. Although Plaintiff has not identified any Georgia

²⁴ Exhibit 38, p. 11-7.

²⁵ This unique character of the Lakeshore Zoning is also noted in the title of Article 11.1 “Lakeshore Low Density Residential/Recreation.”

appellate case that has addressed the issue precisely, the Supreme Courts of both South Carolina and Utah have recognized that the permitted use of a home as a single family dwelling is not dependent upon whether the home is owned or rented.

In holding that a city ordinance concerning the use of single family homes did not prohibit short term rentals of such homes, the Utah Supreme Court stated:

The Code specifically permits use of a dwelling for *occupancy* by a single family. Thus, if a single family occupies a home, the structure is being used as permitted. However, [the City] contends that, because the Code does not specifically permit occupancy by a single *tenant family for less than thirty days*, occupancy by a single *tenant family for less than thirty days* is proscribed by the ordinance. **We are not willing to import such a restriction.** The Code does not limit the permitted use by referencing the type of estate the occupying family holds in the property or the duration of the occupancy. Thus, **it is irrelevant what type of estate, if any estate at all, the occupying family has in the dwelling, i.e., whether the family holds a fee simple estate, a leasehold estate, a license, or no legal interest in the dwelling. It is equally irrelevant whether the occupying family stays for one year or ten days. The only relevant inquiry is whether the dwelling is being used for occupancy by a single family; if it is, the ordinance has not been violated.** [The city's] argument, taken to its logical conclusion, would mean that the staff could restrict any use without limitation by simply arguing that the use was one not specifically mentioned in the general permitted use provisions. For instance, it would allow the staff to prohibit an owner from leasing the property under any conditions because the ordinance does not specifically permit occupancy by a single family *leasing the dwelling*.

Brown v. Sandy City Bd. of Adjustment, 957 P.2d 207, 211 (Utah 1998) (emphasis added). The reasoning that Morgan County employs in claiming that the Zoning Ordinance prohibited rentals of single family dwellings for less than 30 days prior to the adoption of 15.35 is virtually identical to the rationale proffered by the City in *Brown*, and should be rejected for the same reasons underlying the Supreme Court of Utah's decision in that case.

The Supreme Court of South Carolina addressed the question in a similar fashion in *Landing Development Corp. v. City of Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985). The

ordinance in question stated that the principal use for the zoning district in question was “One, two and multi-family dwellings including townhouses, condominiums, apartments and cooperative apartments for *permanent occupancy*.” Even with the inclusion of the word “permanent” in the ordinance, the South Carolina court found that short-term rentals were included within the scope of the uses permitted under the ordinance. The court found that “Nothing in the record reveals that the ordinance, as written or as applied prior to this dispute, prohibited the rental of any home, condominium or apartment based on any specified duration of tenancy. It appears that the practice in the City of Myrtle Beach was to allow vacation rentals of any duration, in structures permitted by the zoning law, in all zoning districts . . .” *Id.* 219, 424.

Just as the court in *Landing Development* found that the city in that case had allowed “vacation rentals of any duration,” Morgan County’s Zoning Ordinance implicitly acknowledges the validity of short-term rentals of second homes in LR-1 by permitting “uses allied to or customarily incidental to traditional residential developments.”²⁶ The County has presented no evidence that a customary use of a home, particularly a second home in a well-established recreational area, does not include the rental of that home to visitors during the times the owner is not using it for her own enjoyment. To suggest that the rental of a second home in the lake area was prohibited prior to the enactment of 15.35 is not only to ignore the textual analysis set forth above, but also to deny the common understanding that such rentals were a customary and commonplace practice “incidental to” resort residential developments.²⁷

The County contends that section 4.6 of the Zoning Ordinance implicitly prohibited “short-term rentals” before the passage of 15.35 because rentals of less than 30 days were not expressly described as a permissible use of single family dwellings under section 11.1. The

²⁶ Exhibit 37, section 11.1.1.

²⁷ Testimony of Judy Gilbert, Butch Thompson and Chuck Jarrell.

County's argument ignores not only the language of the Zoning Ordinance, discussed above, that demonstrates the permissibility of short-term rentals prior to 15.35, but also the abundant evidence and case law, also discussed above, that demonstrates that a permitted use as a single family dwelling is not dependent upon whether that dwelling is rented or owned, or rented for any particular duration. When taken to its logical extreme, the County's argument would also ban so-called "long-term rentals," both before and after the enactment of 15.35, because long term rentals also were not and still are not expressly listed as a permitted use of single family dwellings in section 11.1. But the County has acknowledged that long-term rentals were implicitly permitted under the Zoning Ordinance prior to 15.35 and does not deny that long-term rentals are currently permitted in the LR-1 zoning area.²⁸ The County has provided no plausible explanation for how the Ordinance can be clearly construed to permit long-term rentals while prohibiting short-term rentals prior to 15.35.

Because the Ordinance prior to the passage of 15.35 did not distinguish between ownership and tenancy, or between "long-term" and "short-term" rentals of single family dwellings (as if the average citizen could be expected to know the exact delineation between the two), or between rentals of more than 30 days and less than 30 days, those distinctions cannot be read into the designation of single family use in 11.1 or into the definition of "dwelling" and "dwelling, single family detached" in the definitional section of the Zoning Ordinance.

2. **Even If The Pre-15.35 Zoning Ordinance Did Not Implicitly Permit Short-Term Rentals Of Less Than 30 Days, Plaintiff's Prior Use Of The Property Would Still Be Lawful Because, At The Very Least, The Ordinance Was Not Sufficiently Clear To Permit The County To Criminally Prosecute Homeowners Who Entered Into Short-Term Rentals Prior to 15.35.**

²⁸ Testimony of Chuck Jarrell.

Even if the Zoning Ordinance, when read as a whole, had not permitted short-term rentals prior to the passage of 15.35, the County's interpretation of the Ordinance as prohibiting such rentals prior to 15.35 would still fail because, at the very least, the Ordinance does not clearly support the County's interpretation and fails to provide fair warning to the public of what that interpretation is. Put another way, the County would not have been able to legally enforce its interpretation because the Ordinance is too vague to enable a person of ordinary intelligence to have known from the face of the Ordinance that undefined "short-term" rentals of less than 30 days were prohibited by the pre-15.35 Ordinance but similarly undefined "long-term" rentals of 30 days or more were permitted. Even the County's Chuck Jarrell admitted on cross-examination that there was no way from reading the Zoning Ordinance as it existed prior to 15.35 that a person of ordinary intelligence could know that it prohibited rentals of less than 30 days but permitted rentals of 30 days or more.

The Supreme Court of Georgia has held that a statute or ordinance is unconstitutionally vague "if it fails to convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices' so that 'persons of common intelligence need not necessarily guess at its meaning nor differ as to its application.'" *Franklin v. State*, 279 Ga. 150, 151, 611 S.E.2d 21, 22-23 (2005). Because it has been well established through trial testimony that a person of common intelligence could not determine whether the rental of homes in LR-1 areas for less than 30 days was proscribed by the Ordinance, the pre-15.35 Morgan County Zoning Ordinance could not pass this vagueness standard. .

Real estate broker Judy Gilbert and homebuilder Butch Thompson, each of whom are intimately familiar with Morgan County real estate, understood that rentals of homes in LR-1 were permitted under the Zoning Ordinance prior to the enactment of Section 15.35. Further, the trial testimony of Chuck Jarrell and both internal and public County documents demonstrated

that even the County Attorney and members of the zoning office were not confident that the Ordinance prohibited rentals of less than 30 days. This uncertainty poses the obvious question of how a person of ordinary intelligence could be expected to discern that short-term rentals of less than 30 days were prohibited by the pre-15.35 Zoning Ordinance if the County's employees and professionals most familiar with the Zoning Ordinance could not confidently do so. Because the Zoning Ordinance was too vague to support the lawful criminal prosecution of homeowners who rented their homes prior to 15.35, it follows that Ms. May's rental of her home prior to 15.35 was lawful.²⁹

Since it is clear that Ms. May rented her house for periods of less than 30 days prior to the enactment of Regulation 15.35,³⁰ and that this use was a proper use of her land at that time, the continued unrestricted rental of her home for less than 30 days must be recognized as a legal nonconforming use and the County should be enjoined from any further interference with that use.

B. REGULATION 15.35 IS UNCONSTITUTIONAL ON ITS FACE AND CANNOT PREVENT MS. MAY FROM RENTING HER HOUSE FOR A PERIOD OF LESS THAN 30 DAYS.

1. Regulation 15.35 Violates The Due Process Clause Of The United States and Georgia Constitutions.

Regulation 15.35 violates the due process clause of the state and federal constitutions as an invalid exercise of the police power. In order for an ordinance to be a valid exercise of the County's police power the ordinance must be "substantially related" to the public health, safety, or general welfare and must "rationally" further a legitimate state purpose. "So long as an ordinance realistically serves a legitimate public purpose, and it employs means that are

²⁹ Again, Plaintiff raises the vagueness issue only as a precaution. There should be no need for the Court to address this issue because the Zoning Ordinance, when read as a whole, clearly did not prohibit short-term rentals of single-family dwellings prior to the passage of Regulation 15.35.

³⁰ Testimony of Christine May; Exhibit 13.

reasonably necessary to achieve that purpose without unduly oppressing the individuals regulated, the ordinance must survive a due process challenge.” *City of Lilburn v. Sanchez*, 268 Ga. 520, 491 S.E.2d 353 (1997). While the rational basis standard does not require a local government to adopt the *best*, or even *the least intrusive*, means of achieving its objective, the means adopted by an ordinance must “be reasonable in relation to the goal they seek to achieve.” *Id.* Ms. May has shown through her damages calculations and her testimony at trial that the County’s deprivation of her right to rent her house for less than 30 days is a significant financial detriment to her. The deprivation goes beyond the decrease in value of her land that Ms. May demonstrated at trial.³¹ Ms. May has been deprived of her right to use her land as she sees fit. “In construing...an ordinance, we consider the general rule that the owner of land in fee has the right to use the property for any lawful purpose.” *Henry v. Cherokee County*, 290 Ga. App. 355, 356, 659 S.E.2d 393, 395 (2008). Regulation 15.35 places such unreasonable and impermissible limitations on this right that it creates a significant deprivation.

While the rational basis standard is the lowest level of review, that does not equate to the absence of any standard. There must be a plausible or arguable reason supporting the ordinance in order for it to withstand even this low level of scrutiny. Here, the County has testified that it had no basis, and had not taken the steps that would be necessary for establishing a basis, for forming a rational belief that the prohibition of rentals of less than 30 days in selected zoning districts would further any legitimate interest the County might have had in controlling noise, traffic or other perceived problems. In fact, Chuck Jarrell could point to no violation by renters of any noise, trash, animal or other ordinance designed to protect the public safety and welfare. Further, he acknowledged that his office has received more complaints involving long-term

³¹ Exhibit 45.

rentals than it did about short-term rentals prior to 15.35.³² Mr. Jarrell was unable to demonstrate in his trial testimony that the County had any rational basis for determining that short-term renters were any more likely than long-term renters, or guests of owners, or owners and their families, to engage in behavior that would warrant the imposition of the County's police power to prohibit persons from renting second homes for less than 30 days.

There is typically a presumption in favor of the constitutionality of an ordinance; but the presumption is rebuttable. If a plaintiff demonstrates that she has suffered a significant detriment and that the ordinance is insubstantially related to the public interest, the governing authority is then required to come forward with evidence to demonstrate that the zoning ordinance is reasonably related to the public interest. *DeKalb County v. Dobson*, 267 Ga. 624, 626, 482 S.E.2d 239, 626 (1997). The trial court should then apply a balancing test to determine whether the harm to the individual is outweighed by the public benefit expected from the ordinance. *Dover v. City of Jackson*, 246 Ga. App. 524, 529, 541 S.E.2d 92, 94 (2000). Ms. May has shown that she has suffered a significant financial detriment and even criminal prosecution as a result of the passage of Regulation 15.35, but the County has provided no evidence that there is a reasonable relation between a prohibition of rentals of less than 30 days and any articulated and legitimate public interest. For these reasons, Regulation 15.35 and the County's subsequent designation of zoning districts contemplated by 15.35 constitute an unauthorized exercise of the County's police power and must be held unconstitutional on grounds of substantive due process.

³² Mr. Jarrell testified that there are currently no structures in Morgan County at the moment that would qualify for receiving a conditional use permit for short-term rentals other than homes located in agricultural zoning districts. He further stated that no one had even applied for a conditional use permit for short-term rentals since the passage of 15.35.

2. Regulation 15.35 Violates The Equal Protection Clause Of The United States and Georgia Constitutions.

Regulation 15.35 is invalid on its face for the further reason that the distinctions it draws between owners and renters, between renters and guests, and between those renting for 30 days or longer and those who wish to rent for less than 30 days, bear no reasonable relationship to any articulated or conceivable purpose of the ordinance.

“The Georgia and U.S. Constitutions require government to treat similarly situated individuals in a similar manner.” *City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896 (1996). Where there is no fundamental right nor a suspect class involved, the classifications drawn by an ordinance can survive a constitutional inquiry only “when the classification is based on rational distinctions and bears a direct and real relation to the legitimate object or purpose of the legislation.” *Love v. State*, 271 Ga. 398, 517 S.E.2d 53 (1999). A classification in a zoning ordinance “is arbitrary and offends the equal protection clauses of the State and Federal Constitutions unless it has some fair and substantial relation to the object of the legislation and furnishes a legitimate ground of differentiation.” *Bailey Investment Company v. Augusta-Richmond County Board of Zoning Appeals*, 256 Ga. 186, 188, 345 S.E.2d 596, 596 (1986). An ordinance must also be found unconstitutional if “the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision maker.” *City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896 (1996). Section 15.35 fails each component of this test.

It is difficult to state whether the distinctions among citizens created by Regulation 15.35 bear a fair and substantial relationship to the object of the legislation because the object of the ordinance is unclear. Based upon the trial testimony of Chuck Jarrell and Christine May, the only clear object of the prohibition of rentals of less than 30 days in Regulation 15.35 seems to

have been to quell the incessant complaints of a small number of individual citizens that rentals were occurring next door or in close proximity to the complainer's home. But that is not enough to justify the irrational distinctions drawn by 15.35.

Mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for [a legislative classification]. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 448, 105 S.Ct.3249, 3259 (1985).

Even if there were a clear and legitimate public objective to be achieved by Regulation 15.35, that objective would furnish no legal justification for the multiple distinctions 15.35 draws.³³ The County has provided no rational basis for the classification it draws between renters and owners; between renters and guests of a homeowner; between those renting for less than 30 days and those renting for 30 or more days; or between those who own property in LR-1 and those who own property in LR-3. Without that justification, Regulation 15.35 cannot satisfy equal protection requirements.

Because 15.35 fails to survive scrutiny under both the Due Process and Equal Protections clauses of the 14th Amendment, it should be declared unconstitutional on its face.

³³ The one ground that can be surmised from the arguments the County has put forth for the distinctions they have drawn is that the classifications will somehow improve the residential quality of the Lakeshore zoning district. But the County has admitted that it had no basis for forming a rational belief that the prohibition of rentals of lake houses for less than 30 days would in any way further any articulated public purpose. In fact, Mr. Jarrell acknowledged that the complaints his office received were almost entirely related to the rental itself rather than to any legitimate problems caused by short-term renters that could not as easily have been caused by owners, long-term renters or guests of owners.

C. THERE ARE NO APPLICABLE PROCEDURAL BARS TO PLAINTIFF'S SUIT.

Defendant contends in its trial brief that Plaintiff failed to comply with several alleged procedural requirements imposed by either the Zoning Ordinance or Georgia case law, and that her claims are barred by such failures. That contention is patently without merit.

First, it is axiomatic that the Supremacy Clause of the United States Constitution prevents the County from interposing any procedural bars to Plaintiff's constitutional claims. Article VI, Clause 2 of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In *Ehlers v. City of Decatur*, 614 F.2d 54 (1984), the U.S. Court of Appeals for the 11th Circuit drew upon the strictures of the Supremacy Clause in invalidating an attempt by a local government to defeat a § 1983 claim through procedural impediments not contained in the federal statute.

Federal courts may not require exhaustion of state administrative or judicial remedies in a § 1983 action for damages for deprivation of a constitutional right. States may not statutorily burden access to the federal courts with requirements federal courts themselves are prohibited from imposing. U.S. Const. art. VI, cl. 2 (Supremacy Clause).

Ehlers v. City of Decatur, 614 F.2d 54 (1984) (internal citations omitted). Under *Ehlers*, the County is unable to place procedural barriers in the way of Ms. May's right to pursue her § 1983 constitutional claims. Nor can her facial challenge to the validity of Regulation 15.35 or to the pre-15.35 Zoning Ordinance (to the extent the County contends that the pre-15.35 Ordinance

prohibited the rental of single family homes in Morgan County) be subject to any local or state law procedural requirements.

Defendant first claims that Ms. May was required to appeal the enactment of 15.35 to the Superior Court of Morgan County within 30 days of its enactment. The authority cited above plainly refutes such a contention with respect to Plaintiff's facial challenge to the constitutionality of Regulation 15.35. State and local governments may not interpose such impediments upon facial constitutional challenges. While a different rule might apply to as-applied constitutional challenges,³⁴ Plaintiff does not make such a challenge to either the pre-15.35 or post-15.35 Zoning Ordinance.³⁵

Moreover, Plaintiff's claim that the County has unconstitutionally deprived her of her right to rent her property as a lawful non-conforming use does not constitute an as-applied challenge to a particular ordinance. Rather, it rests upon the fact that the prohibition on short-term rentals contained in Regulation 15.35 simply does not apply to Plaintiff in light of her valid pre-existing use. In connection with that issue, Plaintiff seeks a declaration from the Court that her valid pre-existing use removes her from the scope of the prohibitions contained in 15.35, not that the Regulation is unconstitutional.

Defendant also contends that Plaintiff failed to raise her objection to a zoning decision, including constitutional objections, with the Morgan County Board of Commissioners before proceeding to file this suit. For the reasons discussed above, this purported requirement cannot be used to shield the County from facial constitutional challenges to the County's Ordinance. Moreover, even if any ante-litem notice were applicable to any of Plaintiff's claims, Plaintiff

³⁴ See *Fortson v. Tucker*, 307 Ga. App. 694, 697, 705 S.E. 2d at 895 (2011); *Village Centers, Inc. v. DeKalb County*, 248 Ga. 177, 178, 281 S.E.2d 522 (1981).

³⁵ The alleged 30-day appeal requirement is irrelevant to Plaintiff's claims for the further reason that Plaintiff was never notified of any appealable "zoning decision." In *Wilson v. City of Snellville*, 256 Ga. 734, 735, 352 S.E.2d 759, 760 (1987), the Supreme Court of Georgia stated the plaintiff's challenge of a zoning classification was time-barred when "the notice to appellants of the zoning action was adequate. . . ."

provided the County with fair notice that she might assert a constitutional challenge. When she was issued the criminal citation in 2010, Plaintiff informed Mr. Pritchett that she was entitled to continue a valid nonconforming use. Additionally, in her letter to Danielle Peck dated July 22, 2010, Plaintiff informed Ms. Peck of the challenges she intended to bring against the County's refusal to recognize her rentals as a nonconforming use.³⁶ To the extent Plaintiff was required to provide notice of her intent to pursue any as-applied constitutional challenge, the record demonstrates that Plaintiff provided the required notice.

Defendant also contends that Plaintiff should have requested a re-zoning of her property before filing suit. Even if that were a valid requirement notwithstanding Plaintiff's constitutional challenges, Plaintiff testified that she attempted to file for re-zoning but was told by the County office of planning and zoning that it would be "a waste of \$500" and would be summarily denied. A party is not required to exhaust remedies at law before challenging the validity of a zoning decision if doing so would be a futile exercise. *Mayor and Aldermen of City of Savannah v. Savannah Cigarette and Amusement Services, Inc.*, 267 Ga. 173, 174, 476 S.E.2d 581, 582-583 (1996); *Powell v. City of Snellville*, 266 Ga. 315, 316, 467 S.E.2d 540 (1996). Even as the County claims that Ms. May should have applied for a rezoning of her property or a conditional use permit, it has acknowledged the utter futility of that effort because it would require impermissible spot zoning of Plaintiff's property, which is not contiguous to a zoning district in which owners may apply for a conditional use permit for short-term rentals.

For each of the reasons discussed above, Defendant's procedural defenses are invalid under the circumstances of this case and provide no basis for striking any of Plaintiff's claims.

³⁶ Exhibit 44.

D. PLAINTIFF IS ENTITLED TO DAMAGES FOR THE HARM SHE HAS SUFFERED.

Plaintiff is entitled to recover damages under 42 U.S.C. § 1983 arising from the County's deprivation of Ms. May's due process and equal protection rights. "A plaintiff who succeeds in a 1983 claim will be entitled to compensatory damages." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986). *Carey v. Phipus*, 435 U.S. 247, 254–55, 98 S.Ct. 1042, 1047–48, 55 L.Ed.2d 252 (1978)(basic purpose of damages award under Section 1983 should be to compensate persons for injuries caused by deprivation of constitutional rights and thus such awards should be governed by principal of compensation). These compensable damages may include recovery for "mental and emotional distress," *Carey v. Phipus*, 435 U.S. 247, 262 (1978), as well as for pain and suffering. *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir.), cert. denied, 515 U.S. 1131 (1995).

Ms. May demonstrated at trial that she has suffered \$11,274.14 in lost income since August of 2011, when the Court issued a criminal citation against her and she ceased renting her home for periods of less than 30 days.³⁷ Further, as was clear from the testimony of both Ms. May and Mr. Pritchett, Ms. May suffered and continues to suffer genuine emotional distress arising from the threat and eventual prosecution of criminal action against her for her lawful use of her property, and from her inability to earn reasonably anticipated income from the rental of her house. This emotional distress has been compounded by the County's continued criminal prosecution of Ms. May's lawful actions and by her need to bring this civil suit to declare her acts legal.

³⁷ Exhibit 47.

The standard for determining entitlement to emotional distress damages under § 1983 is different from the damages that attach to the state law tort of intentional infliction of emotional distress. In *Chatman v. Slagle*, 107 F.3d 380 (6th Cir. 1997), the Sixth Circuit agreed with the Third Circuit in upholding an award for mental suffering in a § 1983 case without regard to any requirement of “severe” physical pain that may be found in state tort law.

We disagree that a section 1983 case in which damages for emotional distress are claimed must be analogized to a claim for intentional infliction of emotional distress. ... Moreover, even if we were to agree that this case most closely resembles an intentional infliction of emotional distress case, we disagree that the methods of proving the elements of such a case must be translated directly to this context....

107 F.3d 380. Thus, Plaintiff is not required to have proved any particular level of severity of emotional distress in order to recover emotional distress damages under § 1983. She must only prove that she has suffered emotional distress as a result of the County’s improper actions, and she has done that.³⁸

Plaintiff is also entitled to recover her attorney’s fees and expenses of litigation under 42 U.S.C. § 1988(b), which authorizes such a recovery for parties who prevail on a § 1983 claim. The courts have held that § 1988(b) “is remedial in nature and should be broadly interpreted to facilitate private enforcement and allow counsel to explore and develop every aspect of the case.” *Williams v. City of Fairburn*, 702 F.2d 973 (11th Cir. 1983). As Plaintiff demonstrated at trial through the time records of her previous attorneys and as she demonstrates now through the affidavit of her current attorney, she has incurred attorney’s fees and litigation expenses in the amount of \$50,618.47 through September 20, 2012. The inclusion of the hours

³⁸ Trial testimony of Christine May and Joseph Pritchett.

worked by Ms. May's previous attorneys in the total damages award is proper because those hours were necessitated by the County's wrongful acts. *Jackson v. Austin*, 267 F.Supp.2d 1059 (D. Kansas 2003) (holding that the hours related to former counsel's withdrawal and file review with new counsel could be included in attorney fees award for prevailing plaintiff in § 1983 claim, where such time was reasonable and helped new counsel to prepare more efficiently for trial scheduled less than two months after former counsel's withdrawal). In any event, any inefficiencies that might have resulted from the substitution of counsel prior to trial is more than compensated for by the voluntary reduction of \$11,000.00 in fees by the original and substituted counsel of record.³⁹

In order for Ms. May to be made financially whole from the County's deprivation of her constitutional rights, she should recover a total of **\$61,892.61** in damages for lost income, attorneys' fees and litigation expenses. And in order to properly compensate Ms. May for the emotional distress to which she was subjected by the County's wrongful conduct, the Court should award additional damages in an amount to be determined by the enlightened conscience of the Court, but not less than \$25,000.00.

IV. CONCLUSION.

A government should not be permitted to do to its citizens what Morgan County has done to Christine May. Since building her dream home in this County, she has endured flagrant violations of her constitutional rights, suffered significant losses of income by being unable to rent her home, was surprised by unannounced and unwarranted visits by County law enforcement personnel using undisclosed concealed cameras, and was forced to incur very substantial attorneys' fees simply to vindicate her constitutional rights and rid herself of the

³⁹ Exhibit 48; Affidavit of C. Wilson DuBose.

County's three-year campaign of harassment and bogus criminal prosecution. No law-abiding citizen should have to endure such treatment at the hands of its own government.

In order to redress the wrongs Morgan County has perpetrated upon Christine May, the Court should provide the following relief:

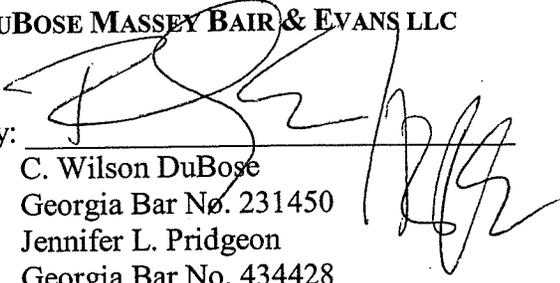
- a. For a declaratory judgment that the rental of Plaintiff's property located at 1061 Grayson Pointe, Buckhead, Georgia for periods of less than 30 days is a lawful non-conforming use under Chapter 14.3 of the Morgan County Zoning Ordinance, and that the provisions of Regulation 15.35 are inapplicable to Plaintiff's property for as long as the current lawful non-conforming use is continued upon the property.
- b. For a permanent injunction prohibiting Morgan County from enforcing any limitations, whether existing or hereafter enacted, upon the right of the owner of 1361 Grayson Pointe, Buckhead, Georgia to rent the property for use as a single family dwelling, including rentals for less than 30 days, for as long as the current lawful non-conforming use is continued upon the property.
- c. For a declaration that Regulation 15.35 and the resulting zoning classifications contemplated by that regulation are unconstitutional on their face under the due process and equal protection clauses of the Constitutions of the United States and the State of Georgia.
- d. For a permanent injunction prohibiting Morgan County from enforcing Regulation 15.35 in its current form.
- e. For an award of compensatory damages, including attorneys' fees, in the amount of \$61,892.61 plus an additional amount, to be determined by the enlightened

III. CONCLUSION

Based on the evidence and arguments produced at trial and the arguments contained in Plaintiff's Post-Trial Brief and Post-Trial Reply Brief, the Court should enter a judgment in Plaintiff's favor.

This 22nd day of October, 2012.

DUBOSE MASSEY BAIR & EVANS LLC

By: 

C. Wilson DuBose

Georgia Bar No. 231450

Jennifer L. Pridgeon

Georgia Bar No. 434428

(signed by Brad J. Evans with express permission)

285 North Main Street
P.O. Box 192
Madison, Georgia 30650
706-342-7900

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

CHRISTINE B. MAY,)
)
 Plaintiff,)
)
 v.)
)
 MORGAN COUNTY, GEORGIA,)
)
 Defendant.)
_____)

CIVIL ACTION FILE NO. 2012CA145

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing **POST-TRIAL REPLY BRIEF OF PLAINTIFF CHRISTINE B. MAY** by electronic mail upon:

Christian G. Henry
Christian G. Henry LLC
204 Thomason Street
Suite B
Madison, Georgia 30650

This 22nd day of October, 2012.

DuBOSE MASSEY BAIR & EVANS LLC

By: _____

Jennifer L. Pridgeon
Georgia Bar No. 434428
285 N. Main Street
P.O. Box 192
Madison, Georgia 30650
(signed by Brad J. Evans with express permission)





N

SABLE

MAY

SANDY
BEACH

DOCK

Goog

Image U.S. Geological Survey

Imagery Date: Mar 31, 2008

33°31'07.09" N 83°16'56.79" W elev 0 ft

Eye alt 1208 ft



**Garder
side
of
the
Point**



**Beach
side
of
the
Point**



3/4 acre Park on a Private Peninsula with 800 feet of shore line





THE GREAT ROOM

**Dining Table
Seats 10**

**Island Counter
Seats 4**





Gourmet Kitchen fully equipped

Textured hot water, common household appliances



2nd Floor Bedrooms with Queen Beds

