No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD W. OGLE; BETTY OGLE; JERRY KERLEY; MARK T. WHITE; JOHN C. SCHUBERT, dba High Bridge Development Partnership
Petitioner

v.

SEVIER COUNTY REGIONAL PLANNING COMMISSION; SEVIER COUNTY, TN
Respondents

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether initial approval in a land development scheme creates a legitimate claim of entitlement for the purpose of establishing a property interest that is protected under the Fourteenth Amendment via the entitlement test set out in *Board of Regents of State Colleges et al v. Roth*, 408 U.S. 564, 577 (1972), and adopted by the lower courts.

Whether, where relevant state law and local regulations and unambiguous previous actions of a Regional Planning Commission support a legitimate claim of entitlement or justifiable expectation of approval in a land development scheme, the Court should find a property interest that is protected under the Fourteenth Amendment.

Whether a Regional Planning Commission, acting in an administrative capacity, is acting arbitrarily and capriciously when it exercises discretion beyond the scope of existing standards and guidelines.

Whether this Court should provide a definitive standard of review for citizens that have a substantive due process right not to be subjected to arbitrary and capricious or irrational land use decisions.

LIST OF ALL PARTIES

The parties to the judgment from which review is sought are Petitioners Ronald W. Ogle, Betty Ogle, Jerry Kerley, Mark T. White, John C. Schubert, collectively doing business as High Bridge Development Partnership. They were parties in all proceedings below.

Respondents are the Sevier County Regional Planning Commission and Sevier County, Tennessee.

CORPORATE DISCLOSURE

Pursuant to Rule 29.6 of this Court's Rules, petitioner High Bridge Development Partnership has no parent company, and no publicly held corporations owns 10% or more of its stock.

RELATED CASES

- *Ogle v. Sevier Cty. Reg'l Planning Comm'n*, No. 3:09-cv-00537, United States District Court for the Eastern District of Tennessee. Judgment entered March 20, 2019.
- *Ogle v. Sevier Cty. Reg'l Planning Comm'n*, No. 19-6327, United States Court of Appeals for the Sixth Circuit. Judgment entered December 9, 2020.

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PETITION FOR A WRIT OF CERTIORARI

The High Bridge Partnership respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is unpublished, and is attached here as Appendix (App.) A. The opinion of the district court is unpublished. It is attached here as App. C.

JURISDICTION

The lower courts had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 1343. On March 20, 2019, the District Court for the Eastern District of Tennessee entered a final judgement in this matter, and subsequently, on October 23, 2019, entered an order denying Petitioner's Motion to Alter or Amend. On December 9, 2020, the Court of Appeals for the Sixth Circuit entered its order affirming the district court's opinion. On January 20, 2021, the Court of Appeals for the Sixth Circuit denied Petitioner's request for a rehearing *en banc*. Attached here as App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under the Court's March 19, 2020, order extending to file a petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

Statute provides a remedy in civil action for every state action which "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case arises from the arbitrary and unchecked expansion of governmental police powers, under the guise of land use planning commissions, and at the expense of the property interests protected under the procedural and substantive due process guarantees of the Fourteenth Amendment. *See* LAND DEVELOPMENT, THE GRAHAM DOCTRINE, AND THE EXTINCTION OF ECONOMIC SUBSTANTIVE DUE PROCESS, 150 U. Pa. L. Rev. 1255. Such regional planning commissions are given broad discretion, under federal precedent and state law, to make determinations about land use on a local level. *See Warren v. City of Athens*, 411 F.3d 697, 707 (6th Cir. 2005) (*citing Nectow v. City of Cambridge*, 277 U.S. 183, 187-88, 72 L. Ed. 842, 48 S. Ct. 447 (1928)) (holding that a court should not interfere with local zoning decisions unless the locality's action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense") (internal quotation marks and citation omitted). The arbitrary and capricious standard has been so narrowly

construed in the context of land use as to be largely ineffective. *See Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (1997) ("even allegations of bad faith enforcement of an invalid zoning ordinance do not, without more, state a substantive due process claim").

When unchecked, this broad discretion results in arbitrary application of local regulations and a lack of meaningful guidance for landowners to help anticipate how the relevant regulations will be interpreted and applied. In this case, under the current entitlement test, the Sevier County Regional Planning Commission's revocation of Petitioner's concept plat approval *after* it had been approved, and without authority or precedent for such revocation, was held insufficient to satisfy the "legitimate expectation of entitlement." The current standard is not effective, and this Court must address the standards by which property interests are measured for the purpose of due process analysis.

A. FACTUAL BACKGROUND

1. The Property and Surrounding Location

On February 28, 2005, the High Bridge Development Partnership ("Partnership"), purchased a 942.3-acre tract in Sevier County, Tennessee (the "Property") for the purpose of building a subdivision with approximately 400 homes. The Property is bordered on the south by Great Smokey Mountain National Park, and on the north by private property, including Miller's Creek, a multi-phase, private subdivision development. Immediately north of Miller's Creek is a tract of federally owned land that has been designated for an extension of the Foothills Parkway. App. C at 3. Both Miller's Creek and the Property have access to

Covemont Road, a county road, via Scottish Highland Way, a permanent private easement. App. A at 2. To get to the Property, or any of the Miller's Creek developments, one must take Scottish Highland Way across a stretch of the Foothills Parkway. The parties agree that Scottish Highland Way has a 50 foot right of way at the intersection with Covemont Road, and a 50 foot right of way at the entrance to the Property. There was a dispute of fact in the district court as to whether the right of way for Scottish Highland way through the Foothills Parkway was 40 feet or 50 feet. See Pretrial Order, R. 98, Page ID # 1073 (submitting to trial judge to decide issue).

2. Tennessee Law and the Sevier County Subdivision Regulations

Tennessee state law grants regional planning commissions the power to promulgate subdivision regulations for the review and approval of proposed development plans. Tenn. Code Ann. § 13-3-413(a). The Sevier County Regional Planning Commission ("Commission") adopted the operative subdivision regulations on March 26, 1996. Any development or subdivision of property is subject to compliance with the county's Subdivision Regulations ("Regulations"). Sevier County Subdivision Regulations, R. 47-14, Page ID # 553. The purpose of the Regulations is to ensure that "subdivisions be conceived, designed and developed in accordance with sound rules and proper minimum standards." Subdivision Regulations, art. I(A), R. 47-14, Page ID # 555.

Compliance with the Regulations is a prerequisite to consideration by the Commission for subdivision approval. Regulations, art. II(B)(1), R. 47-14, Page ID

556. The procedure for plat approval of a subdivision is described in Article II of the Regulations, and requires three steps: "preparation and submission to the planning commission of a concept plan of the proposed subdivision for preliminary plat approval, . . . preparation and submission to the technical staff of a design plan detailing the construction plans of the proposed subdivision, [and] . . . preparation and submission to the regional planning commission of a final plat together with appropriate certificates." Regulations, art. II(A)(1), R. 47-14, Page ID # 555.

Under the Regulations, the subdivider is obligated to "consult early and informally with the Planning Commission for advice and assistance before the preparation of a concept plat for approval." Regulations, art. II(A)(4), R. 47-14, Page ID # 555. Concept plans must comply with all the required design standards *or* include a written request for a variance, to be considered for submission. Regulations, art. II(B)(1), R. 47-14, Page ID # 556.

Article III of the Regulations outlines the general requirements and minimum standards of design for the required right of way widths for proposed subdivisions. *See* Regulations, art. III. Different width requirements exist for different categories of streets. "Minor Collector Streets" are defined as "those which carry traffic from minor streets to the major system of arterial streets and highways and include the principal entrance streets of a residential development and streets for major circulation within such a development. Regulations, art. III(A)(4)(c), R. 47-14, Page ID # 563. "Primary Residential Streets are defined in the Regulations as streets "which are used primarily for access to the abutting residential properties and designed to collect traffic from loop streets and cul-de-sac streets." Regulations,

art. III(A)(4)(d), R. 47-14, Page ID # 563. Both Minor Collector Streets and Primary Residential Streets are required to have 50-foot right of ways, while "Minor Residential and Loop Streets," which are "used primarily for access the abutting residential properties and designed to discourage through traffic," only require 40-foot right of ways. Regulations, art. III(A)(4)(e), R. 47-14, Page ID # 563. Cul-de-sacs similarly only require 40-foot right of ways. Regulations, art. III(A)(4)(f), R. 47-14, Page ID # 564.

A more general provision in the Regulations, which applies to private permanent easements, requires only that every lot of subdivided property be "reasonably accessible and serviceable from a publicly dedicated street or private permanent easement." Regulations, art. III(A)(14), R. 47-14, Page ID # 566.

Per the Regulations, "[w]ithin sixty (60) days after the submission of a concept plan, the planning commission will review it and indicate its approval, disapproval, or approval subject to modifications." Regulations, art. II(B)(4), R. 47-14, Page ID # 557. Sevier County Planner Jeff Ownby and two members of the Commission testified that they could not recall a single instance where the Commission denied a concept plat that satisfied the Regulations. App. C at 9. In the event that a concept plan is approved, the developer may move on to the design plan, which consists of detailed engineering design and construction drawings, and is only reviewed by the technical staff of the Commission. Concept plan approval is generally considered to be a green light for spending money. The subdivider bears the financial burden of any construction work carried out prior to design plan approval. Regulations, art. III(C)(1), R. 47-14, Page ID # 569. The Regulations

state that the final plat "shall conform substantially to the concept plat as approved," indicating that the land use determination is made at the time of concept plat approval, and the subsequent phases are in place to furnish and provide detail to the concept plat. Regulations, art. II(D)(1), R. 47-14, Page ID # 558. At trial, two members of the Commission testified that they could not recall a time when a concept plan was denied if it satisfied the Regulations. App. C at 2.

Furthermore, Tennessee state law requires that "no plat shall be acted upon by the commission without affording a hearing thereon, notice of the time and place of which shall be sent by mail to the address not less than five (5) days before the date fixed for such hearing." Tenn. Code Ann. § 13-3-404.

3. Miller's Creek Developments

The purchase of the Property was significantly inspired by the Miller's Creek developments. Transcript, R. 104, Page ID# 1645-1646.

Three years prior to the Partnership's purchase of the property, the Commission approved, in separate phases over the course of nearly two years, four different plats for the Miller's Creek Developments. App. A at 3. All four plats either noted a 40-foot right of way through the Foothills Parkway stretch of Scottish Highland Way or did not depict or note the right of way at all. App. A at 3. None of the plats were granted variances. App. A at 4. Additionally, the first plat was granted a Certification of Private Easements, indicating compliance with the private easement requirements in the Regulations, i.e. "reasonably accessible." Based on the Commission's application of the Regulations to the Miller's Creek developments, Scottish Highland Way is either a Minor Residential and Loop street,

a cul-de-sac, or a permanent private easement. Approval for the concept plat and the final plat of the last phase of development was in June and July of 2004. The final plats were all publicly recorded, per the Regulations. Regulations, art. II(D)(8), R. 47-14, Page ID # 560.

4. High Bridge Development Timeline

The Partnership, which includes Gerald L. Miller, the developer responsible for Miller's Creek, purchased the Property in early 2005. In early 2007, the Southern Design Group, a representative of the Partnership, contacted Mr. Ownby and requested guidance on the concept plat, per the regulations. App. A at 4; App. C at 3. Southern Design Group met with Mr. Ownby multiple times to go over the requirements and process for the concept plat review process. Based on this guidance, the Partnership submitted a concept plat in March 2007, which was denied for concerns regarding "meet[ing] the regulations to the letter of the law," including the right of way. Initially, because the Commission had not previously applied or enforced a 50-foot right of way for development on Scottish Highland Way, the Partnership disputed the application of that requirement for reasonable access. App. A at 17.

At a Commission meeting on April 10, 2007, the Partnership presented an opinion letter from a regional law firm supporting the finding of the requisite access, as well as new maps and information, including evidence of a 50-foot right of way from 1971, which had been reviewed and endorsed by Mr. Ownby. After some debate, and an unsuccessful motion to table the vote, the Commission *approved* the Partnership's concept plat.

After the Partnership's concept plat was approved, members of the Commission commenced an investigation regarding compliance with the Regulations, and asked Mr. Ownby to conduct further research on the right of way. App. C at 5. Mr. Ownby engaged Jerry McCarter, attorney for Sevier County, and Mark Pinkham, a title abstractor that frequently works with Sevier County. App. C at 5. Mr. Pinkham and Mr. McCarter concluded that the right of way was only 40 feet. App. C at 8.

On May 8, 2007, without providing any notice to the public or the Partnership that the concept plat would be on the Commission's meeting agenda, several members of the public were permitted to speak in opposition to the Commission's *prior* approval of the concept plat and advocated for revocation of that approval. App. A at 5. After some discussion, the issue was added to the agenda for the pending meeting and the commissioners voted 7-6 to revoke the Partnership's concept plat approval on account of the insufficient right-of-way. This vote contravened the by-laws, which required a majority vote by the members present. While 14 members of the Commission were present, only seven voted in favor of revocation. App. C at 7. This vote was unprecedented, as the Regulations did not give the Commission authority to revoke approval once granted, and by all accounts this was the first and only time the Commission revoked approval after granting it. No members or representatives of the Partnership were present or had received notice that their approval would be discussed, much less revoked, at the May meeting.

Following the revocation of approval of the concept plat, the Partnership continued to attempt to work with the Commission's demands, meeting multiple times with Mr. Ownby, meeting with an engineer, considering the efficacy of requesting a variance, decreasing the units in the development, adding more detail at the request of the Commission, and so on. App. C at 7. One of the meetings was between Mr. Schubert and Planning Commissioner Jack Ogle, on the porch of Mr. Ogle's house looking out over the Property. During the meeting, Mr. Ogle told Mr. Schubert that the only development acceptable to him, or that he would even consider, would be a development he could not see from his own front porch. An opinion letter issued by Mr. McCarter on April 29, 2008, falsely claimed that the Miller's Creek Developments had obtained a variance to gain concept plat approval. App. C at 8. On December 9, 2008, using the information garnered from this further consultation period, the Partnership presented a new concept plat for the property, but was still unable to restore approval.

B. PROCEDURAL BACKGROUND

1. District Court Decision

On December 7, 2009, the Partnership filed claims in the District Court for the Eastern District of Tennessee under 42 U.S.C. § 1983 for violation of the Partnership's rights under the Due Process Clause and Equal Protection Clause of the Fourteen Amendment to the United States Constitution.

Following the filing of the Complaint, the parties attempted to negotiate the matter. On a suggestion from the County, the Partnership offered to scale back their plan for the property and commit a portion of the land to a conservation

easement. Negotiations, however, were ultimately unsuccessful and in 2017, Appellant filed a motion for partial summary judgment, asking the trial court to rule on a single issue: whether [the concept plan] provides for 'reasonable access' to the property that meets the requirements of the Planning Commission, pursuant to the requirements for private permanent easements in Article III(A)(14). Regulations, R. 47-14, Page ID # 566. After briefing, the trial court ruled in favor of the Commission, finding the record insufficient to answer the question. The issue went to trial September 24 and 25, 2018, at which time the trial court rejected the Partnership's argument, relying in part on the disputed and unsubstantiated conclusion of fact that, "[t]he parties agree that Scottish Highland Way has a 50-foot right of way. . . except for the part of Scottish Highland Way that crosses the Foothills Parkway," as well as the applicability of the 50-foot right of way requirement for developments located on Scottish Highland Way. *See* App. C.

In its Conclusions of Law, the trial court *sua sponte* concluded that the Partnership "failed to show that they had the requisite property interest to support their procedural and substantive due process claims." App. C at 12. The court rested this conclusion on a holding that the Partnership had not proved that approval of their concept plan was guaranteed. The Partnership then filed a Motion for Additional Findings and to Alter or Amend the Court's Findings and Judgment, which was denied.

2. Sixth Circuit Decision

At the Sixth Circuit, the Partnership argued that the district court's finding that the Partnership had no protected property interest was incorrect in light of the

April 10, 2007, approval of the concept plat for the property and the Partnership's reliance on contextual factors. The Partnership argued that the recorded and publicly available Miller's Creek plats, conversations with Sevier County's planning director, close study of the Regulations, and the Commission's previous application of the Regulations to Scottish Highland Way further reinforced the requisite reliance to finding a protected property interest. Therefore, the Partnership argued that the Commission, under the guise of "discretion," violated its substantive and procedural due process by arbitrarily and capriciously applying the Regulations to the Partnership, and subsequently revoking the approval of the concept plan without the requisite authority, notice, or process.

The Sixth Circuit's analysis of the protected property interest turned on whether the Partnership had a "legitimate claim of entitlement." *See* App. A at 7; *citing Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The entitlement test under *Roth* requires analysis of whether a property interest is created and defined by and independent source, such as state law. *Bd. Of Regents of State Colls. V. Roth, 408 U.S. 564, 577 (1972).* In the Sixth Circuit's review of Tennessee state law, it reviewed primarily case law, as there was no operative statute in place to dictate when a property right in a concept plat approval vests at the time of the events of the case. App. A at 8. Effective in 2015, the Tennessee legislature amended the Tennessee Vested Property Rights Act to establish a vested property right "with respect to any property upon approval, by the local government in which the property is situated, of a preliminary development plan." Tenn. Code Ann. § 13-3-413(b).

Analyzing Tennessee law, the Sixth Circuit's analysis turned on whether approval at the initial stage guaranteed approval at the final stage, and whether the regulating body maintained discretion to deny the plan at subsequent stages. App. A at 8-9; *citing Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992). The opinion referenced a recent case that synthesized "guiding principles." App. A at 10. The Opinion held that "to establish a property interest in an approval, a party must show that the government body lacked the discretion to deny the benefit if the party complied with certain minimum, mandatory requirements." App. A at 10; *citing Tollbrook, LLC v. City of Troy*, 774 Fed. Appx. 929 at *935 (6th Cir. 2019) (internal citations omitted) (*quoting EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012)). The Opinion's reasoning failed to distinguish the available case law from the Partnership's situation, where discretion had been exercised at the initial phase when the concept plat was approved. While the Sixth Circuit noted that the Regulations "did not explicitly provide for revocation of approval after an approval was granted at any stage," it failed to factor this fact into any subsequent protected property interest or due process analysis. App. A at 3.

On December 30, 2020, the Partnership filed a Petition for Panel Rehearing and/or *En Banc* Determination. The Petition argued that the original Sixth Circuit panel opinion contained errors of law and fact that presented issues of exceptional public importance, including that the Commission lacked discretion to revoke the approval, and is required by Tennessee law to exercise their discretion "within existing standards and guidelines" while performing administrative tasks. *Hudson*

v. Metro. Gov't of Nashville & Davidson Cty., 2020 Tenn. App. LEXIS 556 at *8 (Tenn. Ct. App. 2020) (*quoting McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990) ("the overriding issue is whether the enabling ordinance provides sufficient standards to preclude the exercise of unbridled discretion.")). In light of that requirement, the Commission's failure to provide notice and an opportunity to be heard prior to revoking the concept plat approval constituted a deprivation of procedural due process.

Additionally, the Partnership argued that the Sixth Circuit adopted the district court's finding of fact that a 50-foot right of way applied, despite conflicting evidence and a lack of expert testimony at trial. The Partnership had relied on the Commission's treatment of Miller's Creek, which indicated that Scottish Highland Way was a permanent private easement that satisfied the Regulations, or was properly categorized as a Minor Residential Loop street, or that the 50-foot right of way was satisfied, in anticipating how the Regulations would be applied to Scottish Highland Way. The unsettled factual dispute regarding the right-of-way for this section of Scottish Highland Way made it impossible to determine whether the Partnership complied with all of the "minimum, mandatory requirements" for the purpose of establishing a protected property interest. *Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992).

On January 20, 2021, the Petition for Panel Rehearing and/or *En Banc* Determination was denied.

REASONS FOR GRANTING THE PETITION

This case is a perfect vessel to evaluate the current standard for what creates a legitimate claim of entitlement or justifiable expectation of approval for the purpose of establishing a property interest protected under the Fourteenth Amendment via the entitlement test initially set out in *Board of Regents of State Colleges et al v. Roth*, 408 U.S. 564, 577 (1972).

The opinion of the Sixth Circuit endorses the unlimited expansion of a planning commission's authority and ensuing arbitrary, capricious, and unconstitutional application of planning commission rules and regulations. The Opinion dangerously extends what is permissible under the guise of "discretion." The Sixth Circuit opinion effectively places a cloud of uncertainty on persons seeking to develop their private property, even after receiving approval for the proposed land use.

In the interest of not getting too involved in local land use matters, all the circuits have fostered unbridled discretion of local, municipal land use boards and commissions. Such undue deference nullifies any purpose a concept plan approval phase might serve and puts property owners in a position to expend significant time and resources prior to establishing a property interest.

I. The decision below has dangerously overextended the ability of a Planning Commission's discretion to undermine a property interest under the current interpretation of entitlement test.

a. Relevant Legal Background

i. Due Process

The due process clause of the Fourteenth Amendment states, "no . . . State . . . shall deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. The protections derived under the Fourteenth Amendment include both procedural and substantive due process. *Ziss Bros. Constr. Co. v. City of Independence*, 439 Fed. Appx. 467, 471 (6th Cir. 2011); *see, e.g., Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 572-74 (6th Cir. 2008). Consideration of violations of due process under the Fourteenth Amendment requires a two-step analysis. The Sixth Circuit uses a two-part analysis to examine procedural and substantive due process claims. *Ziss Bros. Constr. Co. v. City of Independence*, 439 Fed. Appx. 467, 471 (6th Cir. 2011). First, a party must establish the existence of a constitutionally protected property or liberty interest, then the reviewing court may consider "whether the deprivation of that interest contravened the notions of due process embodied in the Fourteenth Amendment." *Ziss Bros. Constr. Co. v. City of Independence*, 439 Fed. Appx. 467, 471 (6th Cir. 2011) (internal citations removed) (*quoting Wojcik v. City of Romulus*, 257 F.3d 600, 609 (6th Cir. 2001)). This approach is consistent with the other circuits. *See e.g. Bituminous Materials v. Rice County*, 126 F.3d 1068 (8th Cir. 1997); *Robb v. Philadelphia*, 733 F.2d 286, 292 (3d Cir. 1984).

ii. Protected Property Interest

The threshold requirement in establishing a substantive or procedural due process violation requires showing the existence of a constitutionally protected property interest that was taken or infringed. *Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). This Court established the entitlement standard used by all circuits to establish a property interest: a person must have a "legitimate claim of entitlement" to the benefit, as opposed to an "abstract need or desire" or "unilateral expectation" of the benefit. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Because property interests are not created by the Constitution, a legitimate claim of entitlement is created, defined, and supported by "an independent source such as state law -- rules or understandings that secure certain benefits." *Roth*, at 578. This is the entitlement standard that is broadly applied in land use cases.

On the same day that this Court decided *Roth*, it issued another opinion, which noted that "the existence of rules and understandings, promulgated and fostered by state officials, may justify a legitimate claim of entitlement." *Perry v. Sindermann*, 408 U.S. 593, 602 (1972). In *Sindermann*, this Court determined that, though a subjective "expectancy" is not a protected property interest, the respondent was entitled to procedural due process, including notice and an opportunity to be heard, where there was a *de facto* process and rules or mutually explicit understandings supported his claim of entitlement. *Sindermann*, at 601. This standard permits courts to incorporate mutual expectations and understandings into the determination of a legitimate claim of entitlement for

procedural due process purposes, but has yet to be applied to establish a protected property interest in a land use context. *See* Paul E. Ground, *Education—Due Process and the Untenured Teacher: A Review of Roth and Sindermann*, 10 Urb. L. Ann. 283 (1975); *but see Patterson v. Am. Fork City*, 2003 UT 7, P24 (Utah 2003) ("Given such discretion, the Tenth Circuit ruled that the developer could not point to any rules or mutually explicit understandings that would support their claim of entitlement' to the rezoning of their property.") (internal citations omitted).

iii. Protected Property Interest and State Law

Per the *Roth* entitlement test, state law determines whether there is an underlying property interest, while federal Constitutional law "determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Tollbrook, LLC v. City of Troy*, 774 F. App'x 9292, 934 (6th Cir. 2019) (quoting *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 856 (6th Cir. 2012)). But "resolution of the federal issue begins, however, with a determination of what it is that state law provides." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005).

For the majority of the Circuits, determination under state law of whether a party can possess a protected property interest in a municipal or regional land use decision turns on "whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or withhold its approval." *See RRI Realty Corp. v. Incorporated Village of Southampton,* 870 F.2d 911, 918 (2d Cir. 1989)*; see Woodwin Estates, Ltd. V. Gretowski*, 205 F.3d 118 (3rd Cir. 2000); *see Gardner v. Balt. Mayor & City Council*, 969 F.2d 63 (4th Cir. 1992); *see Mahone v.*

Addicks Utility Dist., 836 F.2d 921 (5th Cir.); *see Ziss Bros. Constr. Co. v. City of Independence*, 439 Fed. Appx. 467 (6th Cir. 2011); *Brown v. City of Michigan City, Ind.*, 462 F.3d 720, 729 (7th Cir. 2006); *Carolan v. City of Kansas City, Mo.*, 813 F.2d 178, 181 (8th Cir. 1987); *Shanks v. Dressel*, 540 F.3d 1082, 1091 (9th Cir. 2008); *see Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989);. *See also Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Ks.*, 927 F.2d 1111, 1116 (10th Cir. 1991) (adopting this standard in a case involving procedural due process). Though not expressly adopting the standard, the First Circuit, has also tied the finding of a protected property interest under the entitlement test to the degree of discretion retained by municipal officials. *See Miller v. Town of Wenham*, 833 F.3d 46 (1st Cir. 2016).

b. The Commission's Initial Approval of the Concept Plat Constituted a Protected Property Interest Because the Commission Lacked Discretion to Revoke Initial Approval

i. Tennessee State Law and Applicable Regulations

The authority of regional planning commissions in Tennessee is derived from Tenn. Code Ann. §§ 13-3-401, -413. During the time at issue, the statute gave regional planning commissions "such powers as may be necessary for it to perform its functions and to promote regional planning." Tenn. Code Ann. § 13-3-104 (2005). The statute also broadly defines the procedure for submission of plats: "The regional planning commission shall *approve or disapprove* a plat within sixty (60) days after the submission of such plat." Tenn. Code Ann. § 13-3-404(a) (2005). Additionally, the statute demands that "no plat shall be acted upon by the commission without affording a hearing thereon, notice of the time and place of which shall be sent by

mail to the address not less than five (5) days before the date fixed for such hearing." Tenn. Code Ann. § 13-3-404(a) (2005). The statute does not distinguish between different phases of development.

The Regulations in effect during the time at issue were drafted by the Commission and published in March 1996 and reprinted with amendments through September 2005. According to the testimony of Mr. Ownby, the County Planner, they are intended to be read as a whole. App. B at 5. The Regulations lay out three phases of design, but only the concept plat and the final plat require approval from the Commission. *See* Regulations art. II(B)(4), art. II(D)(3), R. 47-14, Page ID # 557, 559. At the Concept Plat phase, the Commission evaluates compliance with the Regulations, as well as the proposed land use, and "[w]ithin sixty (60) days after submission . . . , the planning commission will review it and indicate its *approval, disapproval, or approval subject to modifications*." *See* Regulations art. II(B)(4), R. 47-14, Page ID # 557. Approval indicates compliance with Regulations and acceptance of the proposed land use.

The Commission drafted their own Regulations, which constituted a legislative act, subject to limited judicial review. *See McCallen v. Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990) ("When the act of a local governmental body is legislative, judicial review is limited to whether any rational basis exists for the legislative action and, if the issue is fairly debatable, it must be permitted to stand as valid legislation") (internal citations omitted). However, when determining how such Regulations should be applied, the Commission's actions are not legislative,

but administrative or quasi-judicial in nature. *See Hudson v. Metro. Gov't of Nashville & Davidson Cty.*, 2020 Tenn. App. LEXIS 556 at *8 (Tenn. Ct. App. 2020).

This distinction is supported in Federal court. *See Bryan v. City of Madison*, 213 F.3d 267, 273 (5th Cir. 2000); *see also Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (citing *Developments In the Law*, 91 Harv.L.Rev. 1427, 1510-11 (1978)). In *Bryan v. City of Madison*, the court differentiated between the actions of an official in determining whether legislative immunity could apply. *Bryan v. City of Madison*, 213 F.3d 267, 273 (5th Cir. 2000) (quoting *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984)) ("If the action involves establishment of a general policy, it is legislative; if the action singles out specific individuals and affects them differently from others, it is administrative.").

To preclude the exercise of unbridled discretion, the authority of the administrative body, such as the Commission in its application of the Regulations to the Partnership's concept plat, is required to exercise discretion "within existing standards and guidelines." *McCallen v. Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990). In writing the Regulations, the Commission gave itself ample time to conduct due diligence to determine whether a concept plat complied with the requisite regulations, but it did not give itself the ability to revoke approval once granted. A legitimate claim of entitlement arises when a statute or regulation places limits on the government's discretion to restrict or revoke approval. *Accord Robinson v. City of Baton Rouge*, No. 13-375-JWD-RLB, 2016 U.S. Dist. LEXIS 146461, at *31 (M.D. La. Oct. 22, 2016) (*citing Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997)).

Furthermore, because the Commission lacks discretion to revoke approval once given, and the Regulations are to be read as a whole, at the final plat stage, where the final plat is required to "conform substantially to the concept plan as approved," the discretion remaining is limited – it permits the Commission to approve or disapprove of the specific elements of the final plat, not re-evaluate the already approved land use decision. Regulations, art. II(D)(1), R. 47-14, Page ID # 558. After the approval of the concept plat, the Partnership had a reasonable expectation of entitlement to the approved land use.

ii. This Court should find the Partnership had a legitimate claim of entitlement based on the prior actions of the Committee.

Additionally and alternatively, in the event that the Commission had the authority to revoke the concept plat approval, this Court should re-evaluate the lower courts' application of *Roth* to determine the process due to the Partnership. Under the standard in *Perry v. Sindermann*, the prior actions of the Committee support a finding of a legitimate claim of entitlement. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) ("the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement").

Specifically, the Commission's prior approvals of the Miller's Creek developments, and subsequent recordation of those developments without a variance, provided notice that Scottish Highland Way was either a Minor Residential and Loop street, a cul-de-sac, or a permanent private easement that complied with the right-of-way requirements for developments. In Tennessee,

recordation serves as notice for the public, and an indication of what the public can rely on. Tenn. Code Ann. § 66-26-102 (" . . . notice to all the world . . . ."). For further context, two members of the Commission testified that they always approved developments in compliance with the Regulations, and another member testified that the Commission had never revoked approval before. The Partnership's legitimate claim of entitlement derived from the Commission's lack of discretion, and the Commission's previous application of the Regulations to the same road that the Property was located on. The Partnership is not asserting a legitimate claim of entitlement to the grant of preliminary plat approval but is claiming a protected property interest in the land use determination made in the Commission's April 10, 2007 grant of concept plat approval. *See David Hill Dev., LLC v. City of Forest Grove*, 688 F. Supp. 2d 1193, 1218 (D. Or. 2010) ("The land use decision is made at the time of the approval or disapproval of the tentative plan."). An entitlement test under this Court's decision in *Perry v. Sindermann* supports this conclusion.

c. The Partnership has a protected property interest in the land use determination made at the time of initial concept plat approval.

In 2010, a section was added which explicitly gave a regional planning commission the legislative authority to promulgate subdivision regulations. Tenn. Code Ann. § 13-3-413 (2010). In 2014, the Tennessee General Assembly enacted the Vested Property Rights Act. 2014 Tenn. Pub. Acts, Ch. 686. The Act amended Tenn. Code Ann. § 13-3-413 to, in pertinent part, establish a vested property right "with respect to any property upon the approval, by the local government in which the

property is situated, of a preliminary development plan or a final development plan where no preliminary development plan is required." Tenn. Code Ann. § 13-3-413.

While not in effect at the time, the current codification of a "vested property right" as inclusive of an initial concept plat approval supports the interpretation that the land use determination is made at the time of initial approval and can be relied on by the developer as they continue to add detail throughout the phases of development. This interpretation has support in other circuits. *See David Hill Dev., LLC v. City of Forest Grove*, 688 F. Supp. 2d 1193, 1218 (D. Ore. 2010) (quoting *Bienz v. City of Dayton*, 29 Ore. App. 761, 566 P.2d 904 (1977)) ("The court explained that preliminary approval is made binding so that the developer can move forward with construction of the project, 'with the assurance the city cannot later change its mind.'"); *see also Long Grove Country Club Estates Inc. v Village of Long Grove*, 1983 U.S. Dist. LEXIS 10278 (N.D. Ill. 1983).

Under the current entitlement test standard, concept plat approval is an illusory property interest. In Sevier County, between the time the Commission approved the Partnership's concept plat and the time the property right vested with approval of the final plat, the Partnership would have been required to expend significant funds for the design plan and final plat, all without the assurance of a property interest protected by the Fourteenth Amendment.

Specifically, the design plan requires ". . . detailed engineering design and construction drawings, calculations and related documents necessary to construct the proposed subdivision. . . ." Regulations, art. II(C)(1), R. 47-14, Page ID # 557. The requirements prior to final plat submission are even more involved, requiring

that the final plat, for example, show: all streets, roads, alleys, building setback lines; sufficient data to determine readily and reproduce on the ground the location bearing, and length of every street line, lot line, boundary line, block line and building line; all dimensions to the nearest hundredth (100th) of a foot and angles to the nearest minute; location and size of culverts; location of fire hydrants; certification for water and sewer systems from the relevant state and regional agencies; and certification that all streets and appurtenances have been installed in accordance with established standards. Regulations, art. II(D)(5)(a)-(k), (6)(a)-(h), R. 47-14, Page ID # 559-560. As stipulated in the Regulations, much of this planning, preparation, and initial construction "shall be at the subdivider's own risk," and happens after the concept plat approval, but before the final plat approval. Regulations, art. II(C)(1), R. 47-14, Page ID # 557.

Under the current standard the Opinion of the Sixth Circuit holds that, because there is some discretion remaining, albeit at a later stage, none of the planning, preparation, or expenses are entitled to due process protections. *See* App. A. Following the entitlement standard in *Sindermann* would not remove discretion or power from a Planning Commission, but would require more deliberate action, and would give weight to context and prior actions.

II. The opinion below permits the Commission to violate substantive and procedural due process.

a. This case is appropriate for federal due process review.

After a property interest has been established, the second part of the two-step due process analysis involves a determination about "what procedures are

required to protect that interest." *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 565 (6th Cir. 2004). Federal courts have made clear their reticence to become involved in regional land use disputes. *See Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982) (". . . the conventional planning dispute-at least when not tainted with fundamental procedural irregularity . . . which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution."); *accord Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983); *and see Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997) (adopting a "truly irrational" standard to reject a land use dispute where there was simply personal animus).

However, exceptions are made where planning disputes are tainted with fundamental procedural irregularity. *See South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir. 1974) (en banc) (dictum) (zoning reclassification, normally not subject to federal court scrutiny, may violate due process where "the action of the zoning commission is arbitrary and capricious"), cert. denied, 419 U.S. 837, 42 L. Ed. 2d 64, 95 S. Ct. 66 (1974); *accord Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2nd Cir. 1999) (holding that the ability of fundamental procedural irregularity to affect substantive due process is a relevant constitutional standard for jury instruction); *and see Chesterfield Dev. Corp. v. Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992) ("An example [of truly irrational government action] would be attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet."). Actions by municipal boards which "shock

the conscience" are also appropriate for federal court review. *See generally County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (". . . we said again that the substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.") (internal citations removed). Here, the Commission applied the Regulations arbitrarily, and acted outside the scope of their authority.

Furthermore, Tennessee has identified a four-part test under which judicial review of a land use decision would be appropriate. *Hudson v. Metro. Gov't of Nashville & Davidson Cty.*, 2020 Tenn. App. LEXIS 556, at *7 (Tenn. Ct. App. 2020) (*citing Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 729 (Tenn. 2012)). Under the test, the court must "only intervene if we determine that the Planning Commission (1) exceeded its jurisdiction, (2) followed an unlawful procedure, (3) acted illegally, arbitrarily, or fraudulently, or (4) acted without material evidence to support its decision." *Hudson v. Metro. Gov't of Nashville & Davidson Cty.*, 2020 Tenn. App. LEXIS 556, at *7 (Tenn. Ct. App. 2020) (*citing Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 729 (Tenn. 2012)) (internal citations removed). For a due process analysis, Tennessee courts have determined that in this context, a regional planning commission "acts illegally if it fails to follow the minimum standards of due process; misrepresents or misapplies applicable legal standards; bases its decision on ulterior motives; or violates the state or federal constitution." *Hudson v. Metro. Gov't of Nashville & Davidson Cty.*, 2020 Tenn. App. LEXIS 556, at *7 (Tenn. Ct. App. 2020) (*referencing Harding Acad. v. Metro. Gov't of Nashville & Davidson Cty.*, 222 S.W.3d 359, 363 (Tenn. 2007))

(internal citations removed). Here, there was evidence that the Commission's actions were arbitrary, and likely motivated by personal gain.

b. The Sixth Circuit should have found that the Commission violated the Partnership's right to procedural due process.

"Procedural due process requires that the government, prior to depriving an individual of their property, provide that individual with notice of the proposed action and an opportunity to be heard." *Paterek v. Vill. of Armada*, 801 F.3d 630, 649 (6th Cir. 2015) (citing *Morrison v. Warren*, 375 F.3d 468, 473 (6th Cir. 2004)). A party in the Sixth Circuit states a procedural due process claim by showing: "(1) the existence of a protected property interest at issue, (2) a deprivation of that protected property interest, and (3) that he or she was not afforded adequate procedures." *Paterek*, 801 F.3d at 649 (citing *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 904 (6th Cir. 2014)). The Tennessee statute applicable at the time required that "no plat shall be acted upon by the commission without affording a hearing thereon, notice of the time and place of which shall be sent by mail to the address not less than five (5) days before the date fixed for such hearing." Tenn. Code Ann. § 13-3-404.

In *Nasierowski Bros. Inv. Co. v. Sterling Heights*, following significant investment in a development project, the plaintiff's land was rezoned in an executive city council session, an act that inflicted immediate injury to the plaintiff. 949 F.2d 890 (6th Cir. 1991). Focusing on the number of individuals affected by the process, the timing and degree of injury, and the lack of good faith in the policy determination, this Court found that the plaintiff had possessed a property interest

and had a right to notice and hearing prior to the city's action. *Id*. at 896 ("The City's failure to afford Nasierowski an opportunity to be heard constituted a denial of procedural due process").

The Sixth Circuit has also held that, in some cases, even the provision of notice, absent a pre-deprivation hearing, is insufficient to provide adequate procedural due process. *See Warren v. City of Athens*, 411 F. 3d 697 (6th Cir. 2005). Citing *Nazeirowski*, the Court in *Warren* relied on the disparate application of regulations, detrimental to a specific individual, or a relatively small number of people, triggers the right to a pre-deprivation hearing. *Warren*, 411 F.3d at 710. The First Circuit has supported the notion that procedural due process is triggered by possession, suggesting that, "where a building permit has been in the possession of the developer for more than a brief period of time and the developer can show that he acted in reliance on it, some kind of pre-deprivation hearing is necessary before it may be revoked." *P.L.S. Partners, Women's Medical Center, Inc. v. Cranston*, 696 F. Supp. 788, 798 (D.R.I. 1988) (citing *Cloutier v. Town of Epping*, 714 F 2d 1184 (1st Cir. 1983)).

Here, the Commission granted initial approval of the concept plan for the Property in April 2017. At the following meeting, the Commission decided to revote on the approval by adding the issue to the agenda. The Partnership, however, did not have anyone present at the meeting and was provided no notice or opportunity to comment at the meeting where the Property's approval was revoked, or otherwise afforded the chance to have its concerns about the process addressed.

Both the trial court and the Sixth Circuit noted that the Partnership was "certainly aware" that the right of way issue was contentious. But awareness of controversy does not equate to notice that the issue would be brought back up for further discussion or vote, and surely does not take the place of the Constitutional obligations of the Commission to provide the Partnership with a pre-deprivation opportunity to be heard.

c. This Court must provide a definitive standard of review for substantive due process rights involving arbitrary and capricious land use decisions.

Substantive due process is "the doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed . . . ." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (quoting Comment, *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1166 (1980)). Specifically, it is "the right not to be subject to arbitrary or capricious action by a state either by legislative or administrative action." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992).

This Court has given lower Courts conflicting guidance on substantive due process review by federal courts. This Court has previously held that federal review of local action on arbitrary and capricious substantive due process grounds is valid in appropriate cases. *See Nectow v. City of Cambridge*, 277 U.S. 183, 187, 72 L. Ed. 842, 48 S. Ct. 447 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373, 71 L. Ed. 303, 47 S. Ct. 114 (1926). But it has also admonished the circuits to exercise "utmost care whenever [. . .] asked to break new ground in this field." *Nicholas v.*

Pennsylvania State Univ., 227 F.3d 133, 141 (3rd Cir. 2000) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 124, 117 L Ed. 2d 261, 112 S. Ct. 1061 (1992)).

Under this standard, the Sixth Circuit has taken a broader view of substantive due process claims than some of its sister circuits. *See Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983) (applying substantive due process review where members of a state barber licensing board were found to have denied the plaintiff due process in refusing a license to a potential competitor of one board member); *contrast with Santiago de Castro v. Morales Medina*, 943 F.2d 129 (1st Cir. 1991). Pertinent here, Sixth Circuit has explicitly observed that "citizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decisions." *Pearson v. Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992). In *Pearson*, noting the lack of uniformity used by various lower courts evaluate federal land use claims, the court set forth six categories of possible claims, including ". . . arbitrary and capricious substantive due process claims . . . ." *See Pearson*, 961 F.2d at 1215-16.

The Fourth Circuits has also applied a substantive due process review to regional land use determinations. In *Scott v. Greenville County*, the Fourth Circuit determined that the plaintiff's deprivation of his building permit by the extraordinary and unlawful intervention of the county governing body, constituted a substantive due process violation. 716 F.2d 1409, 1419 (4th Cir. 1983); *see also Marks v. Chesapeake*, 883 F.2d 308, 310-11 (4th Cir. 1989) (finding due process violation based on arbitrary and capricious action even where the government agency had "wide discretion"). Similarly, the First Circuit applied substantive due

process review and "affirmed a ruling that local officials had committed a constitutional violation by singling out a permit applicant for adverse treatment due to illegitimate political or, at least, personal motives." *Cordeco Development Corp. v. Vasquez*, 539 F.2d 256 (1st Cir.), cert. denied, 429 U.S. 978, 50 L. Ed. 2d 586, 97 S. Ct. 488 (1976) (internal citations removed).

An arbitrary and capricious decision is one where the plaintiff shows that there is no rational basis for the governing body's administrative decision. *Pearson v. Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992); *see also Layman Lessons, Inc. v. City of Millersville*, 636 F.Supp.2d 620, 652 (M.D. Tenn. 2008) (finding a planning commission's administrative decision was not supportable on a rational basis because they had relied on erroneous evidence to reach their conclusion). There is no rational basis for state action that is "malicious, irrational or plainly arbitrary." *David Hill Development v. City of Forest Grove*, 688 F.Supp.2d 1193, 1216 (D. Ore. 2010) (quoting *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996) (*en banc*)).

In the case at bar, the Commission's determinations about how to apply the Regulations, its revocation of the initial approval outside its own scope of authority, and its failure to conduct due diligence prior to approval are all arbitrary and capricious and have no rational basis. As previously discussed, the Commission's determination of how to apply the Regulations to Scottish Highland Way for the purpose of determining access for the Property was completely antipodal to the Commission's prior applications and representations. The Property is located on the same street, adjacent to, and contiguous with several recent developments, including the Miller's Creek developments. The plats for these developments are

recorded and publicly available and were all built without variances. Aside from actually purchasing the land and pursuing a development on it, the Partnership would have had no way of knowing that one right of way standard would be employed for Miller's Creek, and a completely different one would be employed for the Property. Nothing in the Regulations indicates to the Partnership, or any other landowners in Sevier County, that the size, number, or location of the plats will determine what category of right of way applies. While the Regulations grant discretion to the Commission to make decisions about development in Sevier County, it is not at the discretion of the Commission to decide whether or not they want to apply the Regulations, based on whether or not they like the development.

Additionally, the Commission's May 8, 2007, revocation of approval of the Property's concept plan was done outside of the scope of the Commission's authority. The Commission's actions following that revocation are similarly characterized by an overextended sense of authority. Only after granting initial approval for the Property's concept plan, an overt representation of compliance with the Regulations, did the Commission begin its own process of post hoc investigation to challenge or confirm compliance with the Regulations. Neither Mr. McCarter, the attorney retained by the planning director, nor Mr. Pinkham, the title inspector brought in by Mr. McCarter, became involved with the Commission on this matter until after the initial April 10, 2007, approval.

Failure to provide a more definitive standard for substantive due process violations going forward will continue to result in unequal applications of citizen's due process rights. Without this Court's intervention property owners will continue

to have uncertain rights while Planning Commissions continue to run petty kingdoms.

CONCLUSION

For the reasons above, this Court should grant certiorari.

Respectfully submitted,

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0688n.06

No. 19-6327

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD W. OGLE, BETTY OGLE, JERRY KERLEY, MARK T. WHITE, and JOHN C. SCHUBERT, dba HIGH BRIDGE DEVELOPMENT PARTNERSHIP, Plaintiffs-Appellants, v. SEVIER COUNTY REGIONAL PLANNING COMMISSION and SEVIER COUNTY, TENNESSEE, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE OPINION

FILED
Dec 09, 2020
DEBORAH S. HUNT, Clerk

BEFORE: ROGERS, SUTTON, and STRANCH, Circuit Judges.

JANE B. STRANCH, Circuit Judge. The High Bridge Development Partnership wanted to build a large subdivision in Sevier County, Tennessee. It submitted a concept plan to the Regional Planning Commission that included a 40-foot right-of-way, though the subdivision regulations required a 50-foot right-of-way. The Commission denied the plan, citing the right-of-way problem. The Partnership presented information putatively solving the problem and the High Bridge subdivision plan was initially approved. Then, following further investigation, the plan was denied. The Partnership ultimately sued, alleging violations of its due process and equal protection rights. After a bench trial, the district court found in favor of the Defendants. We **AFFIRM**.

I. BACKGROUND

The Partnership develops property in Sevier County, which extends into Great Smoky Mountains National Park. In 2005, it purchased the 942.3-acre piece of property at issue (the Property), planning to build at least 400 houses. The Property borders Miller's Creek, a much smaller subdivision development, to the north, and the Park lies to the south. The only road to both Miller's Creek and the Property is Scottish Highland Way, which passes through the Foothills Parkway area. Sevier County requires all new subdivisions to comply with its regulations, including those governing right-of-way widths. The regulations categorize Highland Way as a "Minor Collector Street," so it must have a 50-foot right-of-way. It has a 50-foot right-of-way along most of its length, but the parties disagree about the right-of-way's width in the Foothills Parkway stretch: the Partnership maintains that it remains 50 feet, but the Commission contends that it narrows to 40 feet. That discrepancy gave rise to this case.

A. Sevier County's Plat Approval Process

During this case, a developer that wanted to build a subdivision in Sevier County had to follow a tripartite procedure and appear twice before the Commission. First, it had to prepare a concept plan and request that the Commission preliminarily approve it. For a developer to submit a plan, it had to "meet[] all the required standards of design" or request specific variances, and for the Commission to approve a concept plan, it had to find that the plan complied with all of those standards, including right-of-way widths. If it disapproved the plan or requested modifications, it was required to give reasons in writing. Two members of the Commission and Jeff Ownby, Sevier County's Planner, testified that they could not recall an instance when the Commission intentionally denied a concept plan that satisfied the regulations, and typically, the Commission did not revoke a concept plan approval after the fact. Once the developer obtained the Commission's approval, it could begin preparing subsequent documents, making street

improvements, and installing utilities. Beforehand, though, it was encouraged to "consult early and informally" with the Commission "for advice and assistance." Second, the developer had to create a design plan to inform the Commission's technical staff about how it planned to construct the subdivision. Any construction work carried out before the design plan was approved would be "at the subdivider's own risk." Third, it had to submit the final plat to the Commission for approval, after which the plat could be recorded.

The regulations did not mandate the Commission to approve a plan that complied with the regulations at any of these three stages. At the preliminary approval stage, the regulations directed the Commission merely to consider the plan:

> Within sixty (60) days after submission of a concept plan, the planning commission will review it and indicate its approval, disapproval, or approval subject to modifications. If a concept plan is disapproved, reasons for such disapproval will be stated in writing. If approved subject to modifications, the nature of the required modifications will be indicated.

No reasons for disapproval were specified, and the regulations did not speak in terms of "must" or "shall" approve, but warned that "[a]ny construction work carried out by the subdivider prior to design plan approval . . . shall be at the subdivider's own risk." Similarly, at the final plat stage, they said that the Commission "shall approve or disapprove" the final plat and give reasons if it disapproves. The regulations did not explicitly provide for a revocation of approval after an approval was granted at any stage.

B. Subdivision Developments

About three years before the Partnership purchased the Property, the Commission approved four plats for Miller's Creek, each of which labeled the Foothills Parkway stretch of Highland Way as a 40-foot right-of-way or did not depict the right of way at all. The subdivision contained 12 to 14 tracts. Though it is unclear from the record whether the Miller's Creek subdividers petitioned

for variances or were granted variances to permit the 40-foot right-of-way, trial testimony established that the plats were ultimately approved without variances. Jerry McCarter, an attorney working for Sevier County, opined that there was a variance, and the Commission argues that it relied on that opinion. The Commission's Chairman subsequently acknowledged that the Miller's Creek approvals were mistakes because they did not include the required 40-foot rights-of-way.

The Partnership purchased the Property in February 2005 to develop the High Bridge subdivision. About two years later, the Southern Design Group ("SDG"), a firm the Partnership retained, contacted Ownby for initial consultation about the Property per the regulations' suggestion. SDG staff met with Ownby multiple times concerning the Commission's review processes. From the time it purchased the Property, the Partnership was aware that Highland Way's right-of-way was 40 feet, as noted on the deed, and that "this was going to be an issue with the Planning Commission." In February or March 2007, the Partnership submitted its concept plan to the Commission, indicating Highland Way's 40-foot right-of-way. The concept plan provided for 400 to 450 tracts. The Commission denied the concept plan because it did not comply with the rights-of-way requirement. SDG and the Partnership returned to the Commission on April 10, 2007, with a plat recorded in 1971 that depicted Highland Way with a 50-foot right-of-way. Ownby agreed with them, and the Commission approved the concept plan based on this evidence.

Some members of the Commission questioned whether that 50-foot right-of-way continued to exist 36 years after it had been recorded. The Chairman testified that the Commission wanted to "get it right" and did not necessarily intend to overturn the earlier approval, so it asked Ownby to continue researching the right-of-way. Both McCarter and a title abstractor told Ownby that the 50-foot right-of-way no longer existed. John Schubert, the Partnership's managing partner, then met with Ownby and a Park Service representative to find an alternate right-of-way.

On May 8, 2007, the Commission held another meeting. Four members of the public spoke in favor of rescinding the High Bridge approval. Commissioner Ogle moved to add High Bridge to the meeting's agenda; after some discussion, the commissioners voted to do so and then voted, 7–6, to rescind the Partnership's concept plan approval.

The Partnership asserts that it did not receive notice that the Commission would discuss High Bridge at the May 8 meeting. None of the Partnership's members or anyone representing it attended the meeting. Prior to the meeting, the Partnership was generally aware of the Commission's concerns about High Bridge, Schubert having met with Ownby and the Park Service. In the following months, the Partnership's representatives met with Ownby multiple times to discuss applying for a variance for the right-of-way. The Partnership resubmitted the High Bridge concept plan to the Commission at a subsequent meeting without applying for a variance, but Ron Ogle, a partner, moved to remove it from the meeting's agenda.

The Commission took up High Bridge again at its December 9, 2008, meeting. The Partnership had submitted an identical concept plan, again without applying for a variance. Three speakers argued that the right-of-way was 40 feet wide. The Commission then voted to deny the concept plan because it did not "provide for access directly to a county road or access via a 50' private permanent easement to a county road." At the same meeting, the Commission denied another development's concept plan for the same reason.

After the Partnership filed suit, the district court held a bench trial, finding in the Commission's favor. The Partnership then filed a motion to alter or amend the findings of fact and conclusions of law and the judgment, which the district court denied. The Partnership timely appealed.

II. DISCUSSION

"Following a bench trial, 'we review a district court's factual findings for clear error and its legal conclusions de novo.'" *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 764 (6th Cir. 2018) (quoting *Muniz-Muniz v. U.S. Border Patrol*, 869 F.3d 442, 444 (6th Cir. 2017)). We review denials of Rule 59(e) motions to alter or amend the judgment under the abuse-of-discretion standard, but denials of Rule 59(e) motions "based on legal error" de novo. *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 811 (6th Cir. 2020).

A. Waiver

At the outset, the Commission argues that the Partnership has waived the due process argument that its "protected property interest vested when the [Commission] approved" the concept plan. The Partnership responds by pointing to its trial brief that discussed the rescission of the concept plan approval and contended that it had "a property interest in the Property proposed and its development, and the right to approval of plans that comply with County Regulations."

Typically, "an argument not raised before the district court is waived on appeal to this Court," *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008), and "the failure to present an issue to the district court forfeits the right to have the argument addressed on appeal," *Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006); *see generally Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("[A]ppellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance."). A party waives a claim by "knowingly and intelligently relinquish[ing]" it, particularly when shown by record evidence, and forfeits a claim by "merely fail[ing] to preserve" it. *Cradler v. United States*, 891 F.3d 659, 665 & n.1 (6th Cir. 2018) (quoting *Wood*, 566 U.S. at 470 n.4). But if a party makes the argument in a different manner that can be fairly interpreted as "another way of saying" the point, it likely did not forfeit that claim. *Haywood v. Hough*, 811 F. App'x 952, 959 n.1 (6th Cir. 2020).

Here, the Partnership did not waive its argument that the Commission's initial approval of its concept plan created a property interest. A review of the record reveals no instance when the Partnership waived the argument by explicitly and knowingly relinquishing it. Though whether the Partnership forfeited the argument may be a closer call, its arguments to the district court were other ways of saying the argument it now makes. So, we analyze the Partnership's due process claims through that lens.

B. Due Process

The Partnership argues that "[w]hen the Commission approved [its] concept plan on April 10, 2007, it created a protected property interest by giving the Partnership a legitimate claim of entitlement to the initial phase of concept plan approval." The Commission responds that no property interest arose because there was no guarantee of High Bridge's ultimate approval given the subsequent stages of the planning process.

Establishing a substantive or procedural due process violation requires first showing "the existence of a constitutionally-protected property or liberty interest" that was taken or infringed. *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). The party claiming the interest must demonstrate a "legitimate claim of entitlement" to the benefit—that is, "more than an abstract need or desire for it" and "more than a unilateral expectation of it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The party cannot claim a property interest in the governmental procedure itself, but rather in the product of that procedure. *Richardson v. Township of Brady*, 218 F.3d 508, 517–18 (6th Cir. 2000).

"Whether a person has a property interest is traditionally a question of state law," but "[f]ederal constitutional law . . . 'determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.'" *Tollbrook, LLC v. City of Troy*, 774 F. App'x 929, 934 (6th Cir. 2019) (quoting *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 856

(6th Cir. 2012)). Tennessee courts have noted that "the mere approval . . . of a subdivision plat does not give a property owner a vested right to develop his or her property in contravention of the applicable zoning restrictions." *Metro. Gov't of Nashville & Davidson Cnty. v. Barry Const. Co.*, 240 S.W.3d 840, 853 (Tenn. Ct. App. 2007) (citing *Union Trust Co. v. Williamson Cnty. Bd. of Zoning Appeals*, 500 S.W.2d 608, 617 (Tenn. 1973)). This is particularly true when substantial construction has not yet begun or related liabilities have not been incurred. *State ex rel. SCA Chem. Waste Servs., Inc. v. Konigsberg*, 636 S.W.2d 430, 437 (Tenn. 1982). And the Tennessee legislature has expressly recognized "the prerogatives and authority of local elected officials with respect to land-use matters." 2014 Tenn. Pub. Acts, Ch. 686, at 1.[1]

In the analogous context of zoning ordinances, the Tennessee Court of Appeals has explained that "[o]ne of the requirements for establishing vested rights in a prior ordinance or regulation is a *final* governmental approval of development plans. In a majority of states, including Tennessee, that approval generally means a building permit." *CK Dev., LLC v. Town of Nolensville*, No. M2010-00633-COA-R3CV, 2012 WL 38287, at *15 (Tenn. Ct. App. Jan. 6, 2012) (emphasis added); *see also Ready Mix, USA, LLC v. Jefferson County*, 380 S.W.3d 52, 66 n.18 (Tenn. 2012). The court warned against "implicitly equat[ing]" a preliminary concept plan approval that "was conditional, subject to modifications, and required additional approval" with a final approval or building permit. *CK Dev.*, 2012 WL 38287, at *15.

[1] Effective in 2015, after the events of this case, the Tennessee legislature amended the Tennessee Vested Property Rights Act, which covers subdivision regulations, to provide that

> [a] vested property right shall be established with respect to any property upon the approval, by the local government in which the property is situated, of a preliminary development plan *or* a final development plan where no preliminary development plan is required by ordinance or regulation *or* a building permit allowing construction of a building where there was no need for prior approval of a preliminary development plan for the property on which that building will be constructed.

Tenn. Code Ann. § 13-3-413(b) (2020) (emphasis added).

In *Silver*, we drew a similar distinction between stages of the plan approval process for determining whether a property interest could exist. 966 F.2d at 1036. If the approval comes at a point in the process when the government body has "the discretion to deny [the plan] even if [the developer] complied with certain minimum, mandatory requirements, then [the developer] would not have a 'legitimate claim of entitlement' . . . in the approval of his plan," and thus "no property right." *Id.* (quoting *G.M. Eng'rs & Assocs., Inc. v. West Bloomfield Township*, 922 F.2d 328, 331 (6th Cir. 1990)). But if the approval comes at a point in the process when "state law circumscribes the discretion of [the government body] to such an extent that approval of the particular use [of the property] was mandatory once [the developer] met certain minimal requirements, then a property interest could exist." *Id.*; *see generally Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").

In subsequent cases, we applied this distinction. In *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), the developer obtained "a favorable opinion from the City stating that the proposed development was permitted, as of right, under the City's relevant zoning regulations" prior to any construction and then purchased the property. *Id.* at 891. A council member who "lived in the immediate vicinity of [the] parcel" later expressed his opposition to the development, and the city council passed an ordinance that rendered the development effectively impossible. *Id.* at 891–93. The court held that the developer had a property interest in the first zoning classification as expressed in the city's opinion, "securely vested by [his] engagement in substantial acts taken in reliance, to his detriment, on representations from and affirmative actions by the City." *Id.* at 897. This holding largely turned on a question of Michigan law. *See id.* (quoting *Roth*, 408 U.S. at 577) ("Nasierowski's property interest . . . ,

if any, depends not on the federal Constitution, but rather on 'existing rules or on understandings that stem from an independent source, such as state law.'").

More recently, in *EJS Properties*, we examined a situation in which the city had issued an "early-start building permit" which allowed "initial renovations." 698 F.3d at 859. Importantly, that permit "did not entitle [the developer] to the ultimate re-zoning change or to a full permit to reconstruct the relevant property." *Id.* The applicable regulations specified that this type of permit was limited to early stages of construction and that all work was performed at the permittee's risk. *Id.* We determined that even if the developer had a property interest in the permit, when the city subsequently rezoned the property (rendering further construction illegal), it did not violate the developer's due process rights to the interest the permit conveyed. *Id.*

In *Tollbrook*, we synthesized these cases and restated their guiding principles. 774 F. App'x at 934–35. We concluded that "a property owner may have a property interest in the existing zoning classification of his or her property or in a discretionary benefit after it has been conferred." *Id.* at 934 (citing *EJS Props.*, 698 F.3d at 856). And "a landowner may have a property interest in a previously approved building permit where the city does not retain discretion to modify its terms." *Id.* But "[a] party cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary." *Id.* at 935 (quoting *EJS Props.*, 698 F.3d at 855). Therefore, to establish a property interest in an approval, a party must show that the government body "lacked the 'discretion to deny [the benefit] if [the party] complied with certain minimum, mandatory requirements.'" *Id.* (quoting *EJS Props.*, 698 F.3d at 855).

The Sevier County regulations derived their authority from Tennessee statutes. The statutes did not explicitly grant or deny discretion to regional planning commissions to deny

concept plans that complied with all applicable regulations. *See, e.g.*, Tenn. Code Ann. §§ 13-3-104, -403 (2008) (discussing commissions' powers and duties and listing permissible goals of subdivision regulations). Certain provisions, however, indicated the existence of that discretion. *See, e.g.*, *id.* § 13-3-104(d) ("In general, the commission has such powers as may be necessary for it to perform its functions and to promote regional planning."). The fact that the Commission heard testimony from members of the public also implicitly suggests that its decisions were discretionary; even if a concept plan complied with all the applicable regulations, community members' disfavor might cause the commission to disapprove it.[2] And, importantly, even after concept plan approval, the Partnership needed to obtain two more approvals, each with its own requirements.

Based on these cases, we conclude that the Commission's initial approval of the Partnership's concept plan did not confer a property interest. The revocation of the concept plan approval (which, it bears repeating, came before the final plan approval stage) was tantamount to a realization that the Partnership had not "complied with certain minimum, mandatory requirements." *Silver*, 966 F.2d at 1036; *see also Tollbrook*, 774 F. App'x at 935. Because the only reason for the revocation and subsequent denials was the right-of-way, at issue is not whether the Commission could deny the Partnership's concept plan after it complied with all of the "minimum, mandatory requirements." The Partnership had not done so. Nothing in the regulations or their associated statutory provisions affirmatively suggests the circumscription of discretion to the extent that would confer a property right here. *See Tollbrook*, 774 F. App'x at 935.

Aspects of this case align with *Nasierowski*, in that the initial concept plan approval indicated the Commission's opinion that the concept plan complied with the regulations, and that

[2] Some community members' comments on High Bridge in particular address both compliance with the regulations and other factors, such as "the impact it would have on the community."

the Commission then effectively halted future development by rescinding the approval. 949 F.2d at 891. But the Partnership did not carry out any "substantial acts taken in reliance, to [its] detriment, on representations from and affirmative actions by" the Commission.[3] *Id.* at 897. Instead, it purchased the Property well before seeking any input from the Commission about the development's feasibility. For years prior to speaking with Ownby about the Commission's review, the Partnership was aware that Highland Way's right-of-way was 40 feet. It was listed as such on the deed. Schubert himself testified at trial that he knew the right-of-way would be problematic when the development began. In *Nasierowski*, by contrast, the developer did not even purchase the property until receiving confirmation from the city that the proposed use would comply with zoning regulations. *Id.* at 891.

Ultimately, we find *EJS Properties* to be instructive. Just like the "early-start building permit" in that case, the concept plan approval did not give the Partnership the right to build the entire 400-to-450-tract subdivision. *EJS Props.*, 698 F.3d at 859. Even if the concept plan were approved and the Partnership began utility and road construction, it still had to obtain final plat approval prior to proceeding further. Any construction before final approval was explicitly at its own risk, just as in *EJS Properties.* *Id.* Because the concept plan approval did not come at the final stage in the process, and the Commission could still exercise discretion prior to design plan approval, the April 2007 concept plan approval did not create a cognizable property interest. The district court correctly held that the Partnership's due process claims fail at the first step. *See Silver*, 966 F.2d at 1036. Because the Commission has not demonstrated the existence of a

[3] Though the existence of the property interest in *Nasierowski* was a question of Michigan law, as opposed to Tennessee law like the one at issue here, both states' laws deemed substantial acts (like construction) necessary for a property right to vest. *Nasierowski*, 949 F.2d at 897; *Ready Mix*, 380 S.W.3d at 66 n.18.

constitutionally protected property interest, we need not reach the next steps of the substantive and procedural due process analyses. *See id.*

C. Equal Protection

Finally, the Partnership argues that the rescission of the concept plan approval violated its equal protection rights because the Commission did not revoke other subdividers' concept plan approvals. It also contends that the denial of the concept plan based on the 40-foot right-of-way was an equal protection violation because Miller's Creek was approved with the same problem.

States may not "make distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005). "The 'rational basis' test means that courts will not overturn government action 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [government's] actions were irrational.'" *Warren v. City of Athens*, 411 F.3d 697, 710 (6th Cir. 2005) quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000)). The state body "has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid." *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005). Moreover, the mere fact that "in practice [the action] results in some inequality" is insufficient to find an equal protection violation. *Id.* at 790–91 (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 n.7 (1993)).

The Partnership brings a "class of one" claim, alleging that it "has been intentionally treated differently from others similarly situated and . . . that there is no rational basis for the difference in treatment." *Johnson v. Morales*, 946 F.3d 911, 939 (6th Cir. 2020) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)). "The first element requires that the plaintiff and the others who were treated differently were 'similarly situated in all relevant

respects.'" *Id.* (quoting *EJS Props.*, 698 F.3d at 865). The second obligates the plaintiff to "demonstrate that a government action lacks a rational basis in one of two ways: either by negativ[ing] every conceivable basis which might support the government action or by demonstrating that the challenged government action was motivated by animus or ill-will." *Id.* (quoting *Warren*, 411 F.3d at 711).

When completed, High Bridge would contain more than 30 times the number of tracts in Miller's Creek. Highland Way, which was a private road as opposed to a county road, was the only way to access both Miller's Creek and High Bridge's proposed location. So, though the Partnership contends that Miller's Creek was comparable to High Bridge, it was not. The Commission was entitled to take these facts into account. Moreover, the Commission approved Miller Creek in error, and other concept plans were denied for lack of a 50-foot right-of way.

Ultimately, the Partnership has not identified any truly similarly situated comparators who the Commission treated differently. Even if it had, it still has not convincingly ruled out the many rational bases for enforcing the right-of-way requirement or demonstrated animus on the Commission's part. The district court did not err in finding that Commission did not violate the Partnership's right to equal protection.

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** the district court's findings of fact and conclusions of law and denial of the Partnership's motion to amend or alter the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

RONALD W. OGLE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No.: 3:09-CV-00537**
	)	**REEVES/GUYTON**
SEVIER COUNTY REGIONAL PLANNING COMMISSION, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiffs brought this action against the Sevier County Planning Commission under 42 U.S.C. § 1983, asking the Court to determine whether the Planning Commission acted arbitrarily and capriciously in denying plaintiffs' Concept Plan for the High Bridge Development. The matter was tried without a jury on September 24-25, 2018, and the Court issued Findings of Fact and Conclusions of Law on March 20, 2019. The Court found the Planning Commission's decision to deny plaintiffs' Concept Plan for the High Bridge Development was rational in light of the information before it, and not arbitrary or capricious. The Court further found plaintiffs had no protected property interest in having their Concept Plan approved by the Planning Commission, and disapproval of the plan did not violate Equal Protection.

This matter is before the Court on plaintiffs' motion for additional findings and to alter or amend the Court's findings and judgment as follows:

1. The Court should revise its finding in paragraph 11 to reflect that there was no agreement that the disputed portion of Scottish Highland Way is actually only 40-feet wide and the Court should not make a factual finding that that section of Scottish Highland Way has only a 40-foot right of way.

2. The Court should find that there is no general requirement in the subdivision regulations that access to all subdivisions is required to be via a 50-foot right of way or a public road.

3. The Court should find that the right of way width requirements for this development is 40-feet.

4. The Court should alter its finding that the May 2007 rescission was proper based upon a 7 – 6 vote when 14 members were present.

5. The Court should amend its Judgment accordingly [R. 114].

Plaintiffs state they are not asking the Court to alter its ultimate conclusion that they have no protected property interest or that defendants did not violate plaintiffs' due process or equal protection rights – plaintiffs reserve these issues for appeal. However, plaintiffs contend certain of the Court's findings and conclusions are not supported by the record and require clarification, alteration and/or additional findings.

II. Standard of Review

Plaintiffs bring their motion under Federal Rules of Civil Procedure 52 and 59. Rule 52(b) provides that on a party's motion, the court may amend its findings or make additional findings and may amend the judgment accordingly. The main purpose of Rule 52(b) is "to create a record upon which the appellate court may obtain the necessary

understanding of the issues to be determined on appeal." *See In re St. Marie Development Corp. of Montana, Inc.*, 334 B.R. 663, 675 n. 3 (Bankr.D.Mont. 2005). A motion to amend under Rule 52(b) may be used "to clarify essential findings or conclusions, correct errors of law or fact, or to present newly discovered evidence." *Wal-Mart Stores, Inc. v. El-Amin*, 252 B.R. 652, 656 (Bankr.E.D.Va 2000) (the purpose of the rule is to correct an "egregious error of law or fact, not the resubmission of unsuccessful arguments"). Rule 52(b) motions are not to be used to obtain a re-hearing on the merits or to raise arguments that could have been made before the court's earlier ruling. *Wilkerson v. Debaillon*, 2013 WL 3803972 at *7 (W.D.la. Jul. 18, 2013).

Alteration or amendment of a judgment under Rule 59(e) is only justified in instances where there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *See GenCorp. Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Manifest injustice is defined as an "error in the trial court that is direct, obvious, and observable." *Tenn. Prot. & Advocacy, Inc. v. Wells*, 371 F.3d 342, 348 (6th Cir. 2004). A showing of manifest injustice requires 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. *Grayhawk, LLC v. Ind/KY Reg'l Council of Carpenters, Local Union No. 64*, 2011 WL 239827 at *2 (W.D.Ky. Jan. 24, 2011)).

Motions for reconsideration are "not an opportunity to re-argue a case" and should not be used by parties to "raise arguments which could, and should, have been made before judgment issued." *Salt Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374

(6th Cir. 1998). Relief under Rule 59 is an "extraordinary remedy and should be granted sparingly because of the interests in finality and conservation of scarce judicial resources." *Jamerly v. Fifth Third Mtg. Co.*, 388 B.R. 795, 805 (B.A.P. 6th Cir. 2008).

III. Analysis

A. Findings in Paragraph 11

In paragraph 11, the Court found: "The parties agree that Scottish Highland Way has a 50-foot right of way from the intersection of Covemont Road and Covemont Lane to the entrance of plaintiffs' property, except for the part of Scottish Highland Way that crosses the Foothills Parkway, where it has only a 40-foot right of way." Plaintiffs argue they never stipulated that Scottish Highland Way only had a 40-foot right of way where it crosses the Foothills Parkway, and they dispute this fact.

Defendants respond that the Court's finding in paragraph 11 is supported by the evidence presented at trial, citing the trial testimony of plaintiffs' representative John Schubert, who stated that when the property was purchased in 2005, plaintiffs understood there was only a 40-foot easement as noted on their deed.

Plaintiffs decided not to present testimony from their expert witness to establish that the portion of Scottish Highland Way that crosses the Foothills Parkway provided a 50-foot right of way. This argument was available to the plaintiffs and could have – and should have – been raised at trial. Instead, plaintiffs attempted to argue that only a 40-foot right of way was required for development of their property. No evidence was presented that the right of way across the Foothills Parkway was anything but 40-feet in width. Thus, the

only evidence presented at trial and contained in the record supports the Court's findings in paragraph 11. No clarification, alteration, or additional findings are necessary.

B. Findings Regarding 50-foot Right of Way

Next, plaintiffs take issue with the Court's finding that streets which are used primarily for access to residential properties are required to have a 50-foot right of way. Plaintiffs contend there is no such requirement in the Subdivision Regulations. Plaintiffs further argue that the Court should find that the right of way requirement for their development is only 40-feet because Scottish Highland Way is a cul-de-sac and a cul-de-sac is only required to have a 40-foot width requirement.

Defendants respond that Jeff Ownby testified that the Subdivision Regulations are to be read as a whole, with all design criteria in Articles III and IV having to be met in order to develop a private permanent easement such as Scottish Highland Way. According to these regulations, a subdivision must provide for access directly to a county road or access via a 50-foot private easement to a county road. Plaintiffs' proposed Concept Plan had neither access directly to a county road, nor access via a 50-foot easement.

The Court's findings are supported by the testimony of County Planner Jeff Ownby, who testified that Article III(A)(4)(d) of the Subdivision Regulations describes the right of way width required for streets. Primary residential streets that are used for access to abutting residential properties and used to collect traffic from loop streets and cul-de-sac streets are required to have a 50-foot right of way. He further testified that Scottish Highland Way is a private permanent residential street, not a public street maintained by the County. Article III(A)(4) states that all design criteria in Article III and Article IV shall

be met for the development of a private permanent easement. Ownby further explained that Scottish Highland Way does not provide a 50-foot right of way from the High Bridge property all the way to a county road. It does through Miller's Creek, but once it gets to the Foothills Parkway, then it reduces to 40-feet. Thus, Scottish Highland Way does not conform to the right of way requirements in Articles III and IV of the Subdivision Regulations because the right of way is only 40-feet. The Court finds the record supports the Court's findings, and no clarification, alteration, or additional findings are necessary.

C. Finding Regarding Recission Vote of Planning Commission

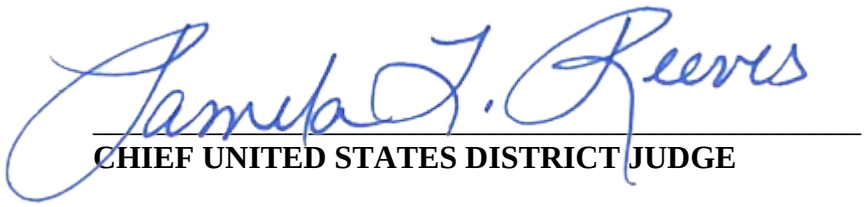
After plaintiffs' Concept Plan was denied in March 2007, plaintiffs resubmitted the plan stating they had located a map filed in 1971 depicting a 50-foot right of way to their property. The Concept Plan was placed back on the agenda and approved by the Commission in April 2007. After the meeting, several Commissioners expressed concerns regarding the 1971 deed and asked for further research of the property records. Attorney Jerry McCarter, working on behalf of the Commission, reviewed the documents in the chain of title and determined that the 50-foot right of way platted in 1971 no longer existed in 2007. Subsequent to this finding, the Planning Commission rescinded its prior approval for plaintiffs' Concept Plan. Fourteen members of the Planning Commission were present for the meeting, and the vote was 7 – 6 in favor of rescission with Chairman McMahan abstaining from the vote.

Plaintiffs again assert their argument that the vote of the Commission was not a majority vote and the prior consent should not have been rescinded. The Court rejected this argument in its Findings of Fact and Conclusions of Law and rejects the argument

again today. Chairman McMahan testified that it has been his practice to only vote if needed to break a tie; therefore, there were only 13 Commissioners voting on rescission and their vote was 7 – 6, a majority. The Court finds the record supports the Court's findings, and no clarification, alteration, or additional findings are necessary.

Plaintiffs offer no newly-discovered evidence in support of their motion, and do not argue that there has been an intervening change in controlling law since entry of the Court's Findings of Fact and Conclusions of Law. Plaintiff's motion also fails to demonstrate that a clear error of law has been committed such that the prior opinion must be set aside to avoid manifest injustice.

In conclusion, plaintiffs' motion to alter or amend the Court's previous opinion [R. 114] is **DENIED.**



CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

RONALD W. OGLE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No.: 3:09-cv -00537**
	)	**REEVES/GUYTON**
SEVIER COUNTY REGIONAL PLANNING COMMISSION, et al.,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs bring this action against the Sevier County Planning Commission under 42 U.S.C. § 1983, asking the court to determine whether the Planning Commission acted arbitrarily and capriciously in denying plaintiff's concept plan for the High Bridge Development. The matter was tried before the undersigned on September 24-25, 2018. Having heard the testimony at trial and having reviewed the record in this case, the following are the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACT

1. Plaintiffs bring this action under 42 U.S.C. § 1983 for violations of plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

2. Plaintiffs own the High Bridge property which consists of approximately 852 acres in Sevier County, Tennessee. Plaintiffs propose to develop High Bridge as a subdivision of 400-450 residential homes. The property is bounded on the south by the Great Smokey Mountains National Park. It is surrounded on the other three sides by privately owned property.

3. In Sevier County, the development and subdivision of property is subject to compliance with the county's Subdivision Regulations.

4. Article III, Section A, Paragraph 4(d) of the Subdivision Regulations establishes the right of way width requirements for streets that are part of a development plan.

5. Primary residential streets are those which are used primarily for access to the abutting residential properties, are designed to collect traffic from loop streets and cul-de-sac streets, and are required to have a 50 foot right of way.

6. Minor Residential and Loop Streets are those which are used primarily for access to the abutting residential properties, are designed to discourage through traffic, and are required to have a 40 foot right of way.

7. Cul-de-sacs are permanent dead-end streets or courts designed so they cannot be extended in the future. A cul-de-sac more than 500 feet in length is required to have a 40 foot right of way. A cul-de-sac less than 500 feet with five or fewer lots is required to have a 30 foot right of way.

8. These width requirements apply to private permanent easements such as Scottish Highland Way.

9. Immediately to the north of plaintiffs' property is the area known as "Millers Creek" which has been developed in separate stages as separate subdivisions. The Millers Creek developments are bordered on the north by federally owned land that has been designated for an extension of the Foothills Parkway.

10. Access to Millers Creek and plaintiffs' property is provided by a road known as Scottish Highland Way. Scottish Highland Way is a private road. It is not listed as a Sevier County Highway Department Road. Scottish Highland Way ends in two cul-de-sacs.

11. The parties agree that Scottish Highland Way has a 50 foot right of way from the intersection of Covemont Road and Covemont Lane to the entrance of plaintiffs' property, except for the part of Scottish Highland Way that crosses the Foothills Parkway, where it has only a 40 foot right of way.

12. The Planning Commission requires that all plans for proposed subdivision developments be submitted to it for approval in accordance with its Subdivision Regulations. According to the Planning Commission, any proposed subdivision in Sevier County must provide for access directly to a county road, or access via a 50 foot private easement to a county road. *See* Article III, Section A, Paragraph 14 of the Subdivision Regulations.

13. In February or March of 2007, the Southern Design Group, who was hired to represent plaintiffs, contacted Sevier County's Planner, Jeff Ownby, in order to obtain guidance as to the requirements for a concept plan for the High Bridge property. Ownby met with members of the Southern Design Group on several different occasions to discuss

the proposed concept plan and to go over the basic information required on a plan submitted for the Planning Commission's review.

14. Ownby testified that any subdivision entrance must be either a collector street or a primary residential street, both of which require a 50 foot right of way.

15. Scottish Highland Way, a private permanent easement, does not conform to the right of way requirements in Articles III and IV of the Subdivision Regulations because the right of way is only 40 feet. Subdivision regulations require the width of the road to be 50 feet until it connects with a county road.

16. Plaintiffs' Concept Plan was submitted in February or March 2007. After the Concept Plan was submitted, discussion ensued regarding access to the property, which included references to the deed for the property which indicated that access to the property via Scottish Highland Way across the Foothills Parkway was only 40 feet.

17. John Schubert, the representative for the plaintiffs, acknowledged that when the property was purchased in 2005, plaintiffs understood there was only a 40 foot easement, which was noted on the deed. He further testified he knew this was going to be an issue with the Planning Commission when plaintiffs decided to develop the property.

18. Plaintiff's Concept Plan was denied by the Planning Commission at a meeting in March 2007 for failing to meet the Subdivision Regulations.

19. After the denial, Southern Design Group claimed it had found a 50 foot right of way via a map plotted and recorded with the Register's Office in 1971. Ownby located the map relied upon by the Southern Design Group, which he also believed depicted a 50 foot right of way to plaintiffs' property. The plaintiffs' Concept Plan was then placed back

on the Planning Commission's agenda in April 2007 with a recommendation for approval. The High Bridge Development Concept Plan was approved based on the existence of a 50 foot right of way.

20. After the meeting, several Commissioners expressed concerns regarding the 50 foot right of way that had been created in the 1971 deed. The Commissioners did not believe that a 50 foot right of way still existed in 2007. As a result of these concerns, Ownby was asked to do further research by the Planning Commission. Ownby requested assistance from the attorney working on behalf of Sevier County, Jerry McCarter. Ownby requested that McCarter determine if the plaintiffs' property was served by a 50 foot right of way. McCarter determined that the 50 foot right of way platted in 1971 did not exist in 2007. [1]

21. McCarter examined the title and reviewed instruments in the chain of title. He also reviewed several instruments that referred to a 50 foot right of way, but found that right of way did not extend to plaintiffs' property. This information was presented to the County Planner.

22. Mark Pinkham is a title abstractor. McCarter asked him to locate or verify whether a 50 foot right of way existed to the High Bridge property. As part of Pinkham's research, he looked at the access granted to the property, including the property to the north of plaintiffs' property, the Foothills Parkway southern boundary, the northern side of the

[1] Plaintiffs contend that McCarter was testifying as an expert witness; however, the court finds that McCarter's testimony related to information that he provided to Ownby prior to the Planning Commission's decisions on the High Bridge Concept Plan in both 2007 and 2008. Thus, the court found McCarter was testifying as a fact witness, not as an expert witness.

Foothills Parkway, and the property in-between in the Foothills Parkway which was taken by the state and later conveyed to the United States. In performing this research, Pinkham found there was no 50 foot right of way through the Foothills Parkway to plaintiffs' property. Pinkham confirmed that the right of way to plaintiffs' property through the Foothills Parkway was only 40 feet.

23. Chairman McMahan testified the Commission did not perform the additional research with the intent to overturn the earlier approval, but to get it right.

24. After it was determined the property did not have the necessary 50 foot right of way, Ownby and the Park Service held a meeting to try and determine whether there was access through an adjoining property owned by Earl Worsham. Plaintiff John Schubert attended this meeting.

25. In May 2007, the Planning Commission was informed that the 50 foot right of way platted in 1971 no longer existed. Subsequent to these findings, the Concept Plan was put back on the agenda and the prior approval of the Concept Plan was rescinded for failing to meet the Subdivision Regulations.

26. Plaintiffs contend they were not given notice that the Concept Plan might be rescinded at the May meeting, nor were they notified by the Planning Commission of the rescission. They claim they heard about the rescission by "word of mouth." However, testimony at trial shows plaintiffs were aware that there was a problem with the Concept Plan as evidenced by the fact that Plaintiff Schubert attended the meeting with Ownby and the Park Service where they tried to determine whether access existed via the Worsham

property. *See* Paragraph 24 above. Schubert was certainly aware that the Commission was still looking at whether a 50 foot right of way existed to plaintiffs' property.

27. The Planning Commission's By-laws require a minimum vote of at least a majority of the members present, subject to a small number of limited exceptions where a larger vote is required. At the May 2007 meeting, 14 members of the Planning Commission were present. Plaintiffs argue that at least eight votes were required to constitute a majority of those present. Thus, they argue passage of the rescission with only seven votes violated the Commission's By-Laws. The court disagrees.

28. McMahan testified that as Chairman of the Commission, he would only vote if it was necessary to break a tie. At this meeting, one commissioner was absent and the vote to rescind the prior approval was 7 to 6. Since there was no tie, McMahan did not vote. He explained that the By-Laws do not require a vote of a majority of the entire Commission; but instead a majority vote, as long as a quorum is present.

29. Sometime following the Planning Commission's rescission of approval for the Concept Plan, Ownby advised plaintiffs that they had a right to apply for a variance. Roughly 3 to 4 meetings were held between Ownby and plaintiffs' representatives from May of 2007 to early 2008.

30. The High Bridge Concept Plan was resubmitted with a request for a variance during the May 2008 Planning Commission meeting. The plan was ultimately never voted on, as one of the plaintiffs, Ron Ogle, chose to remove it from the agenda.

31. McCarter was asked again in 2008 to perform a second review of the title and the instruments in the chain of title after plaintiffs' attorney indicated there was in fact

a 50 foot right of way to the property. After McCarter and Pinkham conducted a second review of the title information, McCarter again told the Planning Commission there was no 50 foot right of way serving plaintiffs' property.

32. McCarter stated that the previously developed Miller's Creek Subdivision had a variance because there was only a 40 foot right of way serving Miller's Creek where a 50 foot right of way was required under the Subdivision Regulations. Plaintiffs dispute that the Miller's Creek Subdivision received a variance, as a variance is not reflected in the Planning Commission minutes. Whether Miller's Creek was approved with or without a variance, McCarter's statement that Miller's Creek had obtained a variance in order to develop their subdivision was relied upon by the Planning Commission when they voted to deny plaintiffs' Concept Plan.

33. Planning Commission Chairman, Jack McMahan, acknowledged that the approval of Miller's Creek Subdivision, without a variance, may have been a mistake, but that did not give the Planning Commission a license to make the same mistake again. McMahan testified he could recall no instances where only a 40 foot right of way was required for approval without a variance. Other than Miller's Creek, plaintiffs identified no other subdivision development that was granted approval with only a 40 foot right of way.

34. In December 2008, plaintiffs' Concept Plan was brought back in front of the Planning Commission. Kevin Fitzgerald from the Park Service was in attendance and addressed the Planning Commission, advising them Scottish Highland Way had only a 40 foot right of way across the Foothills Parkway. The resubmitted Concept Plan was again

denied for lacking the required access under the Subdivision Regulations. The minutes from this meeting reflect two reasons for the denial: The Concept Plan (1) did not provide for access directly to a county road, or (2) access via a 50 foot permanent easement to a county road.

35. Ronnie Allen, a member of the Planning Commission at the time plaintiffs' Concept Plan was considered, stated the reason the Plan was denied was due to a lack of a 50 foot right of way to plaintiffs' property.

35. Ronnie Keener, another member of the Planning Commission, also testified the reason for the denial was a lack of a 50 foot right of way to plaintiffs' property.

36. Ownby could not recall a single instance where the Planning Commission ever intentionally denied a developer's plan where a 50 foot right of way existed.

37. Allen and Keener likewise testified they could not recall a single instance where the Planning Commission intentionally denied a developer's plan where the plan met the Subdivision Regulations. Both further testified they could recall no instance where a concept plan had been approved without the required 50 foot access. Plaintiffs argue this testimony shows the witnesses were not aware of the multiple approvals of Miller's Creek, which were approved without a 50 foot access. However, it does support Chairman McMahan's testimony that the members believed that the Miller's Creek developments were granted a variance.

38. Both Planning Commission Chairman McMahan and County Planner Ownby testified that a concept plan for a different development was also denied in December 2008 for failing to meet the 50 foot right of way requirement. The concept plan

for that development, Covemont Ridge Estates, was denied because it lacked access via a 50 foot right of way.

39. Plaintiff Schubert could not tell the court of any other development that was treated differently than plaintiffs, and acknowledged there was no guarantee that plaintiffs' property could be developed when the property was purchased or when plaintiffs submitted their Concept Plan to the Planning Commission.

40. Plaintiffs include in their proposed findings actions taken in 2018 by the Planning Commission. The court ruled at trial this evidence was not relevant to the central issue in this case – whether the Planning Commission acted arbitrarily and capriciously in denying plaintiff's concept plan for the High Bridge Development in 2008. Accordingly, the court has not considered events following the Planning Commission's 2008 decision denying plaintiffs' Concept Plan.

Conclusions of Law

A. Protected Property Interest

To establish a cause of action under 42 U.S.C. § 1983, a plaintiff must show (1) a deprivation of a right secured by the Constitution or laws of the United States, (2) caused by a person acting under color of state law. *Hunt v. Sycamore Cmty. Sch. Dis. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008). The rights protected include procedural due process, substantive due process, and equal protection, all of which are found in the Fourteenth Amendment to the Constitution.

Both substantive and procedural due process are examined under a two-part analysis. First, the court must determine whether the interest at stake is a protected liberty

or property interest under the Fourteenth Amendment. *Ziss Bros. Constr. Co. v. City of Independence,* 439 Fed.Appx. 467, 471 (6th Cir. 2011). It is only after a protected right is identified that the court will consider whether a deprivation of that interest contravened the notions of due process embodied by the Fourteenth Amendment. *Id.* The Sixth Circuit uses an entitlement test to determine whether an alleged property right is protected under the Fourteenth Amendment. Under that test, a protectable property right exists only if the plaintiff has a legitimate claim of entitlement or a justifiable expectation in the approval of his plan for land use. *Id.* Unilateral expectations of a property interest are insufficient to trigger due process concerns. *Id.*

In *Ziss Bros.*, the Sixth Circuit concluded that the plaintiff did not have a protected property interest to support procedural and substantive due process claims. Plaintiff had purchased a parcel of land to divide into a subdivision consistent with the city's code. Plaintiff alleged that its expectation that the Commission would approve its preliminary plan constituted a protected property interest. *Id.* at 472. The court found that nowhere in the applicable city code was an applicant guaranteed approval of its preliminary plans. *Id.* at 473. Thus, the commission's determination regarding whether a preliminary plan complied with the city code was a discretionary undertaking. *Id.* Because the commission had discretionary authority to evaluate the legality of the preliminary plan, the court found that plaintiff did not possess a protected property interest to support its procedural and substantive due process claims. *See also Brown v. City of Ecorse*, 322 Fed.Appx. 443, 445 (6th Cir. 2009) ("If a zoning authority retains discretion to issue or deny a building permit,

an individual whose permit application has been rejected has no protected property interest").

Here, plaintiffs have pointed to nothing in the County's Subdivision Regulations that guaranteed approval of their Concept Plan. Even if the Concept Plan was approved, there were two more required plans to be submitted by plaintiffs, the Design Plan and Final Plat; neither of which were guaranteed approval by the Planning Commission. Plaintiff Schubert acknowledged that there was no guarantee that he would be able to develop the land when he purchased it. Therefore, the court concludes that Plaintiffs failed to show that they had the requisite property interest to support their procedural and substantive due process claims under § 1983.

B. Substantive Due Process

Even assuming that plaintiffs could establish a protected property interest in developing the High Bridge property, they failed to show a deprivation of that property interest without substantive and procedural due process. Substantive due process recognizes that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed. *Pearson v. Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992). A governmental actor violates a plaintiff's substantive due process right by acting arbitrarily and capriciously. *Id.* at 1221. A government acts arbitrarily and capriciously when its actions are not supportable on any rational basis or are "willful and unreasoning action, without consideration, in disregard of the facts or circumstances of the case." *Layman Lessons, Inc. v. City of Millersville*, 636 F.Supp.2d 620, 651 (M.D.Tenn. 2008).

In order to succeed on a substantive due process claim, a plaintiff must show that (1) a constitutionally protected property or liberty interest exists, and (2) the constitutionally protected interest has been deprived through "arbitrary and capricious action." *Paterek v. Village of Armada*, 801 F.3d 630, 648 (6th Cir. 2015). The Sixth Circuit has stated that it will not "interfere with local zoning decisions unless the locality's action has no foundation in reason and is a mere arbitrary or irrational exercise of power." *Id.*

Where a substantive due process attack is made on an administrative action, the scope of review by the federal courts is extremely narrow. To prevail, a plaintiff must show that the state administrative agency has been guilty of arbitrary and capricious action in the strict sense, meaning that there is no rational basis for the decision. *Pearson*, 961 F.2d 1221. The court's review is limited to determining whether the agency paid attention to the evidence adduced and acted rationally upon it. *Id.* The agency decision may not be set aside if there is some factual basis for the agency action. *Id.* In addition, the courts should show respect for the local authority's professional judgment. They may not override it unless it is such a substantial departure from accepted norms as to demonstrate that the decisionmaker did not actually exercise professional judgment. *Id.*

Plaintiffs argue there is no evidence that any Commissioner exercised his independent professional judgment regarding what regulations applied to plaintiffs' Concept Plan. Plaintiffs further argue the Commissioners "blindly accepted" Ownby's representations that a 50 foot requirement applied. The court disagrees.

The Planning Commission's decision to deny plaintiffs' Concept Plan was based upon the findings of the County Attorney McCarter, the recommendation of the County

Planner Ownby, information from the National Park Service, and an understanding of the Subdivision Regulations at the time the decision was made in 2008. Every Commissioner called at trial testified that the access road to a subdivision had to have a 50 foot right of way. Although the Commissioners could not cite the exact place in the regulations where this provision appears, they certainly knew the substance of the regulation – that a 50 foot right of way was required for a primary residential street. *See* Article III, Section A, Paragraph 4(d). The parties do not dispute that the portion of Scottish Highland Way that crosses the Foothills Parkway has only a 40 foot right of way. Plaintiff Schubert acknowledged that when the property was purchased in 2005, there was only a 40 foot easement that was noted on plaintiff's deed. The court finds defendants' denial of the Concept Plan rational in light of the information before the Planning Commission. Plaintiffs failed to show the Planning Commission's decision was either arbitrary or capricious.

C. Procedural Due Process

In order to establish a procedural due process claim, a plaintiff must show (1) a constitutionally protected property or liberty interest, (2) plaintiff was deprived of that interest, and (3) the state did not afford adequate procedural rights prior to depriving plaintiff of that interest. *Taylor Acquisitions, LLC v. City of Taylor,* 313 Fed.Appx. 826, 830 (6th Cir. 2009). Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest. *Warren v. City of Athens,* 411 F.3d 697, 708 (6th Cir. 2005). Only after a plaintiff has met the burden of demonstrating that plaintiff possessed a protected property

interest and was deprived of that interest will the court consider whether the process provided the plaintiff violated the right to due process. *Id.* Where a plaintiff establishes a possessory interest, a governmental entity must provide "adequate notice and a meaningful hearing prior to any attempt to deprive the interest holder of any rights." *Hamby v. Neel*, 368 F.3d 549, 560 (6th Cir. 2004). An abstract need or unilateral expectation does not suffice to create a property interest; rather, a plaintiff must have a legitimate claim of entitlement. *Richardson v. Township of Brady*, 218 F.3d 508, 517 (6th Cir. 2000).

Plaintiffs argue the Commission's May 2007 rescission of its prior approval of their Concept Plan violated plaintiffs' procedural due process rights. The court disagrees.

First, as stated above, the court finds that plaintiffs did not have a protected property interest in having their Concept Plan approved. Second, plaintiffs received the process they were due. Testimony at trial as well as the record in this case, shows plaintiffs were provided several opportunities to have their Concept Plan heard before the Planning Commission. The County Planner met with Southern Design Group several times to discuss the proposal and to go over information required for a plan to be submitted to the Planning Commission. Plaintiff Schubert admitted at trial that there was no guarantee that he would be able to develop the land. The approval of the Concept Plan was only the first step in a series of submittals that required approval. Denial of the Concept Plan in 2008 did not prevent plaintiffs from submitting further concept plans. The court finds plaintiffs failed to show they had a protected property interest or that they were not afforded adequate procedural rights. Plaintiffs can state neither a procedural due process claim nor a substantive due process claim.

D. Equal Protection

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under the Equal Protection Clause, the states cannot make distinctions that (1) burden a fundamental right, (2) target a suspect class, or (3) intentionally treat one individual differently from others similarly situated without any rational basis. *Taylor*, 313 Fed.Appx. at 836. The rational basis test means that courts will not overturn government action "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational." *Ziss*, 439 Fed.Appx. at 476. Plaintiffs bear the burden of demonstrating that the challenged action had no rational basis. *Id.* The governmental entity has no obligation to produce evidence to sustain the rationality of its action. Its choice is "presumptively valid." *Id.*

Plaintiffs claim unequal treatment by the Planning Commission because the Commission required a 50 foot right of way as a condition for approval of their Concept Plan, when the Millers Creek developments were approved with a 40 foot right of way. Defendants respond that Millers Creek is a much smaller development made up of only 12-14 tracts, while the High Bridge Concept Plan contains 400-450 tracts. The court agrees that Millers Creek is not similarly situated to the proposed High Bridge development. Although plaintiffs argue that the number of tracts in High Bridge compared to Millers Creek is not a factor be considered, the court finds that the number of tracts is highly relevant to the issue whether Millers Creek is similarly situated to High Bridge. Also

relevant to the court's analysis, the proof at trial shows that other concept plans were also denied due to a lack of access via a 50 foot right of way. Plaintiff Schubert admitted he could not tell the court of any other development that was treated differently than High Bridge. Thus, the court finds plaintiffs failed to demonstrate that the Planning Commission lacked a rational basis for denying their Concept Plan, or treated them differently than a similarly situated development.

Conclusion

For the foregoing reasons, the court finds that the Planning Commission's decision to deny plaintiffs' Concept Plan for the High Bridge development was rational in light of the information before it, and not arbitrary or capricious. Plaintiffs had no protected property interest in having their Concept Plan approved by the Planning Commission, and disapproval of the Plan did not violate Equal Protection.

A judgment consistent with these findings of fact and conclusions of law will be entered.

UNITED STATES DISTRICT JUDGE

APPENDIX D

No. 19-6327

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 20, 2021
DEBORAH S. HUNT, Clerk

RONALD W. OGLE, BETTY OGLE, JERRY KERLEY, MARK T. WHITE, AND JOHN C. SCHUBERT, DBA HIGH BRIDGE DEVELOPMENT PARTNERSHIP,

Plaintiffs-Appellants,

v.

SEVIER COUNTY REGIONAL PLANNING COMMISSION and SEVIER COUNTY, TENNESSEE,

Defendants-Appellees.

O R D E R

BEFORE: ROGERS, SUTTON, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk