UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN T. AND ESTHER N. DODERO; et al

Plaintiffs,

v. CASE NO.: 3:20-cv-05358-RV-HTC

WALTON COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Defendant.

WALTON COUNTY'S MOTION TO DISMISS AMENDED COMPLAINT

Defendant, Walton County ("County"), pursuant to Rule 12(b)(6), Fed. R. Civ. P., hereby files it Motion to Dismiss Plaintiffs' Amended Complaint (ECF No.37), and states:

1. Plaintiffs have filed their Amended Complaint (ECF No. 37) asserting six claims arising from the County's enactment of its Ordinance No. 20-09 (the "Ordinance").

2. The "General Allegations" which underpin all of Plaintiffs' claims are set forth in paragraphs 18 through 27. Plaintiffs' claims are as follows:

- Count I, set forth at paragraphs 1 through 36, alleges a violation of the Fifth Amendment Takings clause. It requests that the Court declare the Ordinance unconstitutional and invalid, and award "just compensation" for an alleged temporary taking of Plaintiffs' private properties, along with an award of attorney's fees and costs.
- Count II, set forth at paragraphs 1 through 27, and 37 through 43, seeks declaratory judgment action based upon preemption by Executive Orders 20-91 and 20-92. It requests that the Court declare the Ordinance invalid.
- Count III, set forth at paragraphs 1 through 27, and 44 through 46, alleges a violation of Florida's Constitutional right to privacy. It requests that the Court declare the Ordinance unconstitutional under Florida law.
- Count IV, set forth at paragraphs 1 through 27, and 47 through 58, alleges a violation of procedural and substantive due process rights. It requests that the Court declare the Ordinance unconstitutional and to award Plaintiffs' attorney's fees and costs.

- Count V, set forth at paragraphs 1 through 27 and 59 through 70, alleges an unreasonable seizure under the Fourth Amendment. It requests that the Court declare the Ordinance unconstitutional, and to award Plaintiffs' attorney's fees and costs.
- Count VI, set forth at paragraphs 1 through 27, and 71 through 76, is a declaratory judgment action based upon alleged lack of statutory authority. It requests that the Court declare the Ordinance exceeds the County's legislative authority.

3. Attached to the Amended Complaint in support of all counts are five exhibits, as follows:

- Composite Exhibit 1- deeds to Plaintiffs' respective properties (¶¶ 1 through 14).
- Exhibit 2- County Ordinance 2020-08 (¶18).
- Exhibit 3- Governor's Executive Order 20-91 (¶¶20 and 21).
- Exhibit 4- Governor's Executive Order 20-92 (¶22).
- Exhibit 5- County Ordinance 2020-09 (¶23). [The challenged Ordinance].

4. On its face, the Ordinance does not seek to regulate any activity, essential or otherwise, nor is it specifically directed to Plaintiffs' properties;

rather, it prohibits "any person to enter or remain on the beaches within Walton County" (Ordinance 20-09).[1]

5. The Ordinance, which was expressly limited in time until April 30, 2020 (unless extended by the board of county commissioners), restricted the occupation of only that portion of Plaintiffs' properties consisting of beach, as defined by Chapter 22, Walton County Waterways and Beach Activities Ordinance. ("*Beach* means the soft sandy portion of land lying seaward of the seawall or the line of permanent dune vegetation.")[2]

6. Violation of the Ordinance was punishable as a second-degree misdemeanor as provided in Section 252.50, Florida Statutes.

7. In each count, Plaintiffs seek a declaration that the Ordinance is invalid. Plaintiffs also seek just compensation on their takings claim, as well as attorney's fees on their federal claims.

MEMORANDUM

[1] The Governor declared a Public Health Emergency for the state in Executive Order 20-51. The Ordinance was enacted pursuant to the County's emergency powers under §252.38 and 252.46, F.S., of the Emergency Management Act and with the express authority granted by Governor's Executive Order 20-68.

[2] The County adopted Resolution 2020-35, dated April 28, 2020, which opened the beaches with limited restrictions, effective May 1, 2020 at 12:10 a.m. On or about April 28, 2020, the County adopted Resolution 2020-38, which lifted restrictions on normal beach activities.

Motion to Dismiss Standard- Rule 12(b)(6)

Rule 12(b)(6) allows a defendant to challenge a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Court must accept all factual allegations as true and construe them in a light most favorable to the plaintiff. See *Christopher v. Harbury*, 536 U.S. 403 (2002); see also *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). Pursuant to the pleading requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure, a Plaintiff is required to make a "'showing,' rather than a blanket assertion, of entitlement to relief." See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007). A plaintiff must provide more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do…" Id. Dismissal is appropriate "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (quoting *Twombly*, 550 U.S. at 570).

While the standard of construction with respect to reviewing a motion to dismiss is liberal, it does not impose a duty to rewrite the Complaint upon the Court, or to assume facts not contained within the Complaint. See *Peterson v. Atlanta Housing Auth.*, 998 F.2d 904, 912 n.17 (11th Cir.1993) (noting that, even if the record demonstrates a factual basis exists, the

plaintiff is still required to plead those facts in order to survive a motion to dismiss.) When reviewing a motion to dismiss, a Court need only accept well-pled facts and reasonable inferences drawn from those facts. See *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003). Unsupported conclusions of law or even of mixed fact and law will not survive such a motion. Id.

At the 12(b)(6) stage, while the Court primarily examines the allegations of a Complaint, it is not always limited to its four corners. *Halmos v. Bombardier Aerospace Corp.*, 404 Fed. Appx. 376, 377 (11th Cir. 2010), citing *Long v. Slaton*, 508 F.3d 576, 578 n. 3 (11th Cir. 2007). "[A] district court may take judicial notice of matters of public record without converting a Rule 12(b) (6) motion into a Rule 56 motion." *Halmos* at 377, citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999) See also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 2509, 168 L.Ed.2d 179 (2007) ('courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.')" *Id*. at 377. See also, *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006).

"In determining whether to grant a Rule 12(b)(6) motion, the Court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Watson v. Bally Mfg. Corp.,* 844 F.Supp. 1533, 1535 n. 1 (S.D.Fla.1993), *aff'd,* 84 F.3d 438 (11th Cir.1996), *quoting* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 299 (1990). Jackson v. BellSouth Telecommunications, Inc., 181 F. Supp. 2d 1345, 1353 (S.D. Fla. 2001), aff'd sub nom. Jackson v. BellSouth Telecommunications, 372 F.3d 1250 (11th Cir. 2004)

The Court may consider attachments in ruling on a motion to dismiss. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 2509, 168 L.Ed.2d 179 (2007); *Brown v. Green Tree Servicing LLC*, 820 F.3d 371-373. If an inconsistency exists between the attachment and the pleaded allegations, the attachment controls. See *Comparelli v. Republica Bolivariana De Venezuela,* 891 F.3d 1311, 1316 n.1 (11th Cir 2018); *Williamson v. Curran*, 714 F.3d 432, 435-36 (7th Cir. 2013).

Declaratory Relief

> The Declaratory Judgment Act confers on federal courts a "unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton*, 515 U.S. at 286, 115 S.Ct. 2137. "The statute's textual commitment to discretion, and the breadth

of leeway [the Supreme Court] has always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface." Id. at 286-87, 115 S.Ct. 2137.

The Declaratory Judgment Act has been characterized as an "enabling Act," giving the district courts discretion to grant a new form of relief. Id. at 287-88, 115 S.Ct. 2137. The Act, however, confers no "absolute right upon the litigant" and imposes no duty on the district courts. Id.

Thus – even when a civil action satisfies federal subject matter jurisdictional prerequisites – a district court still maintains discretion about "whether and when to entertain an action under the Declaratory Judgment Act." Id. at 282, 115 S.Ct. 2137; see also *Brillhart v. Excess Ins. Co. of Amer.*, 316 U.S. 491, 494, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942) ("Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction."). "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288, 115 S.Ct. 2137. And we must be mindful that the "facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within [the district court's] grasp." *See id.* at 289, 115 S.Ct. 2137.

Stevens v. Osuna, 877 F.3d 1293, 1311–12 (11th Cir. 2017)

ARGUMENT

Declaratory Relief

All six counts of the Amended Complaint seek declaratory relief concerning Ordinance 2020-09, which temporarily closed the beaches in Walton County. The County submits that any need for declaratory relief has

been rendered moot by the adoption of Resolution 2020-35, Resolution 2020-38, and Resolution 2020-39, which effectively reopened the beaches as of May 1, 2020.

In the context of declaratory judgment actions, the inquiry into mootness views whether the requested relief will actually alter the future conduct of the parties. See, *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). Regardless, and additionally, given the adoption of aforementioned Resolutions there is no longer any justification for declaratory relief. See, *Stevens v. Osuna*, 877 F.3d 1311–12.

The Claims Under the U.S. Constitution

The Fifth Amendment Takings Claim

Plaintiff's Fifth Amendment Takings Claim is set forth at Count I. Plaintiffs allege at paragraph 24 that the purpose of the challenged Ordinance 2020-09 "is to close all beaches, whether public or private, and prohibit anyone from being on the beaches, including owners on their own private property." The allegations concerning the purported physical intrusion of subject properties are set forth at paragraphs 25 through 27, which assert

that the Sheriff[3], the South Walton Fire District[4], and County authorities are "patrolling," "entering," and "occupying" the properties to enforce the Ordinance. Plaintiffs further contend that by engaging in these enforcement activities these separate entities have "physically occupied" their properties (¶30), and have prevented Plaintiffs from using their own back yards or otherwise possessing and physically occupying their own private properties (¶¶31 and 32). In paragraphs 34 and 35, Plaintiffs conclusorily characterize these activities as the "physical appropriation" of their properties.[5]

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[3] The Walton County Sheriff is a Constitutional Officer, separate and apart from the Walton County Board of County Commissioners, pursuant to Article VIII, Section 1(d) of the Florida Constitution.

[4] The South Walton Fire District is an independent special fire control district pursuant to Chapter 191, Florida Statutes, chartered by virtue of House Bill No. 1919 Chapter 2000-491 (signed by the Governor of Florida on June 14, 2000.) Chapter 2000-491 was amended on April 25, 2007 with House Bill 1607 Chapter 2007-316.

[5] It is important to understand what this claim is not. Plaintiffs' allegations do not support a claim for direct physical appropriation. (See, *United States v. Pewee Coal Co*., 341 U.S. 114 (1951); *United States v. General Motors Corp.,* 323 U.S. 373 (1945); *United States v. Petty Motor Co*., 327 U.S. 372 (1946). Nor do Plaintiffs assert a claim for land use exaction. (See, *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994). Likewise, Plaintiffs have not pled a regulatory taking that completely deprived them of all economically beneficial use of their properties. (See, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Further, Plaintiff's do not assert a *Penn-Central* regulatory takings claim, which applies a multi-factor approach including the regulation's economic impact on the plaintiff, the extent to which it interferes with the distinct investment-backed expectation, and the character of the government action. (See, *Penn-Central Transp. Co., v. New York*, 438 U.S. 104 (1978).

The Takings Clause of the Fifth Amendment provides that private property may not "be taken for public use, without just compensation." The Takings Clause does not prohibit a government from taking private property for public use; "it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005), quoting *First English Evangelical Lutheran Church of Glendale, v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The Takings Clause "presupposes that the government has acted in pursuit of a valid public purpose." *Lingle,* 544 U.S. at 543.[6] When determining whether a taking has occurred, the focus is "directly upon the severity of the burden that government imposes upon private property rights." *Id.* at 539 If a government action does not meet the public use requirement, or the action violates due process because it is arbitrary, the Takings Clause is not implicated because "no amount of compensation can authorize such action." *Id.* at 543

[6] By alleging that the Ordinance was preempted (Count II) or enacted without legal authority (Count VI), Plaintiffs undermine their Fifth Amendment claim which presupposes a legitimate public purpose. *Lingle*, 544 U.S. 2883-84, 2087 (The "Substantially advances" formula is not a valid takings test.)

In the context of an alleged physical invasion of private property, the Supreme Court has recognized a *per se* taking only if a government imposes a "**permanent** physical invasion" (emphasis supplied). *Lingle*, 544 U.S. at 538, *Loretto v. Teleprompter Manhattan ATV Corp.*, 458 U.S. 419, 432 (1982) (involving an as-applied taking by physical invasion).

Plaintiffs rely on *Loretto* for their argument that they have suffered a Fifth Amendment Taking. Noting a distinction between permanent and temporary physical intrusions, *Loretto* made clear that not every physical invasion results in a taking. *Loretto*, 458 U.S. at 435 n. 12.

On its face, the Ordinance does not interfere with Plaintiffs' right to exclude others from their property (*Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 949 (11th Cir. 2018), citing Loretto, 458 U.S. at 435), nor does it invite the public to use or pass to and fro over the properties. (*Id*., citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) [taking of permanent easement to pass over properties.]) The complained-of occupation and invasion of the properties consists of the enforcement activities of the various enforcing agencies. While "even a temporary or intermittent invasion of property ***can*** trigger physical takings liability" (*Chmielewski* at 950, citing *Ark. Game & Fish Comm'n*, 568 U.S. 23, 32 (2012) (emphasis supplied) [governmental recurrent floodings of temporary

duration are not categorially exempt from Takings liability], it does not automatically do so. Enforcing authorities would be authorized by Florida law to enter the private property for enforcement of the Ordinance. (See, AGO 2002-38 (Fla. A.G.).)

At this stage the Court must consider what Plaintiffs have pled and whether their allegations plausibly plead a Fifth Amendment Taking. Plaintiffs' conclusory assertion of a "physical occupation" (¶¶ 25 -27, 30) and "physical appropriation" (¶¶34-35), are contradicted and undermined by the very allegations of and exhibits to their pleading. Paragraphs 25- 27 and 31-32, make clear that the complained-of physical invasion, occupation, and appropriation was merely intermittent and incidental to enforcement of the Ordinance, which was enacted to promote public health and safety.

Here even if the Ordinance is construed to have denied Plaintiffs the temporary use of the entirety of their properties, Exhibits 2 through 5 to the Amended Complaint show that the County's adoption of the Ordinance was pursuant to its emergency powers under Chapter 252, Florida Statutes "due to the public health emergency arising from the COVID-19 pandemic."

Even a regulation that temporarily denies an owner all use of their property does not necessarily constitute a taking. "[T]he county might avoid the conclusion that a taking had occurred by establishing that the denial of

all use was insulated as a part of the State's authority to enact safety regulations." *Tahoe-Sierra Preservation Counsel, Inc. v. Tahoe Planning Agency*, 122 S.Ct. 1465, 1482 (2002), quoting First English, 482 U.S. at 313.

Significant in the context of this case is *Loretto's* cite to *United States v. Central Eureka Mining, Co*., 357 U.S. 155 (1958). In *Central Eureka Mining*, the Court found that no taking had occurred "where the Government had issued a wartime order requiring non-essential gold mines to cease operation for the purpose of conserving equipment and manpower for use in mines more essential to the war effort" *Id*. at 181(… on the grounds that the Government did not occupy, use or in any manner take physical possession of the gold mines or equipment connected with them.") *Id.* at 165-66. The Court concluded that "the temporary though severe restriction on *use* of the mines was justified by the exigency of war." *Loretto*, 458 U.S. at 431-32.

The actions taken by the County are akin to the circumstances discussed in *Central Eureka Mining, Co*. and thus do not constitute a taking. A global pandemic would seem akin to a war in that respect. As in *Central Eureka Mining, Co*., the actions of Walton County in restricting the use of all beaches in the County cannot be seen as a taking within this context. See also, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) [dealing with statute requiring vaccination against smallpox – recognizing

authority of states to establish reasonable legislative enactments to protect the public health and safety. Id. at 25. "There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." Id. at 26]

The Constitution contains no "reference to regulations that prohibit a property owner from making certain uses of [their] property." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302,321 (2002). Government regulations that ban certain private uses of a portion of an owner's property, (See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 498 (1987), or that forbid the private use of certain airspace, (See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)), do not constitute a categorical taking. *Id*. at 322-23. Cases dealing with "regulations prohibiting private uses" are not controlled by precedents evaluating physical takings. *Id*. at 323

If a regulation goes "too far" it will be seen as a taking. *Id*. 326, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Rather than adopting per se rules, courts view multiple factors in analyzing partial regulatory takings claims, and in such cases are required to focus on the parcel as a whole. *Id*. 326-27.

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated the 'landmark site.'"
> Id. at 327, quoting *Penn Central*, 438 U.S. at 130-131.

"'Where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand" of the bundle is not a taking.' " *Id*. at 327, quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

At most,the Amended Complaint alleges that the Ordinance interfered with their ability to use the beach portion of their property for 29 days and that enforcing agencies encroached on their private beach during that time. The Ordinance did not authorize third parties to occupy private property, nor otherwise appropriate the property for public use.

As pleaded, and considering the exhibits to the complaint, Plaintiffs have not plausibly pleaded that the County's enactment of the Ordinance constituted an actionable takings claim under the Fifth Amendment. This count should be dismissed.

The Fourteenth Amendment Claims

In Count IV, Plaintiffs have asserted claims under both the Procedural and Substantive Due Process clauses of the Fourteenth Amendment.

Procedural Due Process

To prove a Procedural Due Process claim, a plaintiff must establish: 1) the deprivation of a liberty or property interest protected by the constitution; 2) by state action; and, 3) a constitutionally inadequate process. *Doe v. Florida Bar*, 630 F.3d 1336, 1342 (11th Cir. 2011).

When a government acts legislatively, property owners are typically not entitled to any additional procedural due process, because when a legislature enacts a law affecting a general class of persons, those affected have all received procedural due process through the legislative process. However, when a government acts in an adjudicative fashion, procedural due process is implicated. *75 Acres, LLC v. Miami-Dade County*, 338 F.3d 1288, 1294 (11th Cir. 2003).

The Eleventh Circuit has acknowledged and has regularly applied this principal in procedural due process cases. *Id*. The distinction hinges on whether the government action is determined to be legislative or adjudicative in nature. Id.

In *75 Acres*, the Court acknowledged that this circuit had not articulated hard and fast rules for distinguishing between legislative and adjudicative actions, and noted that the government's labeling is not determinative. *Id*. at 1296. In reaching its conclusion that the action at issue (the imposition of a

building moratorium) was legislative in nature, the Court referenced the Second Circuit's focus on "the function performed by the decisionmaker". *Id*. citing *Thomas v. City of New York*, 143 F.3d 31, 36 n.7 (2d Cir. 1998); and the Seventh Circuit's focus on the generality and prospectivity of government action". *Id*. citing, *LC&S, Inc. v. Warren County Area Plan Comm'n*, 244 F.3d 601, 604 (7th Cir. 2001).

In this case, the allegations of the Complaint establish that the challenged Ordinance was enacted by the County's legislative body through its legislative process upon exercise of its legislative judgment, and not in an adjudicative capacity. Under these circumstances, procedural due process is not implicated.

Substantive Due Process

"The substantive component of the Due Process Clause protects those rights that are fundamental, that is, rights that are implicitly in the concept of ordered liberty... [A]reas in which substantive rights are created only by state law... are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created only by the Constitution. As a result, these state law-based rights constitutionally may be rescinded so long as the elements of procedural – not substantive – due process are observed." *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir.

1994) (en banc) (quoting *Palko v. Connecticut*, 302 U.S. 3419, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937)." See also, *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279 (11th Cir. 2014).

These state-created rights include land-use rights. *Lewis v. Brown*, 409 F.3d 1271, 1272 (11th Cir. 2005), citing *Greenbriar Village, L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir. 2003) ("'Property interests are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *Kentner*, 750 F.3d at 1279.

The rights of waterfront owners in Florida are state-created rights, not fundamental rights. See, *Kentner*, 750 F.3d at 1280, citing, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1105, n. 3 & 1111 n. 9 (Fla. 2008).

There is an exception to that general rule when state-created rights are infringed upon by a *legislative* act, in which event the substantive component of the Due Process Clause will provide protection from "arbitrary and irrational" governmental action. *Greenbriar Village, LLC.*, at 1273, citing *McKinney v. Pate*, at 1557 n. 9; *Kentner*, 750 F.3d at 1280, citing *Lewis*, 409 F.3d at 1273.

In *McKinney*, the Eleventh Circuit stablished a test, culled from prior Supreme Court precedents, to help distinguish executive from legislative acts: Executive acts characteristically apply to a limited numbers of persons (and often only one person); executive acts typically arise from the ministerial or administrative activities of members of the executive branch. The most common examples are employment terminations.

Legislative acts, on the other hand, generally apply to larger segments of – if not all of – society; laws and broad-ranging executive regulations are the most common examples. *Greenbriar Village, L.L.C.*, at 1273, citing *McKinney v. Pate*, at 1557 n. 9.

"Substantive due process challenges that do not implicate fundamental rights are reviewed under the 'rational basis' standard." *Kentner*, 750 F.3d at 1280, citing, *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 945 (11th Cir. 2013).

> Under rational basis scrutiny governments 'are not required to convince the courts of the correctness of their legislative judgments.' *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 (1981). 'Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental descisionmaker.' *Id*.
>
> *Kentner*, 750 F.3d at 1281 (2014).

"This standard is 'highly deferential' and we hold legislative acts unconstitutional under a rational basis standard in only the most exceptional of circumstances. *Kentner* citing *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001)."

The Ordinance, which is attached to the Amended Complaint as Exhibit 5, expressly identifies the basis for its enactment, including its reliance on the Governor's Executive Orders and Florida's Emergency Management Act.

Section 1 of Executive Order 20-91 requires certain people to stay at home (subsection A), and provides that "all persons in Florida shall limit their movements and personal interactions outside of their home to only those necessary to obtain or provide essential services or conduct essential activities" (subsection B). Essential services and essential activities are described at Sections 2 and 3. Executive Order 20-92 merely amended Section 4 of Executive Order 20-91 to read, "[t]his Order shall supersede any **conflicting** official action or order issued by local officials in response to COVID-19. (Emphasis supplied).

Unlike Executive Orders 20-91 and 20-92, Executive Order 20-68 specifically addresses beaches and states that the Governor **"support[s]**

beach closures at the discretion of local authorities." (Emphasis supplied).

The Ordinance was predicated on the Governor's Executive Order 20-91 (the "stay at home" order"), the basis for which included the following:

- Positive cases of COVID-19 have continued to rise in other states in close proximity to Florida, resulting in increased risk to counties in northern Florida.
- Executive Order 20-86 required individuals driving into Florida from states with substantial community spread to self-isolate in Florida.
- Persistent interstate travel continues to pose a risk to the entire state of Florida.
- Executive Order 20-83 directed that a public health advisory be issued urging the public to avoid all social or recreational gatherings of 10 or more people and urging people to work remotely.
- That it is necessary and appropriate to take action to ensure that the spread of COVID-19 is slowed, and that residents and visitors in Florida remain safe and secure.

In Executive Order 20-68, the Governor specifically supported and delegated to local authorities the decision to close beaches, pursuant to his emergency powers under §252.36(5)(k), F.S. Importantly, the Governor did not distinguish between privately owned or public beaches in his support of closure by local officials.

Neither Executive Order 20-91 nor 20-92, on its face, superseded the authority granted to the County by Executive Order 20-68, which was expressly extended by Executive Order 20-91 for the duration of Executive Order 20-52 (the COVID-19 Public Health Emergency), i.e. until 60 days from March 9, including any extensions thereof.

While Plaintiffs may not agree with the wisdom or fairness of these rationales, such is not the test under rational basis review. *Kentner*, 750 F.3d at 1281, citing *Fresenius Med. Care Holdings, Inc.*, 704 F.3d at 945.

Substantive Due Process should not be used to do the work of the Fifth Amendment Takings clause or the Fourth Amendment prohibition against unreasonable seizures, because where a particular Amendment furnishes "an explicit textual source of constitutional protection" against a particular type of governmental conduct, then that Amendment rather than the generalized concept of Substantive Due Process must be used to analyze the claims. See, *Stop the Beach Renourishment, Inc. v. Florida*

Department of Environmental Protection, 560 U.S.702, 721 (2010), citing Albright v. Oliver, 510 U.S. 266, 273 (1994); *Graham v. Connor*, 490 U.S. 386, 395 (1989). Here, Plaintiffs have brought claims under both the Fifth Amendment Takings Clause and the Fourth Amendment, alleging an unreasonable seizure of their property, based upon the County's adoption of the challenged Ordinance.

Even if the Court were to undertake a Substantive Due Process analysis, Plaintiffs' claim would fail because the County's adoption of its Ordinance cannot be said to rise to the level of the egregious conscience shocking behavior required to sustain such a claim. See, *County of Sacremento v. Lewis*, 523 U.S. 833, 846, 849 (1998) "Conduct intended to inure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." Id. at 849

Plaintiffs have not pleaded facts showing that they are entitled to relief under the Due Process clause of the Fourteenth Amendment. Count IV should be dismissed.

The Fourth Amendment Claim

In Count V, Plaintiffs contend that the Ordinance is "arbitrary, capricious and unreasonable"[7] in that it prevents them from "utilizing their own backyards to quarantine or stay safe at home" (¶62). They further allege that the Ordinance itself "constitutes an unreasonable seizure of Plaintiffs' real property" because the actual purpose of the Ordinance is to make enforcement easier for officials having to distinguish between members of the public and property owners who may be on the beach ((¶66).

"A 'seizure' of property occurs when 'there is some meaningful interference with an individual's possessory interests in that property.' " *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009), quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Soldal v. Cook County, Ill*., 506 U.S. 56, 61 (1992). Unquestionably, the Fourth Amendment's protection against unreasonable seizures of property applies in the civil context. *Soldal,* 506 U.S. at 66-69

The protections of the Fourth Amendment extend to real property but may not necessarily protect real property other than a house and its curtilage.

[7] The County submits that the "arbitrary and capricious" argument is more appropriate to a Fourteenth Amendment Substantive Due Process analysis, rather one under the Fourth Amendment. See, *Greenbriar Village, LLC.*, 345 F.3d at 1273.

Presley v. City of Charlottesville, 464 F.3d 480, 483-84 n. 3 (4th Cir. 2006) (Noting conflict between *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) [a forfeiture case involving a four-acre parcel and a house] and *Oliver v. United States*, 466 U.S. 170 (1984) [holding the "open fields – land" over a mile from the home and curtilage was not encompassed within the Fourth Amendment's protections.]

The Supreme Court's real property-focused Fourth Amendment decisions of *Florida v. Jardines*, 133 S.Ct. 1409 (2012) [warrantless drug sniff on porch]; *Collins v. Virginia*, 138 S.Ct. 1663 (2018) [intrusion with area of curtilage to view motorcycle] make clear that it is the home and curtilage that are the primary focus of the protection afforded to real property by the Amendment. The properties in question are open beaches bordered by Florida's sovereign lands and the Gulf of Mexico and do not implicate the Plaintiffs' residences or curtilages. This case deals with open beaches along the Gulf of Mexico which, given the definition of beach in the County's Beach Activities Ordinance ("the soft sandy portion of land lying seaward of the seawall or the line of permanent dune vegetation"), would logically fall outside of the curtilages of Plaintiffs' properties. This case does not involve a civil forfeiture of Plaintiffs' properties, which was the case in *James Daniel Good Real Property.* Rather, Plaintiffs assert that the enactment of the

Ordinance interfered with their ability to use a portion of their beachfront property when the County temporarily closed the beaches.

Even if the Court were to determine that Plaintiffs have sufficiently pleaded that the subject property was entitled to protection, "[t]o prevail on a seizure claim, a plaintiff must establish that the government *unreasonably* seized property." *Presley v. City of Charlottesville*, 464 F.3d 480, 485 (4th Cir. 2006), citing *Soldal*, 506 U.S. at 71; Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997).

"'Reasonableness … is the ultimate standard'" under the Fourth Amendment. *Soldal,* 506 U.S. at 71, quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 539 (1967) This determination involves a "careful balancing of governmental and private interests." *Id*., quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

In this case, the County's Ordinance temporarily prohibits "any person to enter or remain on the beaches of Walton County" (Ordinance 2020-09), to deal with emergent circumstances arising from the COVID-19 Pandemic.

The Ordinance was enacted pursuant to the Governor's declaration of a Public Health Emergency (Executive Order 20-52) and the Governor's and the County's emergency management powers under Chapter 252, Florida Statutes. The Ordinance was, in accord with Executive Order 20-68, enacted

in response to the escalating COVID-19 crisis. The County's actions were both authorized by and consistent with the Governor's concerns as evidenced by his ratcheting-up of restrictions on a host of personal freedoms and business and property interests which absent this dire emergency situation would not likely pass muster. The Governor explicitly delegated his authority under 252.36(5)(k), pursuant to Executive Order 20-68, to close all County beaches.

Given the Governor's Executive Orders and the County's Emergency powers under Chapter 252, the mere enactment of the Ordinance did not effect a seizure of Plaintiffs' property. More importantly, any alleged "seizure" was reasonable in light of the emergency situation posed by the global COVID-19 pandemic; therefore, it would not be a seizure that is actionable under the Fourth Amendment.

The allegations of the Amended Complaint and Exhibits, as well as the public record, demonstrate that the Plaintiffs have failed to plausibly plead a violation of the Fourth Amendment.

The Claims Based on Florida Law

In Counts II, III, and VI, Plaintiffs seek declaratory relief concerning Ordinance 2020-09 based on various provisions of Florida law. As noted above, any limitations imposed by the challenged Ordinance were removed

effective May 1, 2020 by virtue of the subsequent actions of the County in adopting Resolutions 2020-35, 2020-38, and 2020-39. Under the circumstances, these claims are moot, or in any event there is no longer any need or justification for declaratory relief. See, Stevens v. Osuna, 877 F.3d 1311–12. Out of an abundance of caution, the County addresses these claims below.

Preemption- Count II

In Count II, Plaintiffs seek to have the Ordinance declared invalid, arguing that the Governor's Executive Orders 20-91 and 20-92 preempted the Ordinance. The Governor's Executive Orders 20-91 and 20-92 did not preempt the Ordinance. Neither Executive Order 20-91 nor 20-92 specifically pertains to beaches. Indeed, the term "beach" appears nowhere in either Executive Order. The County relies on its analysis set forth above in addressing Plaintiffs' Substantive Due Process claim.

Under the circumstances, the Plaintiff has failed to plausibly plead that the County's Ordinance was preempted by Executive Orders 20-91 and 20-92. Count II should be dismissed.

Florida Constitution- Right to Privacy- Count III

Count III of the Amended Complaint is based upon Florida's Right to Privacy under the Florida Constitution.

> Article 1, section 23, of the Florida Constitution states:
> [I]s an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985)

The Florida Supreme Court has recognized that the right of privacy is a fundamental right to which the compelling state interest standard is applicable. Under this standard, the burden is on the government to establish the justification for "an intrusion on privacy." This burden is met by "demonstrating that the challenged regulation serves a compelling state interest and accomplish its goal through us of the least intrusive means." *Id*. at 547.

However, this "'provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual.' *Florida Board of Bar Examiners Re: Applicant,* 443 So.2d 71, 74 (Fla.1983). The right of privacy does not confer a complete immunity from

governmental regulation and will yield to compelling governmental interests." *Winfield* at at 547.

"[B]efore the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist." I*d*.

Even if the Court were to assume arguendo that the Ordinance implicates Florida's Right to Privacy, the very face of the Ordinance demonstrates the existence of a compelling governmental interest which is met through the least intrusive means.

The Ordinance supported the Governor's efforts to protect the public from the spread of COVID-19. The very open nature of the beach with its access to the Gulf of Mexico, its fuzzy boundaries between privately owned and public areas, both "dry sand" and seaward of the mean high water line, lends itself to use, be it authorized or not, not only by the Plaintiff owners, but also by members of the public who may enter the beach.

Based on the allegations and exhibits to the pleading, Plaintiffs have failed to state a claim.

Lack of Statutory Authority- Count VI

Count VI alleges that the County usurped emergency powers reserved to the Governor of Florida, specifically the power to commandeer property. The enactment of the Ordinance did not result in the County

commandeering Plaintiffs' properties; rather, it prohibited "any person to enter or remain on the beaches within Walton County," for the limited time specified.

The legislature has specifically granted broad emergency powers to Florida counties in §252.38 and 252.46, F.S., of the Emergency Management Act. The Act contemplates a coordinated effort between state and local authorities and grants local authorities the power to implement orders that are not inconsistent with those of state authorities, including the Governor. The enactment of the Ordinance did not conflict with any Executive Orders of the Governor. To the contrary, in Executive Order 20-68 the Governor expressly supported and delegated the decision to close beaches to local authorities.

Executive Order 20-68 reads, in pertinent part:

Section 2. Beaches

Pursuant to section 252.36(5)(k)[8], Florida Statutes I direct parties accessing public beaches in the State of Florida to follow the CDC guidance by limiting theirs (sic)gatherings to no more than 10 persons, distance themselves from other parties by 6 feet, ***and support beach closures at the discretion of local authorities.*** (emphasis supplied)

As is apparent from its face and the Executive Orders referenced therein, the Ordinance was adopted in accord with the County's powers

[8] §252.36, Florida Statues describes the Governor's emergency powers.

under the Emergency Management Act and with the blessing of the Governor's Executive Order 20-68. Count VI should be dismissed for failure to state a claim.

CONCLUSION

WHEREFORE, the County requests that this Court enter an order dismissing the Amended Complaint.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that this response complies with the size, font, and formatting requirements of Local Rule 5.1(C), as well as the word limited set forth in Local Rule 7.1(F). This response contains 6,737 words, excluding the case style, signature block, and certificates.

/s/ William G. Warner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed this 21st day of July, 2020 via CM/ECF, which will send notice to all Counsel of record.

/s/ William G. Warner
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