No. 25-

IN THE

Supreme Court of the United States

RICHMOND ROAD PARTNERS, LLC;
STEP FORWARD,

Petitioners,

v.

CITY OF WARRENSVILLE HEIGHTS; CITY OF WARRENSVILLE HEIGHTS PLANNING COMMISSION; CITY OF WARRENSVILLE HEIGHTS BUILDING COMMISSIONER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Agins v. City of Tiburon*, this Court suggested in a footnote that "extraordinary delay" plays a central part in temporary takings cases. 447 U.S. 255, 263, n.9 (1980), abrogated on other grounds by *Lingle v. Chevron*, 544 U.S. 529 (2005). The *Agins* footnote has metastasized into a multifactor test—involving the duration of the delay and the government's motives—that courts routinely (but inconsistently) apply in temporary takings cases. The decision below deepened a split among state and federal appellate courts on both questions presented:

(1) Whether the extraordinary delay test applies in a retrospectively temporary taking, which involves a once permanent taking that is later cut short by judicial invalidation, legislative repeal, or other events.

(2) Whether the absence of extraordinary delay categorically defeats a takings claim, regardless of other relevant considerations such as impact on economically beneficial use or interference with investment-backed expectations.

PARTIES

Petitioners are Richmond Road Partners, LLC, and Step Forward. Respondents are City of Warrensville Heights, City of Warrensville Heights Planning Commission, and City of Warrensville Heights Building Commissioner.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Richmond Road Partners, LLC, and Step Forward certify that they have no parent corporations and no publicly held company owns 10% or more of the stock of either entity.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in the federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

Richmond Road Partners, LLC v. City of Warrensville Heights, No. 1:23-cv-01662-PAG (N.D. Ohio May 9, 2024).

Richmond Road Partners, LLC v. City of Warrensville Heights, No. 1:23-cv-01662-PAG (N.D. Ohio July 22, 2024).

Richmond Road Partners, LLC v. City of Warrensville Heights, No. 24-3502 (6th Cir. March 7, 2025).

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PETITION FOR A WRIT OF CERTIORARI

In *Agins v. City of Tiburon*, this Court held that a regulation violates the Takings Clause if it does not substantially advance a legitimate government interest, and in a lesser-known part of its opinion, suggested that extraordinary delay may be central to the takings analysis. 447 U.S. at 260, 263, n.9. This Court subsequently disavowed the "substantially advances" test because it says nothing about the burden on the property owner. *Lingle*, 544 U.S. at 542. Yet the extraordinary delay standard has metastasized into a multi-factor test—involving the duration of the delay and the motives of government officials—that courts routinely apply in temporary takings cases.

The Sixth Circuit used that test to deny relief to Petitioners, who were denied a permit for a school in an area zoned for educational purposes. A state court later reversed the city's denial as arbitrary, unreasonable, and unsupported by evidence. App. 50a. But applying the extraordinary delay test, the Sixth Circuit ruled against Petitioners on grounds that they did not allege bad faith, the delay was too short, and part of the delay resulted from Petitioners' choice to appeal Warrensville's erroneous decision. App. 10a.

The decision below contravened this Court's precedents and deepened a divide among state and federal appellate courts on both questions presented. *First*, the Sixth Circuit joined four other courts and split with the Federal Circuit and Wisconsin Supreme Court in applying the extraordinary delay test to retrospectively temporary ("cut-short") takings cases involving permit denials. As

this Court has explained, a takings claim accrues when the government denies a permit. *See United States v. Riverside Bayview,* 474 U.S. 121, 127 (1985). And although a once "unconditional and permanent" taking can be cut short by legislative repeal or judicial invalidation, it can never be undone by later events. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1992).

Second, the decision below joined the Federal Circuit and split with three state supreme courts in concluding that the lack of extraordinary delay relieves the court from evaluating any of the relevant factors in a takings case. Yet this Court has explained that the duration of the government regulation informs the takings analysis rather than supplants other relevant considerations, such as diminution of economically beneficial use or interference with investment-backed expectations. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 342 (2002).

This case presents a clean vehicle to decide questions of paramount importance. But for the Sixth Circuit's resolution of the questions presented, there would have been no basis to affirm judgment on the pleadings against Petitioners. And the issues presented could hardly be more important. Permit delays of any length can cause property owners significant harm and force builders to forgo their projects altogether. There is never a bad time to correct a constitutional wrong, but this Court's intervention is even more important here because that wrong is a likely culprit in the housing crisis plaguing the country today.

OPINIONS BELOW

The Sixth Circuit's decision (App. 1a–14a) is published at 2025 WL 737342. The district court's decision granting Respondents' Motion for Judgment on the Pleadings (App. 15a–25a) is published at 2024 WL 2080737, and its decision denying Petitioners' Motion for Reconsideration (App. 26a–40a) is published at 2024 WL 3495316. The state court's separate decision in favor of Petitioners in their appeal of Respondents' denial of their permit application is unpublished but included here at App. 41a–50a. None of the decisions is published in an official report.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on March 7, 2025. This Court granted an extension to file the Petition for Certiorari to July 21, 2025. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

STATEMENT OF THE CASE

I. Factual Background

A. Richmond Road Leases Property to Step Forward to Serve Disadvantaged Children

Petitioner Richmond Road Partners, LLC, owns property in the city of Warrensville Heights that it agreed to lease to Petitioner Step Forward for use as a preschool. App. 2a. Step Forward is a 501(c)(3) nonprofit organized for the stated purpose of education. *See* Complaint, ECF No. 1-1, *Richmond Road v. City of Warrensville*, 23-cv-1662, at ¶ 7 (N.D. Ohio, Aug. 25, 2023). The nonprofit provides early education services for disadvantaged children in the Cleveland area. App. 16a. The students who enroll in Step Forward's Head Start and early Head Start programs are from low-income families, *id.*, and many are students with disabilities. *See* Complaint, ECF No. 1-1, *Richmond Road*, 23-cv-1662, at ¶ 6 (at least 10 percent of the school's enrollment must be students with disabilities). Step Forward sought to use Richmond Road's property as a school for underprivileged children between three and five years old in the Head Start program and disadvantaged children between six months and two years in the Early Head Start program. *Id.* at ¶¶ 8–9.

B. The City's Permit Denial and Subsequent Reversal by the Court of Common Pleas

In November 2022, Petitioners applied to the Warrensville Heights Planning Commission for site plan approval to use the property as a school or a nonprofit

educational agency.[1] App. 17a; *see also* App. 2a (noting that Warrensville, in denying the site plan application, denied Petitioners a permit). The property is zoned as U-7A, which permits "[p]ublic and private schools, universities, colleges, professional schools, vocational schools, and related education facilities" or "[n]onprofit educational and scientific research agencies." *See* App. 2a–3a. But the Planning Commission and then the City Council denied the application. *Id.*

Petitioners appealed the City Council's denial to the Cuyahoga County Court of Common Pleas. *See* App. 3a; Ohio Revised Code § 2506 (allowing the court to hear appeals from and reverse, modify, or vacate final decisions by political subdivisions). The court, after finding that the denial was arbitrary, unreasonable, and unsupported by the preponderance of submitted evidence, directed Warrensville Heights to grant Petitioners' application. App. 50a. In so doing, the court noted ample evidence that the site would be used for a school or nonprofit educational agency. App. 45a–46a (noting that Step Forward is a nonprofit that planned to employ 33 educators with degrees in early childhood education, provide classrooms, provide a curriculum, and follow a typical school year from September through June). As the court observed, statements from planning commissioners acknowledged that the proposed use "may be that of a school," but expressed their subjective view that the location was not "an appropriate site" for that purpose. App. 46a–47a;

1. About two months earlier, Petitioners applied for approval to use the property as a daycare pursuant to the mayor's instructions. *See* Appellants' Opening Br., 24-3502, at 6 (filed Sept. 16, 2024). Warrensville's denial of that application does not form the basis for Petitioners' takings claim.

see also App. 3a ("The Commissioners provided little explanation" for their denial and merely voiced "that they did not think this was an appropriate location for a school despite its being zoned as such.") (internal parenthesis omitted). As a result, Richmond Road lost a 10-year lease totaling over three million dollars, and Step Forward was forced to find another location for the school. *See* Pltfs' Opp. to Mot. for Judgment on the Pleadings, 23-cv-1662, ECF No. 13, at 8, 13 (Feb. 29, 2024).

C. Procedural History

Petitioners filed their complaint in this case while their appeal of the city's denial in the court of common pleas was still pending.[2] As relevant here, Petitioners argued that Warrensville violated the Fifth Amendment's Just Compensation Clause, and requested relief they could not have obtained in the state court appeal: a mandatory injunction directing Warrensville to start state appropriations proceedings to compensate Richmond Road for lost rents. App. 3a.

After the court of common pleas rendered its decision instructing the government to grant Petitioners' application, the government filed a motion for judgment on the pleadings in this case. It asserted that "[a]bsent extraordinary delay, a governmental entity's application of its administrative process for making zoning decisions cannot result in a state or federal taking claim" and that the roughly year-long delay between the time when Petitioners submitted the site plan application and the

2. Petitioners initially filed their case in state court, but Respondents removed the case to federal court. App. 3a.

time in which the state court ordered the government to grant it did not suffice. *See* App. 22a–23a. The district court agreed. It held that Petitioners could not establish a Fifth Amendment violation since there was no property interest to support a takings claim and, even if there were, no extraordinary delay to establish a taking. App. 23a–24a; *but see Riverside Bayview,* 474 U.S. at 127 (indicating that a taking may occur if the government's denial of a permit prevents economically viable use of the land in question).[3]

The Sixth Circuit affirmed. The court assumed that Warrensville's denial implicated a protected property interest under the Takings Clause and based its affirmance on the absence of extraordinary delay. *See* App. 7a–10a. The Court opined a one-year delay was not extraordinary in "the bureaucratic world," App. 10a, and even if it were, Warrensville could not be faulted for "how quickly the case moved" through "the various judicial appeals processes" after Petitioners appealed the city's denial of their application. *Id.* The Sixth Circuit also noted that Petitioners did not allege bad faith on the government's part even though the government's motives were relevant in assessing whether there was extraordinary delay. *See*

3. The district court later denied Petitioners' Motion for Reconsideration. In that order, it clarified that its earlier sua sponte comment that Petitioners' claims may be barred under res judicata, App. 24a & n.8, did not "serve[] as the basis for the Court's dismissal of any of Plaintiffs' claims," and wouldn't have affected Petitioners' taking claim anyway. App. 31a & n.3 (suggesting that res judicata would only bar Petitioners from prevailing on their first cause of action, which sought a declaration that Warrensville's permit denial was arbitrary, since Petitioners sought (and received) the same relief in its appeal to the court of commons pleas).

App. 8a, 10a. Having concluded that Petitioners failed to satisfy the extraordinary delay test, the court held that Petitioners could not prevail on their takings claim without any discussion of the other factors that typically come into play in regulatory takings cases, including the extent to which government's denial of Petitioners' application affected Petitioners' economically beneficial use of their property. *See* App. 10a.

II. Legal Background

A. Takings Background

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits government from taking private property for public use without just compensation. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021). Physical appropriations of property, such as when government takes possession of property without taking title to it or when government effects a physical taking by recurring flooding as a result of building a dam, make up the "clearest sort of taking." *Id.* at 147–48 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)). Government can also take property if it goes "too far" in restricting property rights. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). A court may determine that government action effects a taking by conducting an "ad hoc, factual inquiry" into factors such as economic impact, effect on the property owner's "reasonable investment backed expectations," and the "character of the governmental action," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), or by finding that government action had completely deprived the owner of "all economically beneficial us[e]" of her property. *Lucas*,

505 U.S. at 1019. These types of "regulatory takings" require just compensation because they are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

"It is well established that temporary takings are as protected by the Constitution as are permanent ones." *Lucas*, 505 U.S. at 1033 (Kennedy, J., concurring in judgment) (citing *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 318 (1987)). One type of a temporary taking is a retrospectively (or cut short) temporary taking. A retrospectively temporary taking may take place where government action was "unconditional and permanent" when it occurs, *Lucas*, 505 U.S. at 1012, but is then cut short by statutory repeal, judicial intervention, or the like. A prospectively temporary taking may occur where a moratorium on development is expressly temporary at the time it was enacted. *See Tahoe-Sierra*, 535 U.S. at 316 (development moratoria were "intended to be temporary from the beginning").

B. The Extraordinary Delay Test

Many courts today, including the Sixth Circuit below, require a property owner to show that the government has committed "extraordinary delay" before the property owner may prevail on a temporary takings claim. *See generally* David W. Spohr, Cleaning Up the Rest of Agins: Bringing Coherence to Temporary Takings Jurisprudence and Jettisoning "Extraordinary Delay," 41 Envtl. L. Rep. News & Analysis 10435 (2011).

In *Agins v. City of Tiburon*, this Court held that the "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests" or "denies an owner economically viable use of his land." 447 U.S. 255, 260 (1980), abrogated by *Lingle*, 544 U.S. 529. This Court later disavowed the "substantially advances" test, noting that it was "not a valid method of discerning whether private property has been 'taken'" because it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights." *Lingle*, 544 U.S. at 542 (emphasis in original). *Agins* also rejected a secondary claim, mentioned only in a series of footnotes, that the city's precondemnation activities related to its subsequently abandoned eminent domain proceedings worked a taking. *Agins*, 447 U.S. at 263, n.9. Yet this footnote has metastasized into a test that federal circuit courts and state supreme courts regularly (but inconsistently) apply in temporary takings cases.

The extraordinary delay test asks courts to "weigh all relevant factors, including the length of the delay, bad faith on the part of the government, and any delay that the interestholder's conduct caused." App. 8a (internal quotation marks omitted). As for duration, courts have declined to deem delays extraordinary—even where they have stretched many years. *See Stand. Industries, Inc. v. Dept. of Transp.*, 454 N.W.2d 417, 419 (Mich. App. 1990) (eleven-year delay not extraordinary delay); *Wyatt v. United States*, 271 F.3d 1090, 1097–1100 (Fed. Cir. 2001) (same for seven-year delay). The extraordinary delay test also calls for an inquiry into the government's motives. App. 8a. As "it is the rare circumstance that [courts] will find a taking based on extraordinary delay without

a showing of bad faith," *Wyatt*, 271 F.3d at 1098, the test places a "high burden of proof" on property owners "to overcome the well-established rule that government officials are presumed to act in good faith." *Aloisi v. United States*, 85 Fed. Cl. 84, 95 (2008). Finally, courts factor in "any delay that the interestholder's conduct caused," App. 8a, and decline to attribute the time that the case moves "through the various judicial appeals processes" to the government. App. 10a.

This case presents two unresolved questions about the extraordinary delay test. First, whether the extraordinary delay test applies in retrospectively temporary takings cases in which a final and permanent government action alleged to have effected a taking is later made temporary through legislative repeal, judicial invalidation, or the like. Second, even if the extraordinary delay test applied, whether the absence of extraordinary delay mechanically defeats a takings claim or whether it should be considered in conjunction with other relevant factors such as a regulation's economic impact or its interference with a property owner's investment-backed expectations.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review to Resolve a Split on Whether Plaintiffs Who Base Their Takings Claim on the Government's Denial of a Permit Must Also Satisfy the Extraordinary Delay Test

A. The Decision Below Deepens a Split Among Federal Circuit Courts and State Supreme Courts on Whether the Extraordinary Delay Test Applies in Cut-Short Takings Cases Involving Permit Denials

The decision below deepens a split among federal courts of appeals and state supreme courts.[4] The Sixth Circuit joined the Fourth Circuit, the New Hampshire Supreme Court, the Vermont Supreme Court, and the Supreme Court of California in holding that plaintiffs must show "extraordinary delay" even in cut-short takings cases involving permit denials. The Federal Circuit and the Wisconsin Supreme Court have reached the opposite conclusion. In those jurisdictions, "[e]xtraordinary delay is not, under established law, an element in such a cut-short scenario." Spohr, *supra*, at 10449 & n.237 (citing *Seiber v. United States*, 364 F.3d 1356, 1365 (Fed. Cir. 2004)).

1. The Sixth Circuit expressly relied on precedents from the Fourth Circuit and the New Hampshire Supreme Court in reaching its conclusion. *See* App. 8a–9a. The

4. In the decades before this Court's decision in *Knick*, takings cases against state and local governments were confined to state court. *See Knick*, 588 U.S. at 185 (overruling state-litigation requirement). Takings cases against the federal government typically proceed in the Court of Federal Claims and the Federal Circuit under the Tucker Act. *See Brott v. United States*, 858 F.3d 425, 428–29 (6th Cir. 2017).

Fourth Circuit used the extraordinary delay test to rule against property owners alleging a cut-short taking in *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 329–30 (4th Cir. 2005). The plaintiffs in *Sunrise*, as here, based their takings claim on damages resulting from the city council's denial of their permit application. *See id. at* 325–26. The property owners appealed the decision to state court, which reversed the council's decision because it was arbitrary, subjective, and without evidentiary support. *Id.* Yet the Fourth Circuit held that the property owners were not entitled to any remedy—in part because "the delay . . . was not extraordinary." *Id.* at 330. As here, the Fourth Circuit faulted the property owners for delays stemming from their appeal of the city council's erroneous decision and thought it relevant that nothing in the record suggested that it "acted in bad faith or engaged in deliberate delay." *Id.*

The **New Hampshire Supreme Court** reached the same conclusion in *Smith v. Town of Wolfeboro*, 615 A.2d 1252, 1258 (N.H. 1992). The alleged taking there arose from a town planning board's denial of two property owners' application to certify their lot for residential development. *Id.* at 1253–55. A state court reversed the board's decision and awarded compensation to the property owners for the temporary taking. *See id.* The Supreme Court reversed the damages award and affirmed in all other respects—noting its view that the owners' right to "petition the trial court to review and reverse planning board decisions" was "their sole remedy." *Id.* at 1254, 1257. Adding its own gloss on this Court's dicta in *Agins*, the New Hampshire Supreme Court viewed appeals to the superior court and the Supreme Court as "one of the incidents of ownership" that "must be borne by the property owner." *Id.* at 1258.

In *Chioffi v. City of Winooski*, 676 A.2d 786, 787–89 (Vt. 1996), the **Vermont Supreme Court** refused to award compensation to a property owner for losses he incurred "during the time between the denial of the zoning permit by the city zoning board" and the issuance of the permit pursuant to a court decision. The court considered judicial proceedings initiated by the property owner as a part of the city's regulatory process, which does not itself give rise to a takings claim. *Id.* at 788–89.

The **California Supreme Court** ruled against a property owner alleging a cut-short taking in *Landgate v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1998). The property owner sought compensation for the delay caused by the California Coastal Commission after the Commission's decision to deny the owner's permit application was set aside by a court. *See id.* at 1189–94. The California Supreme Court denied compensation using similar reasoning as its counterparts in New Hampshire and Vermont. The court viewed litigation as merely "a normal part of the development process" and dismissed any resulting delay as "an incident of property ownership." *Id.* at 1203–04. Although the California Court of Appeals has questioned the continued vitality of *Landgate* in light of this Court's decision in *Lingle*, *see Lockaway Storage v. Cnty. of Alameda*, 216 Cal. App. 4th 161, 188–91 (2013), the California Supreme Court has never overruled that decision.

2. On the other side of the split are the Federal Circuit and the Wisconsin Supreme Court, which do not apply the extraordinary delay test in cut-short takings cases. In *Seiber v. United States*, the **Federal Circuit** stressed important differences between retrospectively temporary

(or cut-short) takings, such as later rescinded permit denials, and prospectively temporary takings such as development moratoria. 364 F.3d 1356, 1364–65 (Fed. Cir. 2004) ("Each of these categories of temporary takings is governed by its own standards."); *See supra* at 9 (describing differences). The court held that the property owners were not required to show extraordinary delay because that showing is not required of plaintiffs (like the Seibers) alleging a cut-short takings claim based on the eventual grant of a permit that was initially denied. *See Seiber*, 364 F.3d at 1365; *see also Boise Cascade Corp. v. United States,* 296 F.3d 1339, 1349 (Fed.Cir.2002) ("[A]bsent denial of the permit, only an extraordinary delay in the permitting process can give rise to a compensable taking."). "[T]hat the taking was 'cut short' does not transmute the interests that" the government "had taken, but instead informs the amount of just compensation." *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 484 (2009).

That the Federal Circuit differs from five courts of last resort is more reason for this Court to hear this case. Under the Tucker Act and the Little Tucker Act, the Federal Circuit is the exclusive venue for appeals in takings cases for compensation against the federal government. *See Brott v. United States*, 858 F.3d 425, 428–30 (6th Cir. 2017). Thus, Americans in the 12 states covered by the five courts on the other side would confront one rule when the federal government works a taking through a permit denial and another when state and local governments do the same. This Court's review is needed to ensure that fundamental property rights do not wax and wane based on the identity of the government defendant.

The **Wisconsin Supreme Court** also saw no need to require property owners to show extraordinary delay before they can state a valid temporary taking claim based on a permit denial that is later invalidated by a court. *See Eberle v. Dane County Bd. of Adjustment*, 595 N.W.2d 730, 747 (Wis. 1999). Relying on this Court's precedents in *Lucas* and *First English*, the Wisconsin Supreme Court explained that there was no basis to exclude government "actions reversed by courts from the pool of actions which might qualify as unconstitutional temporary takings." *Id.* at 742. In reaching its conclusion, the Court was unmoved by the dissent's invocation of all three state supreme court cases on the other side of the split, *see id.* at 748 (Abrahamson, C.J., dissenting), and expressly rejected the California Supreme Court's opinion in *Landgate* as inconsistent with this Court's decision in *First English*. *Id.* at 742, n.25 (majority opinion).

In all, the Federal Circuit or the Wisconsin Supreme Court would not have applied the extraordinary delay test against Petitioners. In those jurisdictions, extraordinary delay is irrelevant where, as here, the property owners allege that the government had worked a taking by denying them a permit.

B. The Decision Below is Inconsistent with This Court's Precedents

The decision below erred in applying the extraordinary delay test to a retrospectively temporary taking arising from a permit denial. As this Court has explained, when a regulatory taking arises from a permit denial, the taking accrues when a permit is denied. *See Riverside Bayview,* 474 U.S. at 127 ("Only when a permit is denied

and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."). In contrast to a scenario in which the government delays in its review of a permit application, a "final decision by the responsible state agency," such as Warrensville's denial of Petitioners' application here, "informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo*, 533 U.S. at 618 (internal citations omitted). Warrensville's denial of Petitioners' application was "unconditional and permanent" when the government issued its decision. *Lucas*, 505 U.S. at 1012. It thus constituted a "*prospectively* permanent restriction on economically viable use [that] effected a taking of the parcel as a temporal whole, regardless of the interests that reverted to the landowner" as a result of subsequent events. *Resource Investments*, 85 Fed. Cl. at 481; *cf. Tahoe-Sierra*, 535 U.S. at 316, 332 (noting that, by contrast, government action "intended to be temporary from the beginning" allows a fee simple estate to "recover value as soon as the prohibition is lifted").

This Court's precedent confirms that the government cannot rely on later events to undo an earlier taking. In *First English*, for instance, this Court recognized that "[i]nvalidation of the ordinance . . . though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." 482 U.S. at 319. "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which

the taking was effective." *Id.* at 321. In *Lucas*, this Court rejected the government's contention that changes to the challenged statute rendered the property owner's claim unripe. 505 U.S. 1010–13. Those changes—like the state court's decision vacating Warrensville's denial—merely morphed an "unconditional and permanent" taking into a temporary one. *Id.* at 1012. As Justice Kennedy put it, the "potential for future relief does not control" because "whatever may occur in the future cannot undo what has occurred in the past." *Id.* at 1032–33 (Kennedy, J., concurring); *see also Knick v. Township of Scott*, 588 U.S. 180, 190 (2019) ("The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."). Put another way, the relevant question here is whether Warrensville's denial itself effected a taking—not whether there has been an extraordinary delay since the denial.

The particulars of the extraordinary delay test confirm that it is a poor fit for retrospectively temporary takings cases. Because the taking accrues when a permit is denied, a property owner who waits for an extraordinary delay risks being time-barred from bringing a takings claim. *See B & B Enters. of Wilson County, LLC v. City of Lebanon*, 318 S.W. 839, 843 (Tenn. 2010) (property owner was time-barred from bringing a takings claim because "the statute of limitations began to run when the planning commission declined to approve the final subdivision plans"); *see also id.* at 847–48 (rejecting argument that the statute of limitations was tolled because the property owner pursued judicial review of the Planning Commission's decision in a timely manner). Nor should the government get a free pass for the time it

takes a court to conclude that its actions worked a taking. *Cf.* App. 10a (Sixth Circuit's refusal to fault Warrensville for "how quickly the case moved" through "the various judicial appeals processes" after Petitioners appealed the city's denial of their application) (citing *Sunrise*, 420 F.3d at 330). A state court decision cannot be viewed as a part of the *city's* regulatory process—especially since property owners need not "exhaust[] state remedies" before bringing a takings claim in federal court. App. 5a and n.2 (citing *Knick*, 588 U.S. at 194). And property owners who vindicate their right to just compensation in any forum are entitled to interest from the time that the property was taken. *See Knick*, 588 U.S. at 190.

The extraordinary delay test improperly puts property owners to the task of proving bad faith on the part of government officials. *See* App. 8a. Such a test is "not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Lingle*, 544 U.S. at 542. Instead, the relevant focus in a takings case is on the "*magnitude or character of the burden* a particular regulation imposes upon private property rights." *Id.* (emphasis in original). This Court has explained that an inquiry into whether a regulation "substantially advance[s] legitimate state interests" is "not a valid takings test." *Id.* at 531, 545. It should say the same about the government's motives, which like the "substantially advances" test, says "nothing about the actual burden imposed on property rights." *Id.* at 543. This Court should grant the petition to make it clear that the extraordinary delay test has no place in cases involving retrospectively temporary takings.

II. This Court Should Decide Whether the Absence of Extraordinary Delay in the Permitting Process Categorically Defeats a Takings Claim

A. Courts are Divided on Whether a Lack of Extraordinary Delay in the Permitting Process by Itself Defeats a Takings Claim

The decision below deepens a split among courts and commentators alike on whether a court must (1) deny relief to every plaintiff who cannot show an extraordinary delay in the permitting process or (2) consider permitting delays alongside the rest of its *Penn Central* analysis in regulatory takings cases. *Compare* Daniel L. Siegel & Robert Meltz, Temporary Takings: Settled Principles and Unresolved Questions, 11 Vt. J. Envtl. L. 480, 492 (2010) (contending that a delay must be extraordinary to ripen a takings claim), *with* Spohr, *supra*, at 10453 (contending that "if the applicant can meet *Penn Central*, the government should pay compensation, whether or not it was guilty of extraordinary delay"). The lower courts are divided—with the Sixth Circuit joining the Federal Circuit on one side of the split and the supreme courts of Ohio, South Carolina, and North Dakota on the other. *See* Siegel & Meltz, *supra*, at 488–93 (cataloging the split).

1. Like the Sixth Circuit, the **Federal Circuit** requires property owners to show that there has been an extraordinary delay in the permitting process before the court will even apply *Penn Central*. *See Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1351–52 (Fed. Cir. 2004). *Appollo Fuels* involved a company's contention that the government's 18-month delay in processing a petition, which exceeded the time frame mandated by

statute, led to a temporary taking of the company's mining rights. *Id.* at 1351. In rejecting that claim, the Federal Circuit opined that delay "in the regulatory process cannot give rise to takings liability unless the delay is extraordinary." *Id.* Relying on precedent in which "there was no extraordinary delay despite a nearly ten-year permitting process," the court held that the "eighteen-month delay here is far short of extraordinary." *Id.* at 1351–52 (citing *Wyatt*, 271 F.3d at 1097–100). Although the court applied the *Penn Central* factors elsewhere in its opinion, it suggested that the *Penn Central* analysis is only appropriate "if the delay were considered extraordinary." *Id.* at 1352.[5] Although the Federal Circuit disagrees with the Sixth Circuit on whether the extraordinary delay test is proper in cut-short takings, both courts view a lack of extraordinary delay as not just the beginning of the analysis, but the end of it too.

2. By contrast, the **Supreme Court of Ohio** "weigh[s] all relevant factors under the *Penn Cent.* test, one of which is the length of any delay." *State ex rel. Duncan v. Middlefield*, 898 N.E.2d 952, 956 (Ohio 2008). In *Middlefield*, the court did not end its analysis after concluding that neither of the delays suffered by the property owner was extraordinary. *See id.* at 957. Instead, the Court ruled against the property owner only after applying *Penn Central* and considering any adverse

5. Although the Federal Circuit has not been consistent about the rule that it applies, *see* Siegel & Meltz, *supra*, at 488–92, more recent cases from the Court of Federal Claims indicate that *Appollo Fuels* provides the governing standard. *See Aloisi*, 85 Fed. Cl. at 93 (noting that the court applies *Penn Central* only if it first determines there is extraordinary delay by the government); *Resource Investments*, 85 Fed. Cl. at 494–95.

economic effect caused by the delay and whether the delay interfered with the owner's investment-backed expectations. *See id.*; *see also State ex rel. AWMS Water Solutions, LLC v. Mertz*, 165 N.E.3d 1167, 1188–90 (Ohio 2020) (considering delay as part of the *Penn Central* analysis). Thus, property owners like Petitioners face different standards depending on whether their case proceeds in state or federal court. That Petitioners' takings claim was vanquished only because it could not show extraordinary delay is a result not of uniformity in the lower courts, but of Respondents' choice to remove it to federal court.

In *Byrd v. City of Hartsville*, 620 S.E.2d 76, 81 (S.C. 2005), the **Supreme Court of South Carolina** also examined delays as part of its *Penn Central* analysis. There, the Court did not reach its decision based solely on whether there had been extraordinary delay but evaluated how the delay affected the property owner's economically beneficial use or interfered with his investment-backed expectations. *See id.* at 81–82; *see also* Siegel & Meltz, *supra*, at 490 (*Byrd* "assumed that any permitting delay is ripe for takings review, and that the delay is considered as part of a Penn Central analysis."). In *Wild Rice River Estates, Inc. v. City of Fargo*, 705 N.W.2d 850, 857–59 (N.D. 2005), the **North Dakota Supreme Court** similarly considered delays as part of its *Penn Central* analysis. If Petitioners raised their claim in the state courts of North Dakota, South Carolina, or even their home state of Ohio, the lack of a delay that the court considered extraordinary could not have categorically defeated their takings claim.

B. The Decision Below Contradicts This Court's Precedents

This Court's precedents reject the notion that a property owner must show extraordinary delay to mount a successful takings challenge. As this Court noted in *Tahoe-Sierra*, "the duration of the restriction" is not dispositive, but "one of the important factors that a court must consider" in a regulatory takings case. 535 U.S. at 342. Thus, courts must evaluate prospectively temporary takings by "relying on the familiar *Penn Central* approach" rather than by fashioning a new rule. *Id.*[6] The decision below refused to apply *Penn Central* and instead affirmed judgment for the government after concluding that Petitioners failed to meet the extraordinary delay test. But there is no reason why length of time should play a dispositive role in a takings claim or why the government's motives should play any role in it.

Start with length. Although the duration of a restriction on property may inform a "landowners' investment-backed expectations" or "the actual impact" of the restriction, there is no basis to decline to evaluate those factors merely because the duration of the government's restriction is short. The duration-above-all theory of the Takings Clause conflicts with both law and logic. Courts have refused to deem delays extraordinary even when they last many years. *See supra* at 10. Yet even short delays could result in significant harm to the property owner. A

6. Nor did the Sixth Circuit's analysis in this case track the analysis in the *Tahoe-Sierra* dissent, which looked to whether the moratoria at issue "resemble[d] any traditional land-use planning device." 535 U.S. at 343 (Rehnquist, C.J., dissenting).

30-month-long delay in California, for example, caused the property owner to suffer over half a million dollars in lost profits and over $300,000 more in increased construction costs. *See Lockaway Storage*, 216 Cal. App. 4th at 173.

That the extraordinary delay test makes bad faith all but a requirement also makes it a poor fit for any type of a temporary takings case. *See Wyatt*, 271 F.3d at 1098 (Fed Cir. 2001) ("[I]t is the rare circumstance that [courts] will find a taking based on extraordinary delay without a showing of bad faith."). As discussed above (at 19), the "notion that such a regulation nevertheless 'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable." *Lingle*, 544 U.S. at 543. Instead, the Takings Clause calls for an inquiry about the objective "*magnitude or character of the burden* a particular regulation imposes upon private property rights," *Id.* at 542 (emphasis in original), rather than the subjective motivations of any government employee. Regardless of whether a property owner suffers a taking at the hands of an official who is malicious, apathetic, or just busy, the Takings Clause "bar[s] Government from forcing [the property owner] alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In sum, the decision below was wrong to provide a functional safe harbor for government officials who take property in good faith or for a short time. This Court's precedents make it plain that extraordinary delay is the beginning of the analysis and not the end of it.

III. This Case Presents an Excellent Vehicle to Resolve Unsettled Questions of Nationwide Importance

A. This Case Presents an Excellent Vehicle

This case presents an excellent vehicle for this Court to resolve unsettled issues surrounding the extraordinary delay test. *First*, without the Sixth Circuit's application of the extraordinary delay test to Petitioners' permit denial, there would be no basis for granting Warrensville's motion for judgment on the pleadings. As the Sixth Circuit noted, if the delay were considered extraordinary, Petitioners would have had a cognizable takings claim. *See* App. 10a–11a, n.4 ("Should Warrensville continue to refuse Richmond Road its court-ordered permit, its delays might become extraordinary and constitute a taking, though that question is not before us."). If the Sixth Circuit had instead refused to apply the extraordinary delay test in a retrospectively temporary takings case involving a permit denial or considered the government's delay as a factor in the *Penn Central* analysis, rather than a prerequisite for a regulatory takings claim, Petitioners would have properly alleged a regulatory takings claim. *Cf.* App. 19a–20a (noting that a motion for judgment on the pleadings is generally reviewed under the same standard as a motion to dismiss). In short, the Sixth Circuit's resolution of the questions presented was dispositive to its affirmance of the judgment below.

Second, given the procedural posture of this case, there are no factual or legal issues that could hinder this Court's review. It is now settled that Richmond Road owns the relevant property, that Petitioners' proposed use was

permitted under the City's Ordinances, and that the City unlawfully denied Petitioners' permit under Ohio Law. *See* App. 42a, 50a. Although the district court initially suggested that extraordinary delay was necessary to establish a cognizable property interest, *see* App. 23a, it later appeared to walk back any reliance on that part of its opinion. *See* App. 36a, n.6 (declining to challenge Petitioners' contention that they have alleged "a cognizable property interest based on their lost rental income"). In any event, the Sixth Circuit correctly assumed "that Richmond Road had a property interest" protected by the Takings Clause. App. 7a. Warrensville's denial of Petitioners' permit implicated cognizable property interests because it prevented them from using and leasing its property as permitted under the City's zoning ordinances. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83, n.6 (1980) ("the term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership],' including the 'right to possess, use and dispose of it.'") (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)); *see also Okey v. City of All. Plan. Comm'n*, 138 N.E.3d 649, 652 (Ohio App. 5th Dist. 2019) (noting that the permitted use here, in contrast to a conditional use, is allowed as a matter of right).

B. The Questions Presented are Exceptionally Important

The issues presented are important, recurring, and of national significance. As the President's 2024 Economic Report details, the United States is suffering from a massive housing shortage of between 1.5 million to 3.8 million units. Executive Office of the President Council

of Economic Advisers, Economic Report of the President (2024) at 148 (March 21, 2024). The decline of smaller homes and low-cost rental units has been especially pronounced. *Id.* at 149. Construction of single-family homes under 1,400 square feet has "declined from 40 percent in the early 1970s to about 7 percent in the early 2020s." *Id.* And the supply of low-cost rental units "fell from 26.7 percent in 2011 to 17.1 percent in 2021," which is "equivalent to the loss of 3.9 million affordable units in the last decade after adjusting for inflation." *Id.*

Permitting is the number one cause of construction delay.[7] Permitting delays contribute to the housing shortage "by increasing the cost of new housing development, leading would-be deals to not pencil out."[8] As this Court recently noted, complex and lengthy permitting

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7. The National Multifamily Housing Council's Quarterly Survey of Apartment Construction and Development Activity in March 2025 found that 79% of reported delays in construction were delays due to permitting. *Quarterly Survey Of Apartment Construction & Development Activity*, National Multifamily Housing council (March 27, 2025), https://www.nmhc.org/research-insight/nmhc-construction-survey/2025/quarterly-survey-of-apartment-construction-development-activity-march-2025/; *see also Increasing the Housing Supply by Reducing Costs and Barriers*, National Conference of State Legislatures (June 7, 2024), https://www.ncsl.org/human-services/increasing-the-housing-supply-by-reducing-costs-and-barriers (reporting that 97% of developers experienced delay and that 83% of the delays were due to permitting).

8. *Reforming Permitting Requirements to Lower the Cost of Building New Housing and Increase Housing Affordability*, The White House (August 13, 2024), https://bidenwhitehouse.archives.gov/cea/written-materials/2024/08/13/reforming-permitting-requirements-to-lower-the-cost-of-building-new-housing-and-increase-housing-affordability/

processes hinder construction projects, resulting in more expensive development and fewer jobs. *See Seven Cnty. Infrastructure Coalition v. Eagle Cnty., Colorado*, 145 S. Ct. 1497, 1513–14 (2025) (discussing the negative social and economic costs of "delay upon delay" in the context of permitting under the National Environmental Policy Act). Permitting requirements for private land use similarly increase the cost of development by "increasing soft costs, administrative burdens, uncertainty, and delays."[9] For example, even a single month of delay can increase the cost of a building by $4,400.[10] And in cities like Los Angeles, "where new apartments can average $600,000 per unit and the cost of capital averages 8%, a month of delay would add $4,000 *per unit*."[11]

The extraordinary delay test adopted by the decision below—and decisions of other appellate courts on its side of the split—exacerbates the problem of permitting delays. The test requires property owners to satisfy one multi-factor test, which all but requires a showing of bad faith, before satisfying another under the *Penn Central* framework. This requirement of piecemeal litigation is not just unfounded in precedent, *see supra* at 23–24, but burdensome in practice. *See Aloisi*, 85 Fed. Cl. at 96 (property owners must "overcome the strong presumption that the government acted in good faith"). The only thing more expensive than a permitting delay might be the expense it takes to litigate it.

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9. *Id.*

10. *Id.*

11. Manville, M., Monkkonen, P., Gray, N., & Phillips, *Does Discretion Delay Development? The Impact of Approval Pathways on Multifamily Housing's Time to Permit*, Volume 89 Number 3 J. Am. Plan. Assoc. 336, 338 (2023) (emphasis added).

The Sixth Circuit's decision to apply the extraordinary delay test to retrospectively temporary takings involving permit denials undermines the Fifth Amendment's promise of securing Just Compensation for property owners. The test essentially asks property owners to make do with a court's reversal of the permit denial. Yet the mere invalidation of a taking typically falls "far short of fulfilling the fundamental purpose of the Just Compensation Clause," which "was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting) (citing *Armstrong*, 364 U.S. at 49). And it is no answer to force the property owner to bear the burden of a judicial review process that it had to initiate because of the government's taking. *See* App. 10a. That process can itself involve multiple appeals that ultimately pile on expenses in the form of attorneys' fees (and other costs) and take years to resolve. *See, e.g.*, *Willow Grove, Ltd. v. Olmsted Twp. Bd. of Zoning Appeals*, 207 N.E.3d 779, 784 (Nine years to reverse permit denial); *Carlson v. Town of Beaux Arts Village*, 704 P.2d 663, 664 (Wash. App. Div. 1 1985) (Four years to reverse site application denial).

The Sixth Circuit's decision to require extraordinary delay before even considering other factors, such as economic impact and interference with investment-backed expectations, also places an unjustified burden on property owners. Courts applying the extraordinary delay test have blessed delays lasting many years. *See supra* at 10. Yet even short delays in the permitting process can cause significant harm to property owners, *see Lockaway Storage*, 216 Cal. App. 4th at 173 (thirty-month delay

caused nearly a million dollars in damages),[12] and even end important projects.[13]

In the end, permit denials and permit delays cause significant harm to property owners. Yet governments routinely look for ways to avoid takings liability. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655–56, n.22 (1981) (Brennan, J., dissenting). Certiorari is warranted to ensure the extraordinary delay test does not nullify the property owner's right to just compensation.

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12. Due to permit delays, a wedding venue in Tampa, FL lost almost $1 million dollars in canceled events. Erikia Kengi, *Many canceled weddings later, the Rusty Pelican is ready to reopen*, Tampa Bay Times (July 9, 2025) https://www.tampabay.com/news/business/2025/07/09/many-canceled-weddings-later-rusty-pelican-is-ready-reopen/.

13. Two-year permit delay threatened a much-needed affordable housing project in Pittsburgh. Andy Sheen, *Developers blame city for delays in big Bakery Square expansion*, CBS News (July 26, 2024). https://www.cbsnews.com/pittsburgh/news/developers-blame-city-delays-bakery-square-expansion/.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 21, 2025

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MARCH 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-3502

RICHMOND ROAD PARTNERS, LLC;
STEP FORWARD,

Plaintiffs-Appellants,

v.

CITY OF WARRENSVILLE HEIGHTS; CITY OF WARRRENSVILLE HEIGHTS PLANNING COMMISSION; CITY OF WARRENSVILLE HEIGHTS BUILDING COMMMISSIONER,

Defendants-Appellees.

Filed March 7, 2025

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

OPINION

Before: BATCHELDER, LARSEN, and RITZ, Circuit Judges.

Appendix A

LARSEN, Circuit Judge. Richmond Road Partners, LLC applied for a site plan approval to lease one of its buildings for use as a Head Start preschool. The Warrensville City Council denied Richmond Road's application. On administrative appeal, a state court found that the permit denial was arbitrary and ordered Warrensville to grant the permit. While the administrative appeal was pending, Richmond Road sued the City, arguing that the permit denial and delay constituted a regulatory taking. The district court granted Warrensville's motion for judgment on the pleadings, concluding that Richmond Road had failed to allege a cognizable property interest or a taking. Richmond Road appeals. We AFFIRM.

I.

In 2022, Richmond Road agreed to lease one of its properties to Step Forward, an Ohio non-profit school that provides Head Start early education services for low-income families in the Cleveland, Ohio area. The relevant property is zoned as U-7A, which permits "[p]ublic and private schools, universities, colleges, professional schools, vocational schools, and related education facilities" or "[n]onprofit educational and scientific research agencies." R. 1-1, PageID 9-10. Richmond Road submitted a site plan application to the Warrensville Planning Commission seeking a conditional use permit to open a Head Start "daycare" center. R. 11, PageID 66. The Planning Commission and the City Council denied the application because daycares are not a permitted use. Richmond Road then resubmitted its application for approval as a school and/or a non-profit educational agency. *Richmond*

Rd. Partners v. City of Warrensville Heights, 2024 WL 2080737, at *1 (N.D. Ohio May 9, 2024). The Planning Commission also denied this second application. The Commissioners provided little explanation why, merely voicing that they did not think this was an appropriate location for a school (despite its being zoned as such). The City Council also denied Richmond Road's application. In March 2023, Richmond Road appealed the denial to the Cuyahoga County Court of Common Pleas ("state court") under Ohio Revised Code § 2506, which allows a party to appeal final decisions by political subdivisions to the local county court of common pleas. *Id.*

Alongside its appeal, Richmond Road filed this complaint in state court. Richmond Road brought four claims: (1) seeking a declaration that Warrensville's permit denial was arbitrary; (2) arguing Warrensville violated the Fifth Amendment's Just Compensation Clause; (3) seeking a mandatory injunction directing Warrensville to start state appropriations proceedings to compensate Richmond Road for lost rents; and (4) a claim under 42 U.S.C. § 1983 for violation of the Fifth and Fourteenth Amendments and Article I § 19 of the Ohio Constitution. *Id.* at *2. Warrensville removed the case to federal court.

In October 2023, the state court resolved the administrative appeal, finding that the City Council's permit denial "was arbitrary, unreasonable, and unsupported by the preponderance of the submitted evidence." *Id.* at *1. The state court remanded the matter, directing Warrensville to grant Richmond Road its permit.

In May 2024, the federal district court granted Warrensville's motion for judgment on the pleadings and dismissed all claims. It reasoned that the state court's administrative decision determining that Warrensville acted arbitrarily in denying the application mooted Richmond Road's request for declaratory relief on this issue. *Id.* at *3. The district court then found that Richmond Road had not adequately alleged a cognizable property interest in the permit it sought and, even if it had, it failed to demonstrate a taking because it had not shown that the delay in getting the permit was extraordinary. *Id.* at *3-4. Richmond Road now appeals.[1]

II.

We review de novo a district court's grant of judgment on the pleadings under Federal Rule of Civil Procedure 12(c), applying the same standard of review as a Rule 12(b)(6) decision. *Jackson v. City of Cleveland*, 925 F.3d 793, 806 (6th Cir. 2019). Courts must construe the

1. Just before filing its notice of appeal, Richmond Road asked the district court to reconsider its decision under Rule 59(e). We held the appeal in abeyance pending resolution of the Rule 59(e) motion. In that motion, Richmond Road largely reiterated its arguments in opposition to judgment on the pleadings. The district court denied the motion for its previously stated reasons. Richmond Road did not amend its notice of appeal to include the Rule 59(e) motion. All that is before us, therefore, is the district court's grant of judgment on the pleadings. *See JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 550 F.3d 529, 532 (6th Cir. 2008) ("[A] court of appeals has jurisdiction only over the areas of a judgment specified in the notice of appeal as being appealed.").

complaint "in the light most favorable to the plaintiff" and accept all well pleaded allegations as true when determining whether the complaint states, "a claim to relief that is plausible on its face." *Id.* (quoting *Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018)). In doing so, we "focus only on the allegations in the pleadings." *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480, 483 (6th Cir. 2020).

A.

The district court granted Warrensville judgment on the pleadings, concluding that Richmond Road had failed to allege a taking within the meaning of either the federal or Ohio constitutions. We agree.

The Takings Clause of the Fifth Amendment prohibits government from taking private property for public use without just compensation, *see* U.S. Const. amend. V, and applies to the states via the Fourteenth Amendment. *See Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897). The Supreme Court has devised different tests for assessing various types of takings.[2]

2. Until recently, a party had to prove that the local government's land use decision was sufficiently final, which meant essentially exhausting state processes before it could bring a § 1983 claim for violation of the Fifth Amendment. *See Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). But the Supreme Court overturned that requirement, holding that a property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it, and can therefore bring a § 1983

See Lingle v. Chevron, U.S.A., 544 U.S. 528, 548 (2005) (discussing the different takings tests). The Court's test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) governs the question here—"whether a [property] use restriction effects a taking." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021). Such takings are commonly known as "regulatory takings." *Id.* at 149. When considering whether a regulatory taking has occurred, we first ask "whether the claimant has established a cognizable property interest for the purposes of the Just Compensation Clause." *Puckett v. Lexington-Fayette Urb. Cnty. Gov't*, 833 F.3d 590, 609 (6th Cir. 2016) (citation omitted). Next, we apply the "*Penn Central* factors" to determine whether a taking has occurred. *Cedar Point*, 594 U.S. at 156. *Penn Central* directs courts to "balanc[e] factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Id.* at 148. The same is true under Article I § 19 of the Ohio Constitution, which in this context, tracks the federal rule.[3] *See Wymsylo v. Bartec,*

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claim in federal court at that time without first exhausting state remedies. *Knick v. Twp. of Scott*, 588 U.S. 180, 194 (2019).

3. Warrensville correctly explains that the Ohio Supreme Court has interpreted Article I § 19 of the Ohio Constitution to provide greater protection than federal law in the physical takings context when it came to what constitutes a "public use." *See Norwood v. Horney*, 853 N.E.2d 1115, 1136, 1141 (Ohio 2006). Those greater protections are not at issue here in the regulatory takings context, however.

Inc., 970 N.E.2d 898, 912-14 (Ohio 2012) (applying *Penn Central*).

In this case, we assume that Richmond Road had a property interest protected by the federal Takings Clause and the Ohio Constitution. Even so, Warrensville's permit denial was not a taking under either federal or Ohio law.

In *Agins v. City of Tiburon*, the Supreme Court rejected a landowner's complaint that a municipality's "precondemnation activities" had amounted to a taking. 447 U.S. 255, 263 n.9 (1980), *abrogated on other grounds*, *Lingle*, 544 U.S. 528. The Court reasoned that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'" *Id.* (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)). Relying on *Agins*, the district court in this case concluded that Richmond Road's loss of rents during the government's decision-making process, including the appeal to the state court, did not constitute a taking because the delay was not extraordinary. *Richmond Rd.*, 2024 WL 2080737, at *3-4.

When deciding whether a taking occurred under the Fifth Amendment, federal courts regularly apply *Agins*' "extraordinary delay" standard to administrative decisions. *See*, *e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 334-35, 341-42 (2002) (rejecting arguments that a temporary moratorium on development was a regulatory taking because the

delay was "not unreasonable"); *Mich. Chrome & Chem. Co. v. City of Detroit*, 12 F.3d 213 (Table), at *9 (6th Cir. 1993) (applying the "extraordinary delay" standard to a master airport plan); *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 618, 631 (9th Cir. 2020) (applying the "extraordinary delay" standard to the reversion of zoning classifications from urban back to agricultural); *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005) (applying the "extraordinary delay" standard to the issuance of building permits). The same is true in Ohio. *See State ex rel. Duncan v. Middlefield*, 898 N.E.2d 952, 956-57 (Ohio 2008) (endorsing the "extraordinary delay" standard and holding that "[u]ntil regulatory delay becomes unreasonable, there is no taking").

The Supreme Court has been careful to distinguish, however, between extraordinary delay, which may constitute a taking, and "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 321 (1987). So the issue here is whether Warrensville's delay in granting the permit is extraordinary or routine. To resolve that question, courts weigh "all relevant factors, including the length of the delay," "bad faith on the part of the government," and "any delay that the interestholder's conduct caused." *State ex rel. AWMS Water Sols., L.L.C. v. Mertz*, 165 N.E.3d 1167, 1188 (Ohio 2020) (cleaned up); *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001) (applying these same factors and the "nature of the permitting process as well as the reasons for any delay").

When, as in this case, "a development permit . . . is denied in a land use regulatory process, but that denial is later held invalid by a reviewing court," courts "generally have rejected" the claim that the delay amounted to a "compensable [] regulatory taking" under the Fifth Amendment. Edward H. Ziegler, Jr., First English *and normal delays—Illegal permit denial and temporary takings*, 1 Rathkopf's The Law of Zoning and Planning § 6:28 (4th ed.). Courts frequently hold that the time necessary for review, including judicial review, falls under *First English*'s "normal delay" distinction. *Id.*; *see Sunrise*, 420 F.3d at 330 ("As a general rule, a delay in obtaining a building permit is not a taking but a non-compensable incident of ownership."); *Smith v. City of Brenham*, 865 F.2d 662, 663 (5th Cir. 1989) (holding that a four-year delay in granting a permit was not sufficient for a taking); *see also Smith v. Town of Wolfeboro*, 615 A.2d 1252, 1258 (N.H. 1992) ("The delay inherent in the statutory process of obtaining [the permit], including appeals to the superior court and to this court, is one of the incidents of ownership . . . [which] must be borne by the property owner and does not give rise to a compensable taking."); *Byrd v. City of Hartsville*, 620 S.E.2d 76, 81 (S.C. 2005) ("[N]ormal delays in obtaining building permits . . . have long been considered permissible exercises of the police power. Until regulatory delay becomes unreasonable, there is no taking." (internal citations omitted)). Were that not the case, "[a] rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking." *Tahoe-Sierra*, 535 U.S. at 335.

Applying federal and Ohio takings precedent to Richmond Road's claims shows there was no taking here. There was a one-year delay between Warrensville's permit denial and the state Court ordering Warrensville to issue the permit to Richmond Road. In the bureaucratic world, such delays are not extraordinary. *See*, *e.g.*, *Wyatt*, 271 F.3d at 1098 (gathering cases showing that much longer delays were not extraordinary). What's more, the "bulk of the delay that [Richmond Road] claim[s] was extraordinary was a result of the process to appeal [Warrensville's] decision." *Sunrise*, 420 F.3d at 330. In fact, Richmond Road may even have contributed to the delay by first submitting its application as a "daycare" facility and submitting the corrected application only on its second try. *Richmond Rd.*, 2024 WL 2080737, at *1. Even if we were to agree that a one-year delay was unreasonable in this situation, Warrensville lacked "any control over how quickly the case moved under state law through the various judicial appeals processes." *Sunrise*, 420 F.3d at 330. Warrensville was thus not the offending entity on the delay front up until the state court's decision. *Cf. Anderson v. Charter Twp. of Ypsilanti*, 266 F.3d 487, 498 (6th Cir. 2001) (dismissing a claim of unreasonable delay against a township because the delay was caused by the reviewing court). As for bad faith on the government's part, Richmond Road does not allege any.

Accordingly, we cannot agree with Richmond Road that the denial and subsequent delay in issuing the permit was a regulatory taking.[4]

4. Richmond Road represents that, as of the time it filed its initial appellate brief in our court, Warrensville had "neither

B.

Richmond Road also argues that its claim could be read to contend that Warrensville violated its substantive due process rights. It asks us to remand for the district court to consider that argument. But Richmond Road did not raise a substantive due process claim in the district court, so it is forfeited. *Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1011 (6th Cir. 2022).

In its complaint, Richmond Road alleged in the most general of terms that Warrensville "deprived Plaintiffs of their civil rights guaranteed by the Fifth and Fourteenth Amendments." R. 1-1, PageID 13 ¶ 30. Richmond Road never alleged anything further concerning a due process claim, however. In its next filing—its opposition to judgment on the pleadings—Richmond Road again failed even to mention its supposed substantive due process claim when arguing that the district court should not dismiss its complaint. Richmond Road twice mentions the Fourteenth Amendment, but only in connection with the Fifth Amendment, which of course is the source of the incorporated Takings rights its briefing did discuss. *See Chi., Burlington*, 166 U.S. at 236. The district court understandably did not discuss a Fourteenth Amendment substantive due process claim when granting judgment

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granted [its] Site Plan application nor issued the corresponding zoning permit" as ordered by the state court, nearly one year earlier. Nor has Warrensville appealed the court's decision. Should Warrensville continue to refuse Richmond Road its court-ordered permit, its delays might become extraordinary and constitute a taking, though that question is not before us.

on the pleadings because Richmond Road did not fairly present that claim. And Richmond Road cannot raise the argument for the first time on appeal. *See Peters Broad. Eng'g, Inc. v. 24 Cap., LLC*, 40 F.4th 432, 443 (6th Cir. 2022) (explaining that appellate courts do "not ordinarily address new arguments raised for the first time on appeal").

C.

Richmond Road finally argues that the district court abused its discretion by exercising supplemental jurisdiction over its takings claim under the Ohio Constitution rather than remanding the claim to state court.[5] We disagree.

We review a district court's exercise of supplemental jurisdiction over state-law claims for an abuse of discretion. *Gamel v. City of Cincinnati*, 625 F.3d 949, 951 (6th Cir. 2010). In analyzing whether a court abused its discretion, we weigh the "values of judicial economy, convenience, fairness, and comity." *Id.* "When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims, or

5. The district court dismissed Richmond Road's state takings claim in its grant of judgment on the pleadings without explicitly discussing Ohio takings jurisprudence. *See Richmond Rd.*, 2024 WL 2080737, at *4. In its denial of Richmond Road's Rule 59(e) motion, the court clarified, however, that "to the extent it was unclear" in its original opinion, "the Court finds that Plaintiffs failed to plead a takings claim under Article I, § 19 of the Ohio Constitution." R. 27, PageID 306 n.4.

remanding them to state court if the action was removed." *Id.* at 952. But this is not an invariable rule.

We see no abuse of discretion here. Richmond Road argues that the district court abused its discretion because (1) a remand would not waste judicial resources since no discovery has occurred and (2) there are remaining complex state law questions. But this case was on the district court's docket for about eight months before the court granted Warrensville's motion for judgment on the pleadings. The court was thus "familiar with the facts, and a significant amount of time had been invested in the litigation by everyone involved." *Stevens v. Saint Elizabeth Med. Ctr., Inc.*, 533 F. App'x 624, 633 (6th Cir. 2013). Moreover, no discovery was needed, as the matter turned on a question of law. Remanding these claims to state court when they were easily resolvable in federal court would have delayed a straightforward resolution, conserving everyone's resources. And, as we have explained, Ohio's regulatory takings jurisprudence largely mirrors federal takings law.

Richmond Road argues that the district court should have remanded the Ohio claims to state court to determine whether the "substantially advances" test for judging regulatory takings survives under the Ohio Constitution. The Ohio Supreme Court, following federal takings law, adopted that test in *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (2002). The U.S. Supreme Court has since abandoned that test for the federal Constitution. *Lingle*, 544 U.S. at 540. And at least one Ohio court has recognized *Shemo*'s implicit overruling. *See State ex rel.*

Anderson v. Obetz, 2008 WL 3319285, at *2-3 (Ohio Ct. App. Aug. 12, 2008). But even if *Shemo* is still good law, that would not merit a remand in this case because Richmond Road did not meaningfully advance an argument under the "substantially advances" test before the district court or before us. In sum, the district court did not abuse its discretion in exercising supplemental jurisdiction over Richmond Road's state-law claim.

* * *

We AFFIRM the district court's grant of judgment on the pleadings.

APPENDIX B — MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED MAY 9, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:23 CV 01662

RICHMOND ROAD PARTNERS, LLC, *et al.*,

Plaintiffs,

vs.

CITY OF WARRENSVILLE HEIGHTS, *et al.*,

Defendants.

Filed May 9, 2024

JUDGE PATRICIA A. GAUGHAN

MEMORANDUM OF OPINION AND ORDER

Introduction

This matter is before the Court upon defendants' Motion for Judgment on the Pleadings. (Doc. 11). This case arises from a zoning dispute wherein municipal defendants denied plaintiffs' site plan application, which

was later approved on administrative appeal. For the following reasons, the motion is GRANTED.

Facts

Plaintiffs Richmond Road Partners, LLC and Step Forward filed this Complaint for Declaratory Judgment and Mandatory Injunction ("Complaint") against defendants City of Warrensville Heights, City of Warrensville Heights Planning Commission ("Planning Commission"), and City of Warrensville Heights Building Commissioner. This case was originally filed in the Cuyahoga County Court of Common Pleas[1] and removed to this Court based on federal question jurisdiction.

Plaintiff Step Forward is an Ohio non-profit school providing Head Start early education services for low-income families and children in the Cleveland area. Plaintiff Richmond Road Partners, LLC owns property in the city of Warrensville Heights that it agreed to lease to Step Forward for a Head Start program. The property is zoned U-7A. Warrensville Heights Ordinance § 1143.02 requires that buildings and land in the U-7A zoning district are used for "public and private schools, universities, colleges, professional schools, vocational schools and related educational facilities," or "non-profit educational and scientific research agencies." Compl. ¶¶ 11, 13.

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1. *Richmond Road Partners, LLC, et al. v. City of Warrensville Heights, et al.*, Cuyahoga County Court of Common Pleas, CV-23-983040, filed July 27, 2023.

In the fall of 2022, plaintiffs submitted a conditional use permit application seeking approval to open a Head Start and daycare facility on the property.[2] The Planning Commission denied the application and the Warrensville Heights City Council thereafter accepted the Planning Commission's recommendation and denied the application.[3]

Around November 21, 2022, plaintiffs applied to the Planning Commission for site plan approval for use of the property as a school and/or a non-profit educational agency. Around December 12, 2022, plaintiffs appeared before the Planning Commission and the application was denied. According to the Complaint, the commissioners indicated that they did not believe the property was a good location "for this type of day care, school, or . . . whatever you want to call it." Compl. ¶ 12. The City Council denied the application on February 7, 2023.

On March 8, 2023, plaintiffs filed an administrative appeal pursuant to Ohio Revised Code § 2506 with the Cuyahoga County Court of Common Pleas.[4] On October 4, 2023, the court found that defendants' decision denying plaintiffs' application for site plan approval was arbitrary,

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2. *Richmond Road Partners, LLC, et al. v. Warrensville Heights City Counsel, et al.*, Cuyahoga County Court of Common Pleas, CV-23-976289, Opinion and Order dated Oct. 4, 2023 (Kelley, K.), at 2 (hereinafter "State Court Order").

3. *Id.*

4. *Richmond Road Partners, LLC, et al. v. Warrensville Heights City Counsel, et al.*, Cuyahoga County Court of Common Pleas, CV-23-976289, filed Mar 8, 2023.

unreasonable, and unsupported by the preponderance of the submitted evidence.[5] The court remanded the matter, directing defendants to grant plaintiffs' application.[6]

While the administrative appeal was pending, on July 27, 2023, plaintiffs filed this Complaint, which asserts four causes of action. Count I seeks a declaration that defendants' decision denying plaintiffs' application for site plan approval was unconstitutional, arbitrary, capricious, unreasonable, and without substantial relation to the public health, safety and morals. Count II is a takings claim based upon the Just Compensation Clause of the Fifth Amendment and made applicable to the states through the Fourteenth Amendment. Count III is a request for mandatory injunction to proceed with appropriations proceedings to compensate plaintiffs for the alleged taking. Count IV is a claim arising under 42 U.S.C. §§ 1983 and 1988 for violations of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Ohio Constitution based on the alleged taking.

This matter is now before the Court upon defendants' Motion for Judgment on the Pleadings.

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5. State Court Order, at 8 ("A review of the entire record reflects that the decision of Appellee Warrensville Heights City Counsel of February 7, 2023, denying Appellants' application for site plan approval for the location of a preschool/educational facility . . . was arbitrary, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence.").

6. *Id.*

Appendix B

Standard of Review

A "motion for judgment on the pleadings under Rule 12(c) is generally reviewed under the same standard as a Rule 12(b)(6) motion." *Mellentine v. Ameriquest Mortg. Co.*, 515 Fed. Appx. 419, 2013 WL 560515 (6th Cir. February 14, 2013) (citing *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir.2001)). "For purposes of a motion for judgment on the pleadings, all well-pleaded allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless entitled to judgment." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir.2007).

Thus, "[w]e assume the factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff." *Comtide Holdings, LLC v. Booth Creek Management Corp.*, 335 Fed. Appx. 587, 2009 WL 1884445 (6th Cir. 2009) (citing *Bassett v. Nat'l Collegiate Ath. Ass'n*, 528 F.3d 426, 430 (6th Cir.2008)). In construing the complaint in the light most favorable to the non-moving party, "the court does not accept the bare assertion of legal conclusions as enough, nor does it accept as true unwarranted factual inferences." *Gritton v. Disponett*, 335 Fed. Appx. 587, 2009 WL 1505256 (6th Cir. 2009) (citing *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir.1997). As outlined by the Sixth Circuit:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief.

> Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). However, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. A plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Keys v. Humana, Inc., 684 F.3d 605, 608 (6th Cir.2012). Thus, *Twombly* and *Iqbal* require that the complaint contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face based on factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678. The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

Appendix B

Discussion

Defendants argue that the Court lacks subject matter jurisdiction over this action because the decision of the Court of Common Pleas directing the defendants to grant plaintiffs' site approval application renders plaintiffs' claims moot. Moreover, defendants argue that plaintiffs fail to allege a viable taking claim.

A. Count I

In Count I, plaintiffs request a declaration from the Court that defendants' decision to deny their site approval application was arbitrary, capricious, and unsupported by the evidence. While the Court of Common Pleas reversed defendants' decision and directed defendants to grant plaintiffs' application, plaintiffs argue that their claims present issues that have not yet been determined and were expressly reserved by plaintiffs through their administrative appeal. Opp. at 10.

"Under Article III of the Constitution, a federal court's jurisdiction extends only to actual cases and controversies. A federal court has no power to adjudicate disputes which are moot." *Ammex, Inc. v. Cox*, 351 F.3d 697, 704 (6th Cir. 2003) (citation and alterations omitted). Claims become moot "when the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome." *Brandywine, Inc. v. City of Richmond, Kentucky*, 359 F.3d 830, 836 (6th Cir. 2004) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1978)).

Pursuant to the State Court Order, plaintiffs have received the relief they now request in Count I.[7] Therefore, because defendants have already been directed to grant plaintiffs' site plan application, the motion is granted as to Count I on the basis that the claim is moot.

B. Counts II, III, and IV

Counts II, III, and IV are all based upon an alleged violation of the Takings Clause. The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use, without just compensation. U.S. Const. amend. V. The Fourteenth Amendment made the Takings Clause applicable to the states. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536. Courts apply "a two-part test to evaluate claims that a governmental action constitutes a taking of private property without just compensation." *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 481 (6th Cir. 2004). "First, the court must examine whether the claimant has established a cognizable "property interest" for the purposes of the Just Compensation Clause." *Id.* (citations omitted). "Secondly, where a cognizable property interest is implicated, the court must consider whether a taking occurred." *Id.* (citations omitted).

Defendants argue that plaintiffs do not establish a takings claim. They argue that "[a]bsent extraordinary delay, a governmental entity's application of its administrative process for making zoning decisions

7. State Court Order, at 8.

cannot result in a state or federal taking claim." Mot. at 9. They argue that there was no delay to the administrative process, which concluded less than a year after plaintiffs' site plan application. *Id.* at 10-11.

Plaintiffs' allegations supporting their takings claim are based upon defendants' denial of their site plan application prior to the State Court Order directing defendants to approve it. Plaintiffs argue that defendants effected a temporary taking from February 7, 2023, when the City Council denied their site plan application, to the time a new tenant is found for the property. Opp. at 13-14. Further, plaintiffs argue that the defendants' administrative process was unnecessarily delayed due to the denial of the site plan application, which plaintiffs submitted only after they were advised that a school was a permitted use of the building. *Id.* at 14.

The Court finds that plaintiffs do not establish a takings claim. Plaintiffs' anticipated value of rent lost during the period of the administrative process is not a cognizable property interest sufficient to support a takings claim. *See Snyder v. Vill. of Luckey Ohio*, 2024 WL 556134, at *6-*8 (N.D. Ohio Feb. 12, 2024) (dismissing takings claim because plaintiffs failed to identify a legally cognizable property interest where "the physical property ha[d] not changed hands" and the alleged property interest taken was the fluctuation in value during the process of governmental decisionmaking").

Moreover, even if it was a cognizable property interest, "[t]he Supreme Court has stated that mere fluctuations in value during the process of governmental decisiomaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense." *Id.* at *7 (citing *Agins v. city of Tiburon*, 447 U.S. 255, 263 n.9 (1980)) (alterations omitted). While plaintiffs argue a delay occurred, a one-year delay is not extraordinary and does not give rise to a takings claim. *See*, *e.g.*, *id.* at *7-*8 (finding two-year delay not extraordinary); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002) (finding thirty-two-month delay not extraordinary); *Wyatt v. United States*, 271 F.3d 1090. 1097-1100 (Fed. Cir. 2001) (finding seven-year delay not extraordinary).

Because plaintiffs do not identify a property interest to support a takings claim and cannot establish an extraordinary delay, there is no illegal taking. Accordingly, the motion is granted as to Counts II, III, and IV.

Conclusion

For the foregoing reasons, defendants' Motion for Judgment on the Pleadings is granted.[8]

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8. Although not argued, because plaintiffs could have raised their state and federal claims alongside an administrative appeal in the state court, their claims are barred under the doctrine of res judicata. *See Moore, Successor Tr. of Clarence M. Moore & Laura P. Moore Tr. v. Hiram Twp., Ohio*, 988 F.3d 353 (6th Cir. 2021) (finding that administrative appeal pursuant to R.C. 2506 precluded subsequent claims that could have been raised during

IT IS SO ORDERED.

Date: May 9, 2024

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

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the appeal) (collecting cases); *Landberg v. Newburgh Heights Police Dep't*, 2018 WL 2899660, at *5 (N.D. Ohio June 11, 2018) (applying res judicata where plaintiff "could have raised his age discrimination claims during his administrative appeal in the Court of Common Pleas").

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED JULY 22, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:23 CV 1662

RICHMOND ROAD PARTNERS, LLC, *et al.*,

Plaintiffs,

vs.

CITY OF WARRENSVILLE HEIGHTS, *et al.*,

Defendants.

Filed July 22, 2024

JUDGE PATRICIA A. GAUGHAN

MEMORANDUM OPINION AND ORDER

INTRODUCTION

This matter is before the Court upon Plaintiffs' Fed. R. Civ. P. 59(e) Motion for Reconsideration. (Doc. 20.) This case arises from a zoning dispute wherein municipal defendants denied plaintiffs' site plan application, which

was later approved on administrative appeal. For the reasons that follow, the motion is denied.

FACTS

As detailed more fully in this Court's Memorandum of Opinion and Order on Defendants' Motion for Judgment on the Pleadings, plaintiffs Richmond Road Partners, LLC ("Richmond Road Partners") and Step Forward (collectively, "Plaintiffs") applied for preliminary/final site plan approval on November 21, 2022, to open a Step Forward facility on property owned by Richmond Road Partners in the city of Warrenville Heights.

On December 12, 2022, Plaintiffs appeared before Defendant City of Warrensville Heights Planning Commission (the "Planning Commission"), who denied the application. On February 7, 2023, Plaintiffs appeared before defendant Warrensville Heights City Council (collectively with the Planning Commission, "Defendants"), who accepted the Planning Commission's recommendation and denied the application.

On March 8, 2023, Plaintiffs filed an administrative appeal pursuant to Ohio Revised Code § 2506 with the Cuyahoga County Court of Common Pleas.[1] On October 4, 2023, that court found in Plaintiffs' favor, ruling that Defendants' decision denying Plaintiffs' application

1. *Richmond Road Partners, LLC, et al. v. Warrensville Heights City Counsel, et al.*, Cuyahoga County Court of Common Pleas, CV-23-976289, filed Mar 8, 2023.

was arbitrary, unreasonable, and unsupported by the preponderance of the submitted evidence. The court remanded the matter, directing Defendants to grant Plaintiffs' application.

On July 27, 2023, while the administrative appeal was pending, Plaintiffs filed this civil lawsuit against Defendants in the Cuyahoga County Court of Common Pleas.[2] Plaintiffs' complaint asserted four causes of action. Count I sought a declaration that Defendants' decision denying Plaintiffs' application was unconstitutional, arbitrary, capricious, unreasonable, and without substantial relation to the public health, safety and morals. Count II claimed that Defendants' denial of Plaintiffs' application amounted to an unconstitutional regulatory taking, in violation of the Ohio Constitution and the United States Constitution. Count III sought an injunction to initiate appropriation proceedings to determine compensation for the alleged taking. Lastly, Count IV claimed that Defendants' alleged taking violated Plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution in violation of 42 U.S.C. §§ 1983 and 1988.

Defendants removed the case to this Court and, on January 30, 2024, filed a motion for judgment on the pleadings. Plaintiffs opposed the motion. On May 9, 2024, this Court granted Defendants' Motion for Judgment on the Pleadings and entered judgment in Defendants' favor.

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2. *Richmond Road Partners, LLC, et al. v. City of Warrensville Heights, et al.*, Cuyahoga County Court of Common Pleas, CV-23-983040, filed July 27, 2023.

On June 6, 2024, Plaintiffs filed the present Motion for Reconsideration. Defendants oppose the motion.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure do not provide for motions for reconsideration. The Sixth Circuit, however, allows for such an operation, reasoning that a motion to reconsider may be treated as a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e). *See Rodriguez v. City of Cleveland*, 2009 WL 1565956, at *1 (N.D. Ohio June 6, 2009) (citing *Smith v. Hudson*, 600 F.2d 60, 62 (6th Cir. 1979)). Nonetheless, such motions are disfavored and seldom granted because they contradict notions of finality and repose. *Id.*; *see also Wells Fargo Bank v. Daniels*, 2007 WL 3104760, at *1 (N.D. Ohio Oct. 22, 2007); *Plaskon Elec. Materials v. Allied-Signal*, 904 F. Supp. 644, 669 (N.D. Ohio 1995).

A court may grant a motion to amend or alter judgment if there has been (1) a clear error of law; (2) an intervening change in controlling law; (3) newly discovered evidence; or (4) a showing of manifest injustice. *Jones v. Gobbs*, 21 F. App'x 322, 323 (6th Cir. 2001) (citing *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). A motion to reconsider "is not designed to give an unhappy litigant an opportunity to relitigate matters already decided, nor is it a substitute for appeal." *Sherwood v. Royal Ins. Co. of Am.*, 290 F. Supp. 2d 856, 858 (N.D. Ohio 2003) (citing *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)). "It is not the function of a motion to reconsider either to renew

arguments already considered and rejected by a court or 'to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue.'" *McConocha v. Blue Cross & Blue Shield Mut. of Ohio*, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996) (quoting *In re August, 1993 Regular Grand Jury*, 854 F. Supp. 1403, 1408 (S.D. Ind. 1994)).

ANALYSIS

Plaintiffs argue that this Court should alter or amend its May 9, 2024 Judgment Entry (the "Judgment Entry") dismissing Plaintiffs' complaint because (1) this Court committed clear errors of law; (2) newly discovered evidence supports Plaintiffs' Takings Clause claim, and (3) dismissing Plaintiffs' claims risks a manifest injustice. The Court will address each argument in turn.

1. Clear Errors of Law

As explained in this Court's Memorandum of Opinion and Order filed contemporaneously with the Judgment Entry, Plaintiffs claims were dismissed for two separate reasons. First, Plaintiffs' Count I (seeking a declaration that Defendants' decision to deny Plaintiffs' application was arbitrary, capricious, and unsupported by the evidence) is moot because Plaintiffs received this requested relief in the state court administrative proceedings. Plaintiffs seem to agree with the Court's dismissal of Count I and do not raise any reason in their

Motion as to why Count I should not have been dismissed. (*See* Doc. 20, at 6-7 ("[T]he Court determined that only the claim for declaratory judgment was moot. . . . Plaintiffs agree with that characterization."); *id.* at 9 ("The only part of [Plaintiffs'] current claim that overlaps the facts of the [administrative] appeal is the legality of the administrative determination itself.").)

Second, Counts II, III, and IV were dismissed because Plaintiffs failed to plead sufficient facts to establish a Takings Clause claim.[3] In determining that Plaintiffs' complaint failed to allege a taking, this Court relied on *Snyder v. Vill. of Luckey*, 2024 WL 556134, at *6-8 (N.D. Ohio Feb. 12, 2024), which in turn relied on the Supreme Court's pronouncement in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" *Id.* at 263 n.9.

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3. Plaintiffs raise an issue with a footnote at the end of the Court's Memorandum of Opinion and Order that noted Plaintiffs' claims that could have been raised alongside their administrative appeal are barred under the doctrine of res judicata. Nothing in that footnote served as the basis for the Court's dismissal of any of Plaintiffs' claims and, therefore, cannot serve as a basis to alter the Judgment Entry. Even so, Plaintiffs acknowledge that, under Sixth Circuit authority, "if a plaintiff chooses to pursue an administrative appeal, claim preclusion may bar a later attempt to seek **the same relief**." (Doc. 20, at 7 (quoting *Harrison v. Montgomery Cty.*, 997 F.3d 643, 651 (6th Cir. 2021) (emphasis added by Plaintiffs).) As noted above, Plaintiffs acknowledge that their Count I seeks the same relief as the administrative appeal.

Appendix C

Plaintiffs argue that the Court's application of *Snyder* is "not analogous" to the present case and "its proposed application is contrary to law." (Doc. 20, at 12.) According to Plaintiffs, *Snyder* is inapplicable because the "taking" in *Snyder* was a delay caused by government processes, whereas here Plaintiffs frame the taking as the Planning Commission's denial itself. Essentially, Plaintiffs ask this Court to find that an arbitrary, capricious, and unsupported denial of a site application amounts to a taking—irrespective of any burden on a property owner.

Plaintiffs' position, however, directly contradicts established Fifth Amendment Takings Clause jurisprudence. In fact, the "substantially advances" test that Plaintiffs rely on to support their position was explicitly abrogated by the Supreme Court in 2005. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the Court held that the "substantially advances" test, first outlined in *Agins*, "is not a valid takings test, and . . . has no proper place in our takings jurisprudence." *Lingle*, 544 U.S. at 548.[4]

4. Plaintiffs also cite to *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St. 3d 59, 2002-Ohio 1627, 765 N.E.2d 345 (2002). Although *Shemo*'s adoption of *Agins*'s "substantially advances" test has not been explicitly overruled or abrogated, the Supreme Court of Ohio seems to have implicitly dropped the "substantially advances" test from its takings jurisprudence in the wake of *Lingle*. *See State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 875 N.E.2d 59, 65 (Ohio 2007) (citing *Lingle* for the applicable standards that establish a taking without reference to *Agins*, *Shemo*, or the "substantially advances" test); *see also State ex rel. Anderson v. Obetz*, 2008 Ohio 4064, 2008 WL 3319285, at *2 (Ohio Ct. App. Aug. 12, 2008) (recognizing *Shemo*'s implied overruling).

Without the "substantially advances" test, Plaintiffs cite no case law to support their position that they can establish a Takings Clause claim based on the validity

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And while the Court acknowledges that the Ohio Supreme Court has held that Article I, § 19 of the Ohio Constitution affords greater protection than the federal Takings Clause in certain instances of physical takings, *compare Kelo v. City of N. London*, 545 U.S. 469 (2005) (holding that a city's use of its eminent domain power to take property for the purpose of economic development satisfies the "public use" requirement of the federal Takings Clause), *with Norwood v. Horney*, 853 N.E.2d 1115 (2006) (finding that an economic or financial benefit alone is insufficient to satisfy the public-use requirement of Article I, § 19 of the Ohio Constitution), Plaintiffs have not alleged a physical taking and, thus, "the analysis required to determine if a regulatory taking has occurred under the Ohio Constitution is the same analysis required to determine if a regulatory taking has occurred under the U.S. Constitution." *In re Davis*, 539 B.R. 334, 345 (Bankr. S.D. Ohio 2015) (citing *Wymsylo v. Bartec, Inc.*, 970 N.E.2d 898, 914-15 (Ohio 2012) (applying federal regulatory takings jurisprudence and determining that the regulation in question did not result in "the type of taking contemplated by either the Fifth Amendment to the United States Constitution or the Ohio Constitution, Article I, Section 19")).

Further, even if the Ohio Constitution affords greater protection to Plaintiffs' state-law claims, Plaintiffs have not offered any independent reason as to why their state-law claims should survive under Ohio's takings jurisprudence. As such, to the extent it was unclear in the Court's original Memorandum and Opinion and Order, the Court finds that Plaintiffs failed to plead a takings claim under Article I, § 19 of the Ohio Constitution and the Fifth Amendment of the United States Constitution. *See State ex. Rel AWMS Water Sols., LLC v. Mertz*, 165 N.E.3d 1167, 1177 (Ohio 2020) (citing *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 875 N.E.2d 59, 65 (Ohio 2007)).

of the Planning Commission's actions alone.[5] Rather, the Supreme Court has explained that a plaintiff can establish a Takings Clause claim by alleging either (1) "a 'physical' taking," (2) "a *Lucas*[*v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992)]-type 'total regulatory taking,'" (3) "a *Penn Central*[*Transp. Co. v. City of New York*, 438 U.S. 104 (1978)] taking," or (4) "a land-use exaction violating the standards set forth in *Nollan*[*v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)] and *Dolan*[*v. City of Tigard*, 512 U.S. 374 (1994)],." *Lingle*, 544 U.S. at 548. Here, Plaintiffs do not allege a physical taking, a *Lucas*-type total regulatory taking, or a land-use exaction. Accordingly, the alleged

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5. To the extent Plaintiffs are asking this Court to establish a new standard for a Takings Clause claim based on the validity of the underlying government regulation, the Supreme Court's takings jurisprudence forecloses Plaintiffs' request. As the Supreme Court has explained, the "common touchstone" of takings jurisprudence is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. Accordingly, the focus in a takings claim is "the severity of the burden that government imposes upon private property rights." *Id.*

In contrast, Plaintiffs' suggested focus on the legitimacy of the Planning Commission's denial, like the "substantially advances" inquiry, "reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners." *Id.* at 542. A challenge to a regulation's underlying validity, "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Id.* at 543.

regulatory taking of Plaintiffs' property is assessed under *Penn Central. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002).

"[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 540. Also relevant may be the "'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good[.]'" *Id.* at 539. Further, under the *Penn Central* framework, courts must focus on "the parcel as a whole." *Penn Central*, 438 U.S. at 130-31 ("'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 [a]ffected 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."); *see also Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 327 ("'[W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking.'" (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)). Relying on the standard and principals set forth in *Penn Central*, the Supreme Court has stated that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in

the constitutional sense'" *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332 (quoting *Agins*, 447 U.S. at 263 n.9) (further citations omitted).

Applying this established takings jurisprudence to Plaintiffs' claims, this Court found that any devaluation in Plaintiffs' property interests[6] caused by the Planning Commission's actions was not because of any extraordinary delay and, thus, as a matter of law, could not establish a Takings Clause claim. (Doc. 18, at 7 ("While plaintiffs argue a delay occurred, a one-year delay is not extraordinary and does not give rise to a takings claim." (citing *Agins* (two-year delay not extraordinary), and *Tahoe-Sierra Pres. Council, Inc.* (thirty-two month delay not extraordinary), and *Wyatt v. United States*, 271 F.3d 1090, 1097-1100 (Fed. Cir. 2001) (seven-year delay not extraordinary)).) Plaintiffs do not cite any case law that suggests the Court applied incorrect law. Nor do Plaintiffs argue that any devaluation of their property rights was caused by an extraordinary delay. Rather, Plaintiffs double down on their contention that the length of any delay is irrelevant because the Planning Commission's denial itself somehow establishes a taking. For the reasons discussed above, Plaintiffs' contention is entirely without merit.

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6. Plaintiffs take issue with this Court's finding that they failed to allege a cognizable property interest based on their lost rental income. (*See* Doc. 20, at 13.) However, as the Court held in its previous Memorandum Opinion and Order and now re-explains here, even if Plaintiffs alleged a cognizable property interest, they have failed to allege a taking.

For that reason, and all the aforementioned reasons, no clear error of law warrants an amendment or alteration to this Court's Judgment Entry dismissing Plaintiffs' claims.

2. Newly Discovered Evidence

Plaintiffs also contend that newly discovered evidence supports their Takings Clause claims and warrants altering the Judgment Entry dismissing the same. This Court dismissed Plaintiffs' claims as a matter of law on Defendants' Motion for Judgment on the Pleadings. Fed R. Civ. Pro. 12(c). In reviewing a Rule 12(c) motion, courts can consider all available pleadings, including the complaint and the answer. *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 832 (6th Cir. 2010) (citing Fed. R. Civ. P. 12(c)). "The court can also consider: (1) any documents attached to, incorporated by, or referred to in the pleadings; (2) documents attached to the motion for judgment on the pleadings that are referred to in the complaint and are central to the plaintiff's allegations, even if not explicitly incorporated by reference; (3) public records; and (4) matters of which the court may take judicial notice." *Id.* Courts may not, however, "consider material outside of the pleadings unless the court converts the motion into one for summary judgment." *Hickman v. Laskodi*, 45 F. App'x 451, 454 (6th Cir. 2002) (citing Fed. R. Civ. P. 12(c)).

Nevertheless, Plaintiffs now ask this Court to alter the Judgment Entry and deny Defendants' Motion for Judgement on the Pleadings based on "newly discovered" deposition testimony, which was obtained during fact discovery while Defendants' motion was pending. As Defendants' properly point out, however, this deposition testimony is irrelevant to whether the pleadings can withstand Defendants' motion and, accordingly, is not a proper basis for altering the Judgement Entry. (Doc. 24, at 8.) Plaintiffs do not refute this basic principle in their reply brief.

For all the aforementioned reasons, no newly discovered evidence warrants an amendment or alteration to this Court's Judgment Entry dismissing Plaintiffs' claims.

3. Manifest Injustice

Last, Plaintiffs argue that dismissing Plaintiffs' claims risks causing manifest injustice by "render[ing] takings law theoretical and reward[ing] illegal and dishonest behavior by public officials." (Doc. 20, at 16.) "For [a] court to find manifest injustice, there must be 'a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy.'" *Sims Buick-GMC Truck, Inc. v. Gen. Motors LLC*, 2017 WL 7792553, at *3 (N.D. Ohio Mar. 1, 2017) (quoting *In re Bunting Bearings Corp.*, 321 B.R. 420, 423 (Bankr. N.D. Ohio 2004)).

Plaintiffs contend that "[i]f this Court were to hold that a city could not be sued for damages, including delays in the ability to use property, caused by unconstitutional zoning actions, no city could be held responsible as long as its decision were overturned on appeal for completely lacking legal basis." (Doc. 20, at 16.) According to Plaintiffs, "[a] city could, with impunity, prevent landowners from using their land in lawful ways and defeat time-sensitive transactions by unlawfully denying the landowners' applications and merely permitting their determinations to be overturned on appeal." (*Id.*)

Contrary to Plaintiffs' argument, as explained above, the underlying validly of the Planning Commission's actions cannot form the basis of Plaintiffs'—or any—Takings Clause claim. Further, Plaintiffs' argument that governments could intentionally, arbitrarily interfere with landowners' property rights with impunity is a red herring. The law provides other avenues to challenge such allegedly unlawful government actions. *See Lingle.*

For all the aforementioned reasons, the Court's judgment applying established takings jurisprudence does not risk any manifest injustice and does not warrant an amendment or alteration to the Judgment Entry dismissing Plaintiffs' claims.

Appendix C

CONCLUSION

For the foregoing reasons, Plaintiffs' Fed. R. Civ. P. 59(e) Motion for Reconsideration (Doc. 20) is DENIED.

IT IS SO ORDERED.

Dated: 7/22/24

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

APPENDIX D — OPINION AND ORDER OF THE COURT OF COMMON PLEAS FOR THE CUYAHOGA COUNTY, OHIO, DATED OCTOBER 3, 2023

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NO. CV 23 976289

RICHMOND ROAD PARTNERS, LLC, *et al.*,

Plaintiffs-Appellants,

v.

WARRENS VILLE HEIGHTS CITY COUNCIL, *et al.*,

Defendants-Appellees.

JUDGE KEVIN J. KELLEY

OPINION AND ORDER

This matter comes before the Court on an appeal of a decision issued by the Appellee Warrensville Heights City Council, Cuyahoga County, Ohio, on February 7, 2023, pursuant to R.C. Chapter 2506. The parties have fully briefed the appeal.

I. FACTS

The record, docket, and transcript indicate the following: The property at issue is located at 4834

Richmond Road, Warrensville Heights, Ohio. Appellant Richmond Road Partners, LLC, owns the property. In the fall of 2022, Appellant Step Forward submitted a conditional use permit application to seek approval to open a "Head Start and daycare facility" on the property. Tr. p.001. Appellee the Warrensville Heights Planning Commission ("Planning Commission") denied the application. On October 18, 2022, Appellee the Warrensville Heights City Council ("City Council") accepted the Planning Commission's recommendation and denied Step Forward's application.

In November 2022, Step Forward submitted an application before the Planning Commission for site plan approval for use of the property at issue as a "school and/or as a nonprofit educational agency." Tr. p.126. On December 12, 2022, the Planning Commission denied the application. On February 7, 2023, the City Council accepted the recommendation of the Planning Commission and denied the application. Pursuant to R.C. 2506, Appellants appealed to this Court from the final decision of City Council to deny the application for site plan approval of the "school" and/or "nonprofit educational agency" at 4834 Richmond Road, Warrensville Heights, Ohio.

Appellants set forth two assignments of error herein. First, City Council erred when it affirmed the decision of the Planning Commission denying the site plan approval for the location of a school and/or nonprofit educational agency in a U-7A District because the decision was not supported by a preponderance of substantial, reliable, and probative evidence. Second, City Council erred when

it affirmed the decision of the Planning Commission denying site plan approval for the location of a school and/or nonprofit education agency in a U-7A District because the decision was illegal, arbitrary, capricious and unreasonable. This Court agrees with Step Forward on both assignments of error.

II. Analysis

A. Jurisdiction

This Court has jurisdiction over this matter due to R.C. Chapter 2506, which states in pertinent part that:

> If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence of the whole record.

R.C. 2506.04.

B. Warrensville Heights Codified Ordinance Section 1143.02

It is uncontroverted that the property at issue is zoned U-7A in Warrensville Heights. See City Council Conclusions of Fact, Tr., p.424. Warrensville Heights City Codified Ordinance at Section 1143.02 states as follows:

> "Building and land in the Class U-7A District shall be used and buildings shall be designed, erected, altered or intended for the following:
>
> ***
>
> (d) Public and private schools, universities, colleges, professional schools, vocational schools, and related educational facilities;
>
> ***
>
> (1) Nonprofit educational and scientific research agencies; . . . "

Schools, related educational facilities, and nonprofit educational agencies are not defined in the City's Code. Further, the City's Code does not condition these permitted uses in any way. The zoning ordinance expressly permits a school and/or a nonprofit education agency.

C. The Proposed Use and Evidence of Use as a School and/or Nonprofit Educational Agency

Both the Planning Commission's and City Council's inquiry is limited to whether the proposed use conforms with the requirements of WHCO §1143.02, specifically, whether the proposed use is permitted in the Class U-7A District as either a school or a nonprofit educational agency.

Appendix D

In reviewing a zoning ordinance, a court must first apply the plain and unambiguous language of the ordinance. Just as with any legislative enactment, the words in a zoning code must be accorded their usual, customary meaning. *Village of Terrace Park v. Anderson Twp. Bd. of Zoning Appeals*, 2015-Ohio-4602, 48 N.E. 3d 143, ¶ 22 (1st Dist.), citing *Olentangy Local Schools Bd. of Edn. V. Delaware Cty. Bd. of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723, 23 N.E. 3d 1086, ¶ 30.

Further, this Court finds that zoning restrictions are "ordinarily construed in favor of the property owner." *Speedway L.L.C. v. Planning Comm'n City of Berea*, 2013-Ohio-3433, ¶ 9 (8th Dist.) (*quoting Saunders v. Clark Cty. Zoning Dept.*, 66 Ohio St.2d 259, 261, 421 N.E.2d 152 (1981). Zoning restrictions "cannot be extended to include limitations not clearly prescribed." *Id.*

In reviewing the transcript, the Court finds the following testimony supporting the notion that the use is that of either a school or a nonprofit educational agency:

- Step Forward will employ 33 early childhood educators who have degrees that range from a CDA to BS in early childhood education. Tr., p. 005.

- Step Forward will provide up to eight classrooms. Tr., p. 005.

- Step Forward provides a curriculum. Tr., pp. 141-174.

- Step Forward would follow a typical school year from September through June. Tr., pp. 141-174.

- The Ohio Department of Education describes Head Start and Early Head Start as programs that promote school readiness through improved access to educational . . . services to enrolled children. Tr., p. 173.

- Step Forward is eligible for state of Ohio grants due to its involvement with Head Start and Early Head Start. Tr., 172.

- The Law Director finds that Step Forward is a non-profit agency. Tr., p.610.

Despite the voluminous quantity of evidence, including a transcript of 657 pages, a preponderance of probative evidence does not exist to support the finding that Step Forward is not a school and/or nonprofit educational agency. The assertion that Step Forward is not a school and/or nonprofit education agency was arbitrary and capricious. In fact, instead of discussing WHCO 1143.02 in depth, Appellees reached their decision as follows:

- Commissioner Hubbard stated, " . . . I don't think it's an appropriate site for a school or day care, no matter what you call it, like I said." (Tr., p. 609).

- Commissioner Strong stated, "It's a day care and a school should not be in that area. That's all." (Tr., p.609).

- Commissioner Rox stated, "I don't believe that that's the right location for this type of day care, school, or what do you want, whatever you want to call it." "I just don't believe it is a good location." (Tr., p.609, 610).

- Commissioner Howard stated, "I just don't think the need is at this location" (Tr., p. 611). "And we would like to work with you to find another location here in the city-we just don't think that this is the right one." (Tr., p.612).

In reviewing the statements of the Commissioners, this Court concludes that these are subjective statements not based on whether the proposed use is permitted by the city's ordinances. In fact, these statements acknowledge that the proposed use is or may be that of a school, but they don't believe that it is an appropriate site.

An agency or commission's reliance on general and subjective goals and aspirations instead of specific statutory or ordinance provisions when evaluating land use applications is erroneous as a matter of law. *Speedway L.L.C. v. Planning Comm'n City of Berea*, 2013-Ohio-3433, ¶ 18 (8th Dist.). The record indicates that Appellees' decision was arbitrary. There is little evidence, let alone

a preponderance of reliable, probative, and substantial evidence, that Appellees addressed the specific codified ordinance language. Instead, the evidence shows a reliance on subjective personal preferences, intentions, and beliefs. See *South Park, Ltd. v. Council of Avon*, 2006-Ohio 2846.

Appellees submit as evidence the target age for children enrolled at the proposed school would not be considered "school-age." Tr., p. 602. In reading the City Ordinance, this Court cannot find any reference to "school-age" children, or any other terms denoting age or level of schooling. WHCO, 1143.02. Despite the lack of reference to "school-age" children in WHCO, 1143.02, Appellees use the phrase "school-age" children throughout the briefing of this matter. The Court finds no merit to this line of argument.

Appellees argue that "Step Forward's proposed facility did not qualify as a nonprofit educational agency or school and its Second Application must be denied." Conc. of Fact, ¶ 8. However, no reasoning is articulated as to how this decision was reached by the Commission. The Commission does mention that Step Forward's proposed facility "aligned with that of a daycare facility and not a conventional school-based institution." Conc. of Fact, ¶ 9. This Court notes that neither "daycare facility" nor "conventional school-based institution" is mentioned in WHCO 1143.02. The Commission finds that Step

Forward operates "head start" and "early head start" programs and is licensed by the Department of Job and Family Services as a "Child Care Center." Conc. of Fact, ¶ 10. However, not included in the Conclusions of Fact, is that the Ohio Department of Education describes Head Start and Early Head Start as programs that "promote school readiness through improved access to educational . . . services to enrolled children." Tr., p. 173. Yet the Commission fails to find the same in its Conclusions of Fact. Also noticeably absent is the fact that Step Forward is eligible for state of Ohio grants due to its involvement with Head Start and Early Head Start. Tr., 172. See Also Appellants' Reply Brief at Exhibit A.

Further, the Commission does not find that Step Forward is a nonprofit educational agency, yet the Law Director stated that Step Forward is a non-profit agency. Tr., p.610. Appellees offer no explanation as to why this particular nonprofit agency that promotes "school readiness through improved access to educational . . . services to enrolled children" is not a school nor a nonprofit educational agency. Appellees emphasize "the material differences between school and educational facilities uses and the work performed by Step Forward." Conc. of Fact, Tr., p.425. The record suggests otherwise. A review of the record and transcript indicates that at any given time Step Forward "will employ 33 early childhood educators who have degrees that range from a CDA to BS in early childhood education." Tr., p. 005. Step Forward

will provide up to eight classrooms. Tr., p. 005. Much like school and educational facilities, Step Forward, provides a curriculum. Tr., pp. 141-174. Step Forward would follow a typical school year from September through June. Id. After a thorough review of the whole record, this Court finds that the nonprofit agency at issue is either a nonprofit educational agency, a school, or a related educational facility as contemplated by Warrensville Heights City Codified Ordinance at Section 1143.02 regarding property zoned U-7A.

III. Conclusion

A review of the entire record reflects that the decision of Appellee Warrensville Heights City Council of February 7, 2023, denying Appellants' application for site plan approval for the location of a preschool/educational facility at 4834 Richmond Road, Warrensville Heights, Oho, was arbitrary, unreasonable, and unsupported by the preponderance of substantial, reliable, and probative evidence submitted herein. The denial is reversed and the matter is remanded to the Appellees to grant the Appellants' application.

/s/ Kevin J. Kelley	10/3/23
JUDGE KEVIN J. KELLEY	DATE