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**OPINION, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT (JANUARY 7, 2025)**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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WILLIAM BECKER; DARCY LYNCH, CO-TRUSTEES OF THE ANTOINETTE OGILVY TRUST UNDER THE WILL OF GEORGE OGILVY,

*Plaintiffs - Appellants,*

v.

CITY OF HILLSBORO, MISSOURI,

*Defendant - Appellee.*

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No. 23-3367

Appeal from United States District Court for the Eastern District of Missouri - St. Louis

Submitted: September 25, 2024
Filed: January 7, 2025

Before: COLLOTON, Chief Judge, LOKEN and SHEPHERD, Circuit Judges.

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SHEPHERD, Circuit Judge.

The City of Hillsboro adopted land-use ordinances prohibiting new private wells within City limits and prohibiting the use or construction of residences in the City unless those residences are connected to the City

water system. A local landowner sued the City, arguing that the ordinances create an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments. The district court[1] granted summary judgment to the City, rejecting the landowner's claims, and the landowner now appeals. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

## I.

This case centers around a 156-acre[2] tract of land in Jefferson County, Missouri. The Property is owned by the Antoinette Ogilvy Trust. Appellants, siblings William Becker and Darcy Lynch, are co-trustees of the Trust.

The Property currently sits within but at the edge of the City of Hillsboro, Missouri, but it has not always been a part of Hillsboro. In 2000, the Property was voluntarily annexed into Hillsboro and zoned for residential use. Both of the relevant annexation documents stated that the City "has the ability to furnish normal municipal services to the area" (or a similar variation). The documents said nothing about paying to connect those services.

As a part of the City of Hillsboro, the Property is subject to two key Hillsboro regulations. The first was enacted in 1971, nearly three decades before the Trust annexed the Property to Hillsboro. That regulation prohibits new private wells in City limits. The second

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[1] The Honorable Audrey G. Fleissig, United States District Judge for the Eastern District of Missouri.

[2] The Property was originally 176 acres but the owners sold about 20 acres of it in 2021. The remaining 156 acres are at issue here.

regulation was enacted in 2008, eight years after the voluntary annexation. That regulation makes it unlawful to "occupy, use[,] or otherwise live in" any residential structure "which is not being serviced by the [C]ity water supply system or by an approved and functioning deep well."

In 2020, after years of allowing the property to sit vacant, the trustees[3] tried to sell the Property. Becker stated that the initial attempts to sell the Property as a single tract failed. Upon the recommendation of their real estate agent, the trustees began marketing the Property in eight smaller lots instead. In 2021, the Trust sold one of the lots to Josh and Julia Brown for $233,825, a price Becker claims was based on the mistaken assumption by both the buyer and the seller that the Browns would be able to drill a private well.

It was around that time that Becker claims the trustees first became aware of the annexation and the applicable regulations. As the trustees further investigated the effect of these regulations, they learned that the cost to extend the City water system to the eight tracts of land would be substantial. In fact, per an expert appraisal report the trustees requested, the estimated cost to connect water to all the proposed lots is between $963,000 and $1,578,000,[4] making development of the property "not financially feasible." The trustees claim that these water connection expenses

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[3] Becker and Lynch became the trustees in 2021, when their mother died.

[4] There is a mismatch between the amount the expert report lists and the amount the trustees admit to in summary judgment documents. The expert report lists $1,578,000, while the trustees state the estimated cost is $1,575,000.

have deterred additional buyers from moving forward with purchasing some of the tracts the trustees seek to sell.

The City water lines currently run to a spot about 228 feet away from the Property. The City asserts it is willing and able to run water from that spot to within 20 feet of the trustees' property line—at the trustees' cost—enabling the trustees to tap into the City's water supply.[5] This is the same process the neighboring Eagle Ridge Subdivision went through when developing, though Eagle Ridge had to pay to extend the water about 3,000 feet, a City representative testified. The trustees have not asked the City to run water to their property.

In 2022, the trustees sued the City of Hillsboro, alleging the City's regulations constituted takings in violation of the Missouri Constitution[6] and the United States Constitution and violated their Constitutional

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[5] The trustees question the City's ability to extend the water line, noting City representatives testified that such an extension would require the City to obtain easements either by agreement or by eminent domain. The trustees further highlight testimony from a City representative noting that engineers might have to "figure out" some "residual pressure" issues in connecting the water line. Even if both these statements are true, they only indicate that the City has not yet worked through the logistics of extending the water; they do not negate the City's assertion that it is able to extend the water line if the trustees request.

[6] Missouri courts analyze Missouri takings claims under the same framework provided by the Supreme Court for Fifth Amendment takings. *See Clay Cnty. ex rel. Cnty. Comm'n of Clay Cnty. v. Harley & Susie Bogue, Inc.,* 988 S.W.2d 102, 107 (Mo. Ct. App. 1999) ("Missouri considers the same factors the Supreme Court has considered in making a determination of whether a taking has occurred under . . . the Missouri Constitution.").

rights under 42 U.S.C. § 1983. They sought damages for inverse condemnation and violation of constitutional rights under § 1983. The § 1983 claim was resolved on a motion to dismiss. Both sides moved for summary judgment on the taking claims.

The trustees moved for summary judgment first. They asserted that the City's regulations constitute a taking in three ways. First, they argued that the City's regulations constitute an effective permanent physical invasion of their property. Second, they asserted that the regulations effectively deny them all economically viable use of their property. If established, either of these first two types of takings would be a *per se* taking, meaning the court would not need to consider any mitigating factors to issue a decision in favor of the landowners. *See Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 538-39 (2005) (noting that *per se* regulatory takings are the only type of regulatory takings not governed by *Penn Central).* Finally, the trustees claimed that the regulations are a taking under the Supreme Court's balancing test for regulatory takings (the *Penn Central* test). *See Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978).

A few weeks later, the City filed a motion for summary judgment as well. In its memorandum in support of its motion, the City argued that the *Penn Central* test governs and that its regulations do not constitute a taking because they pass that test. A few days later, in a separate filing responding to the trustees' motion, the City further asserted that its regulations do not constitute a physical invasion of the trustees' property because the regulations do not require an actual occupation of the property. The City also argued

that the regulations do not deprive the Property of all economically viable use, but instead merely required the developers to pay costs associated with developing the property.

The district court denied the trustees' motion and granted the City's motion for summary judgment. The court first rejected both of the trustees' *per se* taking claims, noting that the regulations do not involve or require any kind of physical encroachment onto the trustees' property and—by the trustees' expert's own admission—do not deprive the Property of *all* economic value. The Court then determined that no reasonable factfinder could conclude a taking exists under the Supreme Court's balancing test for regulatory takings.

**II.**

We review a grant of summary judgment de novo. *Se. Ark. Hospice, Inc. v. Burwell,* 815 F.3d 448, 450 (8th Cir. 2016). "Summary judgment is appropriate if there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law." *Huynh v. Dep't of Transp.,* 794 F.3d 952, 958 (8th Cir. 2015). In other words, "[t]he mere existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under prevailing law." *Holloway v. Pigman,* 884 F.2d 365, 366 (8th Cir. 1989). We view the evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Corkrean v. Drake Univ.,* 55 F.4th 623, 630 (8th Cir. 2022).

The Fifth Amendment, as applied to the States through the Fourteenth Amendment, "provides that private property shall not be taken for public use, without just compensation." *Iowa Assur. Corp. v. City*

*of Indianola,* 650 F.3d 1094, 1097 (8th Cir. 2011) (quoting *Lingle,* 544 U.S. at 536). The purpose of the Takings Clause is "to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo v. Rhode Island,* 533 U.S. 606, 617-18 (2001) (citation omitted).

For decades, the Takings Clause was generally understood only to apply to "direct appropriation[s]" of property, or "the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1014 (1992) (second alteration in original) (first quoting *Legal Tender Cases,* 79 U.S. (12 Wall.) 457, 551 (1871); then quoting *N. Transp. Co. v. City of Chicago,* 99 U.S. 635, 642 (1879)). That all changed in 1922 when the Supreme Court issued its decision in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). *See Lucas,* 505 U.S. at 1014.

*Mahon* established the "general rule" that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. Though recognizing that "[g]overnment hardly could go on" if regulations are easily characterized as takings, the Court in *Mahon* noted that when the diminution in value "reaches a certain magnitude," the Fifth Amendment requires the government to compensate the property owner for his loss. *Id.* at 413.

Fifty years later, the Supreme Court laid out what would become the default test for determining whether a regulation constitutes a taking. *See Penn Central,* 438 U.S. at 130-31. The *Penn Central* Court crafted a test that focuses largely "upon the particular circumstances [in each] case." *Id.* at 124 (citation

omitted). Under the *Penn Central* balancing test, courts consider: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.*

Furthermore, certain types of regulatory actions are *per se* regulatory takings—meaning they are not subject to the *Penn Central* test. *See Lingle,* 544 U.S. at 538. There are thus "four types" of regulatory takings. *City of Indianola,* 650 F.3d at 1097; *see also Lingle,* 544 U.S. at 538-39, 546-48. First, there are regulations which "require[] an owner to suffer a permanent physical invasion of her property." *City of Indianola,* 650 F.3d at 1097 (citation omitted). These were first identified in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). *See id.* Second, there are regulations that "completely deprive[] an owner of all economically beneficial use of her property." *Id.* (citation omitted). This type of taking was identified in *Lucas,* 505 U.S at 1019. *See id.* Third, there are "government requirement[s] that, without sufficient justification, require[] an owner to 'dedicate' a portion of his property in exchange for a building permit." *Id.* These are known as "exactions." *See id.* at 1097-98. Finally, there are all other regulations which fail the *Penn Central* balancing test. *See id.*

The trustees allege that the City's regulations constitute all four types of taking. We analyze each in turn.

**A.**

The trustees first argue that the City's regulations mandate a permanent physical invasion of the property.

A regulation that "requires an owner to suffer a permanent physical invasion of her property" is a taking. *Id.* at 1097 (citing *Loretto,* 458 U.S. at 419). In *Loretto,* a New York apartment owner challenged a state law which required her to permit a cable television company to install cable facilities on her property. 458 U.S. at 421. The cable, which was slightly less than one-half inch in diameter, occupied portions of her roof and the side of her building. *Id.* at 422. The Supreme Court determined that such a "permanent physical occupation authorized by government is a taking." *Id.* at 426.

This rule is limited to "permanent physical occupations"—that is, regulations that do not "simply take a single 'strand' from the 'bundle' of property rights," but rather "chop[] through the bundle, taking a slice of every strand." *Id.* at 435, 441. *Loretto's* "very narrow" holding did not "question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." *Id.* at 441.

In this case, the district court correctly determined that the regulations at issue do not involve a permanent physical invasion of the property. The applicable ordinance requires all residential structures in the City to be "serviced by the city water supply system or an approved and functioning deep well," but do not require the trustees to dedicate to the City either the water lines themselves or the land on which they sit.[7]

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[7] The trustees assert without citation that the regulations require "a *permanent dedication of those improvements and the land* on which they sit to the City." Appellants' Br. 22. This assertion appears to be based on the City's alleged history of conditioning development on a dedication of utility easements. See

Nor do the trustees point to any regulation obligating the landowners to build any residential structures. Unlike in *Loretto,* in which the apartment owner was forbidden from interfering with the installation of the cable on her property, here the trustees may prohibit anyone from entering their property by choosing not to build residential structures on their property. *See* 458 U.S. at 423, 426. The regulation is thus the type of "appropriate restriction[] upon an owner's *use* of his property" that the *Loretto* Court did not question. *See id.* at 441.

The trustees are not being compelled to tolerate a permanent physical occupation because they are not being compelled to do anything at all. This case is similar to *City of Indianola.* In that case, this Court held that an ordinance requiring certain vehicles to be enclosed by a fence in all outdoor areas was not a taking under *Loretto* because "[b]y its own terms, the ordinance does not require [the landowner] to permit either the City or any third party to enter the property and install a fence." *City of Indianola,* 650 F.3d at 1098. So long as the landowner "still may choose whether to build the fence or forgo placing more than one vehicle outside, he cannot establish the required compliance

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Appellants' Br. 7. However, the trustees have not established that there is an affirmative obligation on them to dedicate the improvements, the land, or any easements to the City absent development. Because the trustees have not supported their position with evidence, they are unable to overcome summary judgment on this issue. *See Bedford v. Doe,* 880 F.3d 993, 996 (8th Cir. 2018) (noting that "the burden on the movant 'may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the non-moving party's case'") (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)).

necessary for a *Loretto* claim." *Id.* So too here, the trustees still may choose whether to build a structure and comply with the ordinance or forgo building a structure. The trustees argue that this case is distinguishable from *City of Indianola* because absent compliance here, they "cannot make *any use* of their Property, other than leaving it vacant and idle." But the trustees point to no case law in support of this position, and their purported factual distinction is not supported by the record; the trustees may still use the Property as is for recreational purposes, or they could sell it. To the extent the trustees argue that their inability to use the Property without succumbing to the City regulations deprives them of all use of the Property, that argument is resolved in Part II.B, *infra*.

Because the trustees have not established that the regulations require them to suffer "a permanent physical invasion," they have not established a *per se* regulatory taking under *Loretto*. *See id.* at 1097.

**B.**

The trustees next argue that the regulations constitute takings because they deprive the trustees of all economically beneficial use of their property.

The Supreme Court has established that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas,* 505 U.S. at 1019. Thus in *Lucas,* in which the trial court determined that the Act "deprive[d] [the landowner] of any reasonable economic use of the lots," rendering them "valueless," the Supreme Court found a compen-

sable taking. *Id.* at 1009, 1027 (first alteration in original) (citation omitted).

But a landowner cannot succeed on a *Lucas* claim if the landowner's property still has substantial value following the regulation. *See Palazzolo,* 533 U.S. at 616. "Diminution in property value, standing alone," does not establish a taking. *Penn Central,* 438 U.S. at 131. In *Palazzolo,* the landowner sought to develop his waterfront parcel, but his plans were rejected due to wetland regulations. 533 U.S. at 611. The landowner argued that the regulations diminished his property value such that he was left with only "a few crumbs of value," thus constituting a regulatory taking under *Lucas*. *Id.* at 631 (citation omitted). The property was worth roughly $3.15 million (according to the landowner's own calculations) at the time it was taken and retained only $200,000 in development value under the State's wetlands regulations. *Id.* at 616, 630-31. But despite the significant reduction in value, the Supreme Court rejected the landowner's takings argument, noting that the regulations still permitted the landowner to build a substantial residence on an 18-acre parcel of the land and thus did not leave his property "economically idle." *Id.* at 631 (citation omitted). The alleged taking was not compensable because the landowner was left with more than a "token interest." *See id.*

Here, the district court correctly rejected the trustees' claim of a taking under *Lucas*. Unlike the regulations in *Lucas,* the regulations in this case do not bar the trustees from erecting any permanent habitable structures; they merely impose water-system requirements on those who choose to erect structures in the City. Even the trustees' own expert did not

suggest that the property was rendered valueless by the City's ordinances. Rather, the trustees asserted that the effect of the ordinances "reduced the Property's value from $1,550,000 to $477,000, or about 70%." Appellants' Br. 26. This is both a greater residual value than in Palazzolo—$477,000 here compared to $200,000 in *Palazzolo*—*and* a smaller percentage decrease than in Palazzolo—roughly 70% here compared to nearly 94% in *Palazzolo*. Thus, even accepting the numbers the trustees relied on without citation in their brief, the trustees' property here has not been deprived of all economic value and does not constitute a regulatory taking under *Lucas* and *Palazzolo*. The trustees' argument that *Palazzolo* is distinguishable because that landowner could still develop a portion of its property is unavailing; here, the trustees can develop *all* of their property so long as they comply with the regulation. As the Supreme Court has recognized, "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Lucas,* 505 U.S. at 1027. It is only when those regulations eliminate *all* economically valuable use that *Lucas* requires compensation, and the trustees have failed to establish that Hillsboro's regulations render their property valueless.

**C.**

Third, the trustees argue that the City's regulations amount to an impermissible exaction.

Exactions are "land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 702 (1999). Such condi-

tions are impermissible unless they satisfy a two-pronged test. *See Sheetz v. Cnty. of El Dorado,* 601 U.S. 267, 275 (2024). First, there must be an "essential nexus" between the permit condition and a legitimate state interest. *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 837 (1987). Second, there must be "rough proportionality" between the condition and the projected impact of the proposed development. *Dolan v. City of Tigard,* 512 U.S. 374, 391 (1994). The trustees claim that the City's ordinance fails both prongs, constituting a taking under exaction analysis.

This Court declines to reach this issue because, as the district court correctly determined, the trustees did not sufficiently raise the issue below. In its memorandum in support of its motion for summary judgment, the trustees noted that the City might argue its regulations imposed a "reasonable condition." To this point, the trustees stated:

> This contention is mistaken for several reasons. First, the Trust is not seeking any permits from the City, but rather merely to sell the Property for potential development by others. Second, even if construed as the Trust indirectly seeking building permits for future purchasers of the Property, the imposition of this alleged "condition" fails to meet . . . *[Dolan* and Nollan]. . . . In this case, the exaction of $500,000 plus the dedication of land for the purpose of extending the City's water system is (1) totally unrelated to any impact . . . and (2) totally disproportionate to any such impact. . . .

The trustees claim this proves they raised the exaction claim because they used the phrase "exaction" and

cited both *Nollan* and *Dolan*. But those references and citations were made in the context of arguing that the regulations are *not* impermissible exactions because the Trust is not seeking permits from the City. Furthermore, the trustees made no reference to exactions, *Nollan,* or *Dolan* in their Amended Complaint. It is well-settled that "[a] party may not assert new arguments on appeal of a motion for summary judgment." *O.R.S. Distilling Co. v. Brown-Forman Corp.,* 972 F.2d 924, 926 (8th Cir. 1992); *see also N. Bottling Co., Inc. v. Pepsico, Inc.,* 5 F.4th 917, 922 (8th Cir. 2021) ("[A] party's failure to raise an argument before a trial court typically waives that argument on appeal."). Because the trustees failed to raise the exactions argument to the district court, we decline to consider it on appeal.

**D.**

Lastly, the trustees argue that there are enough factual disputes[8] to warrant a jury trial on whether the regulations constitute a taking under *Penn Central.*

Under *Penn Central,* courts consider three factors to determine whether a regulatory scheme constitutes a compensable taking: (1) the regulation's economic impact, (2) the interference of the regulation with investment-backed expectations, and (3) the character of the government action. *See Heights Apartments, LLC v. Walz,* 30 F.4th 720, 734 (8th Cir. 2022) (citing *Penn Central,* 438 U.S. at 124). Courts give "primary" consid-

[8] In their summary judgment filings, the trustees asserted that the regulations constitute a taking under *Penn Central* as a matter of law; they did not argue that the case should go to trial because of factual disputes. However, the trustees did maintain there were several disputes of fact.

eration to the first two factors while considering the third factor as potentially "relevant in [discerning] whether a taking has occurred." *Hawkeye Commodity Promotions, Inc. v. Vilsack,* 486 F.3d 430, 441-42 (8th Cir. 2007) (quoting *Lingle,* 544 U.S. at 538-39).

**1.**

As a preliminary matter, the parties here dispute how to characterize the property under *Penn Central.* The trustees seek to apply the *Penn Central* factors based on the cost to hook up City water to eight different subdivided lots within the parcel, as that's how they hope to sell the tract. In other words, the trustees attempt to characterize the parcel as eight separate lots for purposes of *Penn Central* analysis. The City asserts the impact should be calculated based on the cost to hook up water to the parcel as a whole, treating the parcel as just one lot. This dispute thus involves "the difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo,* 533 U.S. at 631. Put another way:

> [b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'

*Murr v. Wisconsin,* 582 U.S. 383, 395 (2017) (alteration in original) (citation omitted).

This is known as the denominator problem, and the Supreme Court has addressed it. *See Murr,* 582 U.S. at 395. In *Murr,* the Court was tasked with

determining "the proper unit of property against which to assess the effect of the challenged governmental action." *Id.* In other words, the Court had to determine whether to evaluate a takings claim by considering a piece of property as one single lot or as multiple separate lots. And "[a]s commentators have noted, the answer to this question may be outcome determinative." *Id.*

The Supreme Court announced a multi-factor test, in which "no single consideration can supply the exclusive test for determining the denominator." *Id.* at 397. Courts are to consider a number of factors, including: (1) "the treatment of the land under state and local law," (2) "the physical characteristics of the land," and (3) "the prospective value of the regulated land." *Id.* The Court further directed the inquiry to be an "objective" inquiry of "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Id.* This analysis is undertaken by courts as "a question of law based on underlying facts." *See Lost Tree Vill. Corp. v. United States,* 707 F.3d 1286, 1292 (Fed. Cir. 2013); *see also Murr,* 582 U.S. at 405 (noting that courts define the parcel).

Here, the *Murr* factors favor treating the parcel as one singular lot. As to the first prong of the *Murr* test, the land is still characterized as one parcel under local law.[9] On the second prong, courts look to the

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[9] The lot that was sold to the Browns is characterized separately from the remaining 156 acres still owned by the trustees. The trustees further argue that they are not required to seek approval from the City to subdivide their property into lots of five acres or more. But even if the trustees are not legally compelled

"physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment." *Murr,* 582 U.S. at 398. Here, Jefferson County maps show that the parcel is contiguous, divided only by one road. And third, assessing "the value of the property under the challenged regulation," *see id.,* the trustees have admitted that it would cost *more* (and thus decrease the value of the property more) to extend the water to all eight proposed subdivided lots than to just one parcel. Furthermore, there is no clear limiting principle to the trustees' argument; if the trustees are permitted to treat their property as eight parcels for purposes of takings analysis, they could also argue their property should be treated as 16, or 32, or 64 different parcels needing water connections. The lot was purchased as one lot, annexed to the City as one lot, inherited by the trustees as one lot, and initially advertised for sale as one lot until the trustees decided it would better sell subdivided. The trustees have not provided sufficient justification to begin treating it as eight different lots now.

**2.**

Considering the trustees' property as a whole, the district court was correct to determine that no reasonable fact finder could conclude that the regulations here constitute a taking under the *Penn Central* balancing test.

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to subdivide their property with the City, the fact that the property has not formally or legally been subdivided is still relevant to the *Murr* analysis.

The first prong of the *Penn Central* balancing test considers "the regulation's economic effect on the landowner." *See Palazzolo,* 533 U.S. at 617.

Here, the district court correctly found that this factor weighs in favor of the City because the trustees failed to demonstrate the regulations impose a significant economic impact on the parcel as a whole. At summary judgment, "[t]he moving party can satisfy its burden in either of two ways: it can produce evidence negating an essential element of the nonmoving party's case, or it can show that the nonmoving party does not have enough evidence of an essential element of its claim to carry its ultimate burden of persuasion at trial." *Bedford,* 880 F.3d at 996. In this case, the trustees have presented no evidence that there is a significant economic impact in connecting City water to the property as a whole. The trustees acknowledged in a deposition that they had not considered what it would cost to run water to just one point of the tract, and that they had only inquired with the City about connecting water to all eight subdivided parts of the property. The expert report that the trustees rely on does not consider the cost to run water just 228 feet to the nearest point of the Property. And even the expert's affidavit asserted only that "the cost to the Trust of extending the City water system to the Property *made the development for that highest and best use* economically unfeasible," with no mention of the economic impact for a use other than subdivided lots. But the fact that an ordinance "deprives the property of its most beneficial use does not render it unconstitutional" if the "ordinance is otherwise a valid exercise of the town's police powers." *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592 (1962). Because

the trustees have not met their burden of establishing a severe economic impact on the whole parcel as a result of the regulations, this prong favors the City.

The second prong of the *Penn Central* test considers whether and how much the regulation of the trustees' property interfered with the trustees' "reasonable investment-backed expectations." *See Palazzolo,* 533 U.S. at 617. A reasonable investment-backed expectation requires "more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005 (1984) (citation omitted). The reasonableness of an expectation may be shaped by "the regulatory regime in place at the time the claimant acquires the property." *Palazzolo,* 533 U.S. at 633 (O'Connor, J., concurring); *see also Murr,* 582 U.S. at 405 ("Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots."). Investment-backed expectations are often "informed by the law in force in the State in which the property is located." *See Ark. Game & Fish Comm'n v. United States,* 568 U.S. 23, 38 (2012).

Here, the trustees failed to show that the City's regulation interfered with reasonable, investment-backed expectations. The trustees assert that they had an expectation that the Property could be developed without paying to connect to the City water. But they have not shown how this expectation was reasonable and investment-backed rather than "unilateral." The ordinance prohibiting construction of new private wells had been in place for nearly 30 years when the Trust voluntarily annexed the Property to the City. While the trustees' claim "is not barred by the mere fact that [the Property was annexed] after the effective

date of the [regulation]," *see Palazzolo,* 533 U.S. at 630, that timing is not "immaterial," *id.* at 633 (O'Connor, J., concurring). The reasonableness of the trustees' expectations is shaped by the "regulatory regime" that was in place when the Trust annexed the Property—including the ordinance prohibiting private wells. *See id.* This regulatory regime is further exemplified by evidence showing that at least some other landowners (including the neighboring Eagle Ridge subdivision developer and two individuals who lived outside the City and wanted to tap into the City's water system) paid the costs of connecting to the water system. The fact that the second relevant regulation—the one prohibiting use or occupation of a residential structure—was not implemented until after the Property was annexed does not change this conclusion; the prior existence of the ordinance prohibiting new private wells was sufficient to provide notice that City property is subject to water regulation, and the trustees' primary complaint is directed at the first regulation, not the second.[10] The trustees' "right to improve property" here "is subject to the reasonable exercise of state authority," which includes the enforcement of Hillsboro's land-use restrictions. *See Palazzolo,* 533 U.S. at 627.

The final prong of the *Penn Central* test considers the "character of the governmental action." 438 U.S. at 124. This includes inquiring into "whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting

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[10] For instance, in Becker's deposition, he testified that "Josh Brown's intention would have been to just have a well" and another interested purchaser likewise wants a private well.

the benefits and burdens of economic life to promote the common good.'" *Lingle,* 544 U.S. at 539 (quoting *Penn Central,* 438 U.S. at 124).

Here, the district court correctly determined that this factor also favors the City. As discussed in section II.A *supra*, the regulation amounts to a limitation on use, not to a "physical invasion." *See Lingle,* 544 U.S. at 539. Moreover, City representatives testified that the prohibition on new private wells was likely passed in part to prevent water contamination within City limits and to protect depletion of the aquifer. Weighty public interests alone are not sufficient to transform a *per se* regulatory taking into a permissible regulation. *See Lucas,* 505 U.S. at 1015 (noting that *Loretto* and *Lucas* takings are compensable even when there is a significant public interest). However, the government interest is appropriately taken into consideration under *Penn Central* analysis. *See Murr,* 582 U.S. at 405 (determining the third *Penn Central* prong favored the government in part because the governmental action was enacted as a part of an "effort to preserve the river and surrounding land"); *see also Penn Central,* 438 U.S. at 125 (noting that the Supreme Court has permitted land-use regulations when the public interest would be promoted by doing so). Thus, this final prong also favors the City.

**III.**

The Takings Clause is intended "to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo,* 533 U.S. at 617-18 (citation omitted). But here, the trustees seek to have the public bear the burden of

guaranteeing the trustees the highest and best use of their Property. Rather than pay the cost to connect City water like at least one similarly situated developer has done, the trustees are attempting to transfer their development costs to the City. Neither common sense nor the Takings Clause requires the City to bear this burden.

For the foregoing reasons, we affirm the judgment of the district court in its entirety.

**MEMORANDUM AND ORDER, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION (OCTOBER 17, 2023)**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM BECKER, ET AL.,

*Plaintiffs,*

v.

CITY OF HILLSBORO, MISSOURI,

*Defendant.*

Case No. 4:22-cv-00886-AGF

Before: Audrey G. FLEISSIG, U.S. District Judge.

**MEMORANDUM AND ORDER**

Plaintiffs William Becker and Darcy Lynch filed this property rights action in their capacity as co-trustees seeking damages against Defendant City of Hillsboro, Missouri (the "City") for inverse condemnation under the federal and state constitutions and violations of their constitutional rights under 42 U.S.C. § 1983. Plaintiffs allege that they have been deprived of any and all economical and productive use of their

property as a result of the actions, ordinances, and regulations of the City with respect to water access.

This matter is now before the Court on cross motions for summary judgment. Doc. Nos. 35 and 38. Each side asserts there are no material issues of fact and that it is entitled to judgment as a matter of law. For the reasons set forth below, the Court will deny Plaintiffs' motion for summary judgment and grant the City's motion for summary judgment.

## BACKGROUND

For purposes of the motions before the Court, the record establishes the following.

Plaintiffs are co-trustees of the Antoinette Ogilvy Trust (the "Trust"). The Trust owns 176 +/-acres of land located in Jefferson County, Missouri (the "Property"). The Property was purchased by Antionette Ogilvy and her husband in 1948 and title was placed in the Trust. It has remained vacant during the Trust's ownership. In 2000, Antionette Ogilvy, on behalf of the Trust, voluntarily annexed the Property into the City. The ordinance approving the annexation states that the City has the ability to furnish normal municipal services to the area to be annexed within a reasonable time. When the Property was voluntarily annexed it was zoned for residential use. The City points out, and Plaintiffs concede, that the annexation ordinance only states that the City has the *ability* to provide municipal services; it does not state that such services would be provided at the City's cost. The Property is still currently zoned by the City for residential use.

When Plaintiffs' mother died in 2021, Plaintiffs became trustees of the Trust. Plaintiffs decided to try

to sell the Property for development as residential lots. Plaintiffs originally attempted to sell the Property as a whole, but when that effort failed, they opted to subdivide the Property into eight residential lots for development as single-family homes. In 2022, Plaintiffs sold one lot to Josh and Julia Brown for $233,825 and accepted a Sale Contract for the another.[1]

Plaintiffs assert that around this time, they first learned that the Property had been voluntarily annexed into the City in 2000, and that City ordinances prohibited any residences from being used or occupied unless they had access to a source of water. The first ordinance at issue was passed in 2008, which states in relevant part,

> **Sec. 23-73. Unlawful to occupy, use or live in a residential structure without water.**
>
> * * *
>
> (b) It shall be unlawful for any person to occupy, use or otherwise live in any home, mobile home, apartment, or other residential structure within the city limits of the City of Hillsboro which is not being serviced by the city water supply system or by an approved and functioning deep well.

City of Hillsboro Municipal Code Section 23-73, Doc. No. 36-4; *see also* Doc. No. 40-5.

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[1] Aside from the parcel sold to the Browns (Lot 8) being recorded as a plat in Jefferson County, Plaintiffs admit that they have not recorded the subdivision of the remainder of the Property in any way with the City of Hillsboro or with Jefferson County. Doc. No. 46 ¶ 11.

Further, pursuant to an ordinance enacted in 1971, the City prohibits the drilling or use of any wells as a water source on any property in the City.

> **Sec. 23-71. Use of water from certain sources and other utilities.**
>
> (a) Drilling, digging, enlarging or deepening of water wells, or reopening of abandoned water wells withing the boundaries of the city, except by the city, and the taking of water from wells hereafter dug or drilled within the city, except by the city, is hereby prohibited.

*Id.* at Section 23-71; *see also* Doc. No. 40-4.

Plaintiffs were informed that they would be responsible for the costs of extending the municipal water system to the Property, as opposed to the City. The Property is located several hundred feet from the City's water system and Plaintiffs contend that the cost to extend the water system to each of the Property's proposed eight subdivided lots exceeds $500,000. Plaintiffs engaged an expert appraiser who opined that the cost to separately run water to all of the proposed lots is between $963,000 and $1,575,000. Doc. No. 44-3.[2]

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[2] The expert's report states that these estimates were computed as the cost to run water to "10+ acre" subdivided lots. Given that the Property is approximately 176 acres, this could result in seventeen subdivided lots as opposed to the eight proposed by Plaintiffs. The expert report does not clarify whether the cost to run water to eight lots as opposed to potentially sixteen would vary, and to what extent. The Court also notes that the record contains only selected excerpts of the expert report.

Plaintiffs allege this excessive cost makes the development and use of the Property as residences economically unfeasible and prohibitively expensive. Plaintiff William Becker went to the City Council on two occasions and spoke during open sessions asking that the Property be de-annexed. Plaintiff Becker states that he went to the City multiple times and asked to be allowed to drill private wells on the Property, but was not granted a variance. Doc. No. 40-1, 44:1-4, 61:12-14.

The City states that they are able to extend municipal services to within 20 feet of the Property from the neighboring Eagle Rock subdivision, and Plaintiffs would then be able to tap onto water line. Doc. No. 40 at ¶¶ 29, 36. It is undisputed that the distance from the water hook up in the Eagle Ridge subdivision to the back of the Property is 228 feet. *Id.* at ¶ 36. It is also undisputed that when the Eagle Rock subdivision was developed, the developer paid the costs of running approximately 3,000 feet of water main to hook the subdivision up to the City's water line. *Id.* at ¶ 35. The City also noted that it has had two instances in the past in which property owners outside the city limit wanted to tap onto the City's water supply, which the City permitted as long as the owners paid the costs of connection. *Id.* at ¶¶ 41-42.

On July 11, 2022, Plaintiffs filed a petition against the City in the Circuit Court of Jefferson County. The City then removed the action to this Court on the basis of federal question jurisdiction. Doc. No. 1. Plaintiffs allege that the City ordinances coupled with the City's requirement that Plaintiffs pay to extend municipal services has effectively deprived the Trust from any and all economical and productive use and benefit of

the Property and its property rights therein. Doc. No. 1-1 at ¶ 7.

Plaintiffs' petition sets forth three causes of action. Count I is a Missouri state law claim of inverse condemnation claiming that the City's actions constitute a taking of the Plaintiffs' private property; Count II is a claim of inverse condemnation under the United States Constitution on the same grounds; and Count III is a claim brought under 42 U.S.C. § 1983 claiming Plaintiffs' due process rights have been violated by the actions of the City. *See id.* at ¶¶ 10-22. The City filed a motion to dismiss all counts for failure to state a claim. Doc. No. 2. The Court denied the dismissal as to Counts I and II and granted the dismissal of Count III, such that the only claims remaining are the state and federal takings claims. Doc. No. 15.

## ARGUMENTS OF THE PARTIES

Both parties agree that the analysis applicable to Plaintiffs' federal takings claim under Count II is equally applicable to Plaintiffs' state takings claim under Count I pursuant to Article I, Section 26 of the Missouri Constitution and Missouri case law.

### Total Taking

Plaintiffs argue that the City's prohibition of any residence on the Property without paying to extend the City's water system constitutes a *per se* regulatory taking. Plaintiffs explain that a *per se* or "total" taking occurs when a government regulation results in a physical invasion of property, or the regulation deprives the owner of all economically viable use of their property. Plaintiffs argue that both circumstances apply here. First, they argue that the City's ordinance is an

effective physical invasion because the ordinance essentially requires that Plaintiffs not only allow the physical construction of an extension of the City's water system on the Property, which will become a permanent physical feature of the Property, but also require Plaintiffs to pay for the costs of that extension. Second, Plaintiffs argue that the ordinance constitutes a *per se* regulatory taking because it has deprived them of all economically viable use of their land. Plaintiffs are seeking judgment in the amount of $1,080,000, which is the amount that their expert has opined is the diminution in value of the Property due to the regulations.

The City argues that a *per se* analysis is not applicable here because there has been no physical invasion and Plaintiffs' Property has not been deprived of all economically viable use. With respect to economic viability of the Property, the City points out that Plaintiffs are not prohibited from developing residential structures, they are simply being asked to pay the costs associated with connecting to the City's water system like all other developers. The City contends that there is no evidence in the record to support the finding that the Property is worthless without such development. The City explains that while Plaintiffs' expert opined there was an $1,080,000 diminution in value of the Property, this valuation does not support a finding of a *per se* taking because (1) he did not opine that the Property was worthless, and (2) a diminution in property value alone does not establish a taking. The City also contests this valuation because it was based on the alleged cost to run water to all eight lots of the Property, not the cost to run water 228 feet to the edge of Plaintiffs' Property.

**Partial Taking**

Plaintiffs also argue, in the alternative, that the City's regulatory scheme constitutes a compensable partial taking pursuant to *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Plaintiffs argue that all three *Penn Central* factors—economic impact of the ordinance, investment-backed expectation of the owner, and character of government action—weigh in their favor. The City disagrees.

**Economic Impact**

Plaintiffs argue that the economic impact of the ordinance is significant given that the installation cost alone of the water system extension demanded by the City will exceed $500,000, not including the value of the land which will be consumed in public easements to accommodate the system. Plaintiffs also cite their expert's appraisal, which determined that diminution in value of the Property was $1,080,000.

The City argues that Plaintiffs cannot put any evidence into the summary judgment record as to the economic impact of the City's ordinances because Plaintiffs have never even asked what it would cost to run water to the edge of the Property. The City contends that it can run water to within 20 feet of Plaintiffs' property line, and then Plaintiffs would be able to pay to tap on to the City's water supply. The City further argues that Plaintiffs' economic analysis is improper because it only considers the costs to extend the water system to all of Plaintiffs' proposed subdivided lots. The City further explains that it is solely Plaintiffs' preference to subdivide the Property into the eight lots, and no one from the City is mandating that occur.

Additionally, the City argues that the facts of this case indicate that the value of the land is much greater than the alleged cost to comply with its ordinances, even if the Court assumed that the relevant cost was the cost to run the water to all eight proposed lots. The City notes that Plaintiffs themselves paid nothing for the Property and sold one of the proposed lots in 2021 for $233,825.00, thus assuming similar sales for the other seven proposed lots, the value of the entire property far exceeds the alleged $500,000 or more to run water to all eight lots. As such, the City contends that the cost to connect to the City's water system does not have a substantial economic impact considering the total value of the land and the future earning capacity of the land.

**Investment-Backed Expectations**

Plaintiffs argue that the Property was purchased by their grandparents as an investment for the family, and the Trust's reasonable expectation was to be able to sell the Property in the future for uses similar to other nearby developments not burdened by the restrictions of the City imposed on the Property.[3] Further, Plaintiffs argue that the fact that one of the ordinances in question, namely the prohibition against private wells, was in place before the annexation of the Property in the City, does not defeat the Trust's claim.

The City argues that Plaintiffs have no investment-backed expectations because they inherited the property and there is no evidence in the record that they spent any money at all on the Property. The City further

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[3] Although Plaintiffs made this argument, they point to no evidence in the record supporting this contention.

argues that the regulations at issue were in place before Plaintiffs inherited the Property; thus, their expectation that they would not be burdened by the restrictions of the City was unreasonable. To the extent Plaintiffs argue that they or their predecessors had a reasonable expectation when they annexed to the City that the City would pay the costs of extending municipal services, the City argues that any such expectations were mistaken and unreasonable, and not supported by anything in the summary judgment record.

**Character of Government Action**

Lastly, Plaintiffs argue that the character of the government action is the *de facto* exaction of both the installation cost and physical taking of part of the Property for the purpose of extending the City's own water system. Plaintiffs further contend that there is no overriding public interest here in preventing or abating a nuisance from the construction of single-family homes that might adversely affect the residents of the City. In sum, the Plaintiffs argue that the City is placing the entire burden of extending its public water system on Plaintiffs when in fairness, that burden should be borne by the City and the City's residents as a whole as with other public improvements and infrastructure.

The City contends that the ordinances at issue are in place for the important government purpose of ensuring that the City's water supply is not contaminated by private wells located in the City limits. The City further argues that these ordinances are not forcing Plaintiffs to bear the burden of a public benefit, but like any other developer or landowner, Plaintiffs are simply being asked to pay the costs to extend

the City's water system to the Property that they themselves want to subdivide into eight lots. The City argues that its taxpayers should not have to pay to provide special treatment to Plaintiffs just so they can make more money on the Property they inherited.

Additional facts and arguments will be discussed in further detail below as relevant to the parties' specific arguments.

## LEGAL STANDARDS

### Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he burden of demonstrating there are no genuine issues of material fact rests on the moving party, and we review the evidence and the inferences which reasonably may be drawn from the evidence in the light most favorable to the nonmoving party." *Allard v. Baldwin*, 779 F.3d 768, 771 (8th Cir. 2015) (citation omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). In order to demonstrate a genuine issue of material fact, the opposing party must set forth "specific facts showing that there is a genuine issue for trial." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968). Mere allegations or denials in the non-movant's pleadings will not meet this burden, not will a mere scintilla

of evidence supporting the non-moving party. *Anderson*, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks and citation omitted). "Where parties file cross-motions for summary judgment, the legal standard does not change. Each motion must be evaluated independently to determine whether a genuine issue of material fact exists and whether the movant is entitled to judgment as a matter of law." *Jaudes v. Progressive Preferred Ins. Co.*, 11 F. Supp.3d 943, 947 (E.D. Mo. 2014).

**Takings**

"The Takings Clause of the Fifth Amendment, applicable to the States though the Fourteenth Amendment . . . prohibits the government from taking private property for public use without just compensation." *Palazzo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897)). Inverse condemnation is an action by which a property owner seeks compensation for the government's taking of his or her property, where the government has failed to offer reimbursement. *United States v. Clark*e, 445 U.S. 253, 257 (1980). Such action is also recognized under the Missouri constitution. *Page v. Metro. St. Louis Sewer Dist.*, 377 S.W.2d. 348, 354 (Mo. 1964); Mo. Const. Art. I, § 26. Generally, an inverse condemnation claim involves a physical invasion or intrusion by the government upon private property. *See Palazzo*, 533 U.S. at 617. However, a separate species of inverse condemnation claims, regulatory takings, has also been recognized to arise from excessive regulation by the government, even without any

physical invasion. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

There are two types of regulatory takings often recognized by the courts. The first is a *per se* or total regulatory taking where government regulations completely deprive an owner of all economically beneficial use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). The second is a partial taking, which can occur when there is anything less than a complete elimination of value or total loss. *See Palazzo*, 533 U.S. at 617. A partial taking requires an ad hoc factual inquiry under the *Penn Central* factors. *See Palazzo*, 533 U.S. at 617; *Penn Central*, 438 U.S. 104, 124 (1978).

Article I, Section 26 of the Missouri Constitution is the state equivalent of the Fifth Amendment. It states,

> That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

Mo. Const. art. I, § 26. Missouri Courts analyze takings claims under the same framework provided by the Supreme Court. *See Clay Cnty. ex rel. Cnty Com'n v.*

*Harley and Susie Bogue, Inc.*, 988 S.W.2d 102 (Mo. Ct. App. 1999); *see Reagan v. Cnty. of St. Louis*, 211 S.W.3d 104 (Mo. Ct. App. 2006).

## DISCUSSION

### Ripeness

As an initial matter, although the parties do not raise this issue, the record suggests that Plaintiffs' federal claims may not be fully ripe. "When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision." *Pakdel v. City & Cnty. of San Francisco, California*, 141 S.Ct. 2226, 2228 (2021) (citing *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 737 (1997)). "[T]he finality requirement is relatively modest. All a plaintiff must show is that 'there [is] no question . . . about how the regulations at issue apply to the particular land in question.'" *Pakdel*, 141 S.Ct. at 2230 (2021) (quoting *Suitum*, 520 U.S. at 739). The finality requirement is not the same as procedural exhaustion, that is to say that there is no strict administrative exhaustion requirement such that takings plaintiffs are required to fully and properly exhaust administrative procedures before bringing suit. *See Pakdel*, 141 S.Ct. at 2231; *see Knick v. Twp of Scott, Penn.*, 139 S.Ct. 2162, 2169 (2019).

Here, Plaintiff Becker testified that he had gone to the City multiple times and asked to be allowed to drill a private well, but that he had not received a variance. He does not expand on whether he officially sought variances or appealed the variance decisions. But the City does not raise this issue; it only contests

that he never asked the City for permission to put in a private well at *his own cost*. The City has not suggested or indicated that they would allow a well variance or that their decision in this regards is otherwise not final.

Additionally, Plaintiff Becker testified that he spoke with City Council at two open sessions and asked that the Property be de-annexed. The City suggests that this was not the proper avenue to request de-annexation given that during these open sessions the City Council does not respond to any comments. Similar to above, there is no indication in the record that the City would consider de-annexation of the Property. Given that neither party raised this issue, it appears the parties agree that the there is no question about how the regulations apply to the Property, and the finality requirement has been satisfied. *See Pakdel*, 141 S.Ct. at 2230. As such, the Court will consider Plaintiffs' federal takings claim to be ripe for adjudication.[4]

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[4] The Court also recognizes that the regulations at issue may have been properly characterized as an exaction, which calls for a separate analysis pursuant to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). An exaction occurs when a governmental entity requires an action by a landowner, including the payment of money, as a condition to obtain governmental approval of a requested land development. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). An exaction is not compensable where there is a "'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Id.* at 599. Typically, exaction cases involve conditions placed on building permits which is not at issue here. Additionally, neither party asserts that the regulations here constitute an exaction. In fact, Plaintiffs affirmatively argue (and the City does not dispute) that the regulations are *not* an exaction. *See* Doc. No. 37 at 7. As such, the Court will not address this analysis, and will

**Per Se Taking**

Plaintiffs allege that the City's regulations constitute a *per se* taking because they require an effective physical invasion of the Property, and the regulations deprive Plaintiffs of any economically viable use of the Property.

**Physical Invasion**

A physical taking occurs when "when the government encroaches upon or occupies private land for its own proposed use." *Palazzo*, 533 U.S. at 617. This "permanent physical occupation of property" is considered a taking "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). The *Loretto* court also recognized that permanent occupations of land by installations such as telephone lines, rails, or underground pipes or wires are takings "even if they occupy only relatively insubstantial amounts of space and do not substantially interfere with the landowner's use of the rest of his land." *Id.* at 430 (citations omitted). A physical taking has also been found where the government requires private landowners to dedicate a portion of their land solely for government benefit. *See Horne v. Dep't of Agric.*, 576 U.S. 351 (2015) (finding that a government requirement that raisin growers set aside a percentage of their crop of the benefit of the government was a taking.)

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analyze Plaintiffs' claims under the standards applicable to per se and partial takings.

The regulations at issue do not involve or require a physical encroachment, rather they regulate the *use* of the property by requiring all residential structures in City limits to be "serviced by the city water supply system or by an approved and functioning deep well." Doc. No. 40-5. The *Loretto* court was very clear that its holding applied only to permanent physical occupations of property, and not regulations on *use* of property. *Loretto*, 458 U.S. at 441 ("Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. . . . We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.").

To be clear, the City has in no way actually physically encroached on the Property. Rather, Plaintiffs argue that the City's regulations require Plaintiffs to allow the physical construction of an extension of the City's water system on the Property, which will become a permanent physical feature of the Property and must thereafter be dedicated to the City. There is simply no evidence in the record that the City requires any sort of physical encroachment onto Plaintiffs' private property in order to extend the water system. Rather, the City representative testified, and the Plaintiffs do not dispute, that the City has the ability to extend the water system to *within* 20 feet of Plaintiffs' property line and then Plaintiffs would be able to tap into it. Jesse Wallis Dep., Doc. No. 40-8 at 35:14-17. Additionally, a physical taking occurs when government occupies private land for its *own* proposed use. *See Palazzo*, 533 U.S. at 617. So even if there was some sort of physical encroachment required here, the

water lines would be for the property owners' private use of water at their private residences. In short, the record demonstrates that the issue here is not a physical invasion but whether the City's regulations impermissibly restrict the *use* of Plaintiffs' property to the extent that a taking has occurred.

**No Economically Viable Use**

Plaintiffs also argue that, regardless of any physical invasion, the City's regulations constitute a *per se* regulatory taking because the regulations have deprived Plaintiffs of all economical use of the Property. A *per se* or total regulatory taking occurs when a regulation "denies all economically beneficial or productive use or land." *Lucas*, 505 U.S. at 1015. This is not the case here. The regulations do not preclude all development and force the Property to remain vacant, idle, and bereft of any economic value. *See Lucas*, 505 U.S. at 1019. The regulations simply require Plaintiffs to hook up to the City's water lines, at their own cost, in order to lawfully occupy a residential structure. While these costs may decrease the property value of the Property, they do not render it useless or valueless. *See Penn Central*, 438 U.S. at 131 ("Diminution in property value alone, however, does not establish a taking.")

Notably, Plaintiffs' expert did not opine that the Property was rendered valueless by the City's ordinances. *See* Clint Cooper Affidavit, Doc. No. 36-6; Cooper Expert Report, Doc. No. 44-3. The expert's affidavit stated that the highest and best use of the Property (subdividing it into 10+ acre lots) would be economically unfeasible for Plaintiffs given the cost to extend water to every single lot. Doc. No. 36-6 at ¶ 3. Yet, his expert report noted a range in costs, and explained

that only when that cost reached $1,080,000 would the cost surpass the Property's market value. Doc. No. 44-3 at 3. His report also noted that under the best-case scenario with respect to extension costs, the Property would retain a value of $587,000. *Id.* He further opined that even if the cost of extension exceeded $1,080,000, the Property would still retain value as recreational land in the amount of $470,000. *Id.*[5] Accordingly, Plaintiffs have failed to demonstrate that that the regulations preclude *all* economic use of their Property, and their own evidence confirms that any such contention is unfounded.

As such, the Court finds that the City's regulations do not constitute a categorical or *per se* taking. Anything less than a "complete elimination of value" or a "total loss" is not a categorical taking and requires a *Penn Central* analysis. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1019-20, n. 8); *see also Palazzo*, 533 U.S. at 616, 631 (finding that regulations which decreased land value by 93% was not sufficient to trigger *Lucas's per se* treatment). Therefore, the Court will proceed with its analysis under *Penn Central*.

**Partial Taking**

"Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending

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[5] The Court notes that the financial analysis provided by Plaintiffs is considerably limited and fails to consider a number of alternative scenarios, such as the cost to extend water to one point on the Property where a residence or two could be built. These issues are discussed in further detail below.

on a complex of factors." *Palazzo*, 533 U.S. at 617. These factors, often described as the *Penn Central* factors, are: (1) economic impact of the regulation on the landowner; (2) the regulation's impact with the owners' reasonable investment-backed expectations; and (3) the character of the government action. *Penn Central*, 438 U.S. at 124. These factors are neither exclusive, nor even mandatory, but have "particular significance" in what are considered takings' "essentially ad hoc, factual inquiries." *Id.* "The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The *Penn Central* court explained that while the enumerated factors have particular significance in our inquiry, there is no "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionally concentrated on a few persons." *Penn Central*, 438 U.S. at 124.

**Economic Impact**

There is a "heavy burden placed upon one alleging a regulatory taking," and Plaintiffs must show a "deprivation significant enough to satisfy this heavy burden." *Keyston Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987). Further, evidence of economic impact cannot be too speculative. *See In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995) (finding that economic impact was too speculative to support a takings claims); *see Maine Educ. Ass'n Benefits v. Cioppa*, 695 F.3d 145 (1st Cir. 2012) (holding that economic impact evidence was conjectural

in nature and the plaintiff failed to demonstrate that the economic impact was sufficiently concrete to establish a regulatory taking); *see Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 456 (6th Cir. 2009) (finding the economic impact of the challenged regulation did not support the movant's takings claim, in part because "the [economic] impact [of the regulation was] speculative.").

Plaintiffs' economic impact evidence is incomplete and speculative. While it is likely that the value of the land will decrease if Plaintiffs are required to pay the costs to extend City water services, the extent of that decrease is uncertain. Plaintiffs claim a $1,080,000 diminution in value, but that value *assumes* the Property was subdivided into 10+ acre lots, the purported "highest and best use" of the property, with water extended to every individual lot. Plaintiffs' expert stated that it would be "economically unfeasible" to develop the Property to this extent given the costs to extend the water system. The expert report notes that the market value of the land without the regulations (*i.e.*, if Plaintiffs would be permitted to dig wells) is $1,550,000, whereas the market value, assuming the development of 10+ acre lots, with the regulations would range from $587,000 to $0. Doc. No. 44-3. These calculations are based on the premise that it would cost $180-$280 per linear foot to extend the water lines and the water lines would have to be initially extended either 1,750 or 2,220 feet to reach the edge of the Property. *Id.*

However, this calculation fails to take into consideration the undisputed fact that it would only be 228 feet for the City to extend water services to the edge of the Property from the neighboring Eagle Rock

Subdivision. Doc. No. 41-8 at 53:20. This figure significantly impacts the cost analysis. Plaintiffs' analysis estimated that it would be 1,750 feet or 2,220 feet just to extend the water system to the edge of the Property, which even at the maximum price of $280 per linear foot, results in costs of $490,000 and $616,000, respectively. Whereas the cost to extend 228 feet to the edge of the Property at the maximum price of $280 per linear foot is only $63,840.[6] This is a significant variation that is not accounted for in Plaintiffs' analysis.

Additionally, as briefly mentioned above, the expert analysis only states that the costs were evaluated at the price to extend to individual 10+ acre lots. The expert report did not explain whether the cost to extend would vary depending on the number subdivided lots.

Further, the Court is not convinced that the correct economic impact analysis is the cost to extend to every proposed subdivided lot as opposed to the cost to extend to the Property as a whole parcel, which is its present state. Notably, the remaining Property has not been legally subdivided, and it is Plaintiffs' own decision to subdivide their Property in order to maximize their selling ability. The Property was annexed into the City as a whole parcel, and legally remains a whole parcel. As such, the economic impact is likely more fairly evaluated as the cost to extend to the Prop-

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[6] The Court is not suggesting that these calculations are the correct economic analysis, but these figures illustrate the variability in Plaintiffs' economic impact analysis. The Court is mindful that these figures may be impacted by additional costs such as the costs to obtain easements in the Eagle Rock subdivision. However, like many other factors, such costs are not included in the record and were not considered in Plaintiffs' analysis.

erty as a whole (*i.e.* the cost to extend to one point). The record indicates that the cost to extend the water line to one point on the property (as opposed to the eight proposed by Plaintiffs) is considerably less costly. Yet Plaintiffs have presented no calculations on the economic impact to extend to one portion of the Property where a residence or two could be built and legally occupied.

The City does not dispute that the highest and best use of the Property may be to subdivide it into 10+ acre lots to be sold for residential development. But a regulation is not a taking merely because it prohibits the highest and best use of a property. *See Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 592-93 (1962) ("If [the] ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional"); *see also Kabrovski v. City of Rochester, N.Y.*, 149 F. Supp. 3d 413, 425 (W.D.N.Y 2015) ("[I]t is well settled that a "taking" does not occur merely because a property owner is prevented from making the most financially beneficial use of a property."). The mere fact that Plaintiffs cannot maximize their profits by subdividing their Property into multiple lots does not support the conclusion that a regulatory taking has occurred.

In any event, regardless of whether the economic impact is evaluated from the cost to extend to multiple points on the Property or from one point on the Property, the evidence of economic impact is too speculative. In sum, on this record, Plaintiffs have not presented sufficient concrete evidence for a reasonable factfinder to sufficiently determine the economic impact of the regulations. As Plaintiffs have failed to meet their

burden of demonstrating a significant economic impact, this factor thus weighs in favor of the City.

**Investment-Backed Expectations**

"A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) (citation omitted). Plaintiffs claim that they, and their predecessors, had a reasonable expectation to sell the Property for uses similar to other nearby developments not burdened by the restrictions of the City imposed on the Property. The City argues that Plaintiffs have no investment-backed expectations as there is no evidence in the record that they spent any money on the Property at all, and when Plaintiffs inherited this land, the City regulations were already in place and the Property was zoned residential.

As an initial matter, the fact that Plaintiffs inherited the Property rather than purchased it is not dispositive in the investment-backed expectations analysis. *See Palazzo*, 533 U.S. at 635 ("We also have never held that a takings claim is defeated simply on account of the lack of personal financial investment by a postenactment acquirer of property, such as a donee, heir or devisee.") (O'Connor concurring).

Further, a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 632. However, that "does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive

significance." *Id.* at 633 (O'Connor concurring). "A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property." *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017).

Here, Plaintiffs assert that the Property was purchased by their grandparents in 1948 and placed in the trust as an investment property. It has never been used or occupied to date. While Plaintiffs assert there was a reasonable expectation that the Property would be able to be developed without being burdened by the restrictions of the City, there is no such evidence of this in the record. Moreover, this expectation was necessarily altered when Plaintiffs' predecessors *voluntarily* annexed the Property into the City in 2000 and chose to be subject to the City's regulations, including the ordinance prohibiting private wells which had already been in place for nearly 30 years. The Property was perfectly free to remain in Jefferson County where Plaintiffs allege private wells are commonplace, but the Trust affirmatively chose to join the City and be subject to its laws. Whether or not Plaintiffs' predecessors knew of the well prohibition at the time of annexation is immaterial to this analysis; ignorance of the law is not an excuse. In this same vein, Plaintiffs also claim that they have recently incurred expenses to divide and market the Property as large lots and paid a real estate commission to their agent in connection with the sale of Lot 8, believing that the buyer would be able to construct a home with a private well. However, this was not a reasonable belief. Plaintiffs' failure to conduct any due diligence

as to what ordinances applied to their Property before incurring these expenses was not reasonable.

To the extent that Plaintiffs' expectation was for water to be furnished to all eight proposed subdivided lots at the City's expense, such expectation is also unreasonable. All other developers and those wishing to connect to the City's water supply have paid the connection costs. In fact, when the neighboring property owner, direct west of Plaintiffs' Property, decided to develop his property into a subdivision, the developer paid the costs to extend the City's water system to his Property. The City has also had two instances in the past where individuals who lived outside the City limits wanted to tap into the City's water system, which the City allowed them to do so long as the property owners paid the costs of extension.[7]

"[U]nilateral expectations, no matter how adamantly pursued, are not enough. . . . The expectation must be a reasonable one." *Cioppa*, 695 F.3d at 156 (1st Cir. 2012) (citing *Monsanto*, 467 U.S. at 1005-06). It is simply not reasonable to expect the City, and its taxpayers to pay the cost to extend water services to every single point on a property that an owner unilaterally decides to subdivide in order to maximize profit.

Again, the fact that Plaintiffs acquired the Property after the enactment of relevant ordinances is not dispositive. But the totality of the circumstances here, including that the Property was voluntarily annexed and all other developers and those wishing to connect

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[7] Indeed, it appears from the excerpt of Plaintiffs' expert report that the cost to extend the water approximately 3,400 feet along Lake Wauwanoka Road, presumably to accommodate subdivided lots, far exceeds the cost to bring water to the Property.

to the City's water supply have paid the connection costs, cause this factor also to weigh in favor of the City.

**Character of Government Conduct**

With respect to the final factor, the parties dispute the true character of the City's prohibition on drilling wells.[8] This ordinance was enacted in 1971, and it is not apparent from the text of the ordinance or the bill which passed such ordinance why the City decided to prohibit the drilling of private wells. The City's representative, Jesse Wallis, testified that while he did not definitively know why the City enacted this ordinance in 1971, he assumed it was to protect the City's water supply from contamination. He explained that "[if] you look at any other water district around you'll notice a lot of them do not allow wells to be drilled in their districts . . . because they supply the water." Doc. No. 44-1 at 20:12-18. When asked whether the water districts to prohibit wells in order to be the exclusive provider of the water, Wallis stated,

> I think there's some of that and I also believe there's other, as far as maintaining the samples and the water table that you're getting your water from, there's more control over, you know, what's going in the ground, you know, you don't have the possibility of open wells within your system putting contamination into the water table.

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[8] The parties do not dispute the purpose of Ordinance Section 23-73, which prohibits residential occupancy without a proper source of water, for it is apparent from its face that this ordinance promotes "the health, safety, morals, or general welfare" of its citizens. *See Penn Central*, 438 U.S. at 125.

*Id.* at 20:24-21-6. The City's corporate representative, Adam Wells, also noted that the prohibition of wells is in part a conservation consideration as it protects the depletion of the aquifer. Wells Dep., Doc. No. 44-2, at 27:8-17. In instances in which it has been "reasonably concluded that "'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, [the Supreme Court] has upheld land-use regulation that destroyed or adversely affected recognized real property interests." *Penn Central*, 438 U.S. at 125 (citing cases). Plaintiffs here have not controverted the City's evidence that a government prohibition against the drilling of private wells inside the city limits protects its water supply from contamination, and such a restriction would promote the health, safety, and general welfare of its citizens. Even if such prohibition was motivated in part by the economic benefits of being the exclusive water supplier, the fact that the ordinance incidentally promotes health and safety cannot be wholly disregarded. Regardless, even if the Court were to consider this factor to be neutral on balance, or even weighing slightly in favor of Plaintiffs, Plaintiffs still would not be able to demonstrate a taking in light of the other factors and the record as a whole.

In short, even viewing the record and all reasonable inferences in the light most favorable to Plaintiffs, no rational trier of fact could find that a partial taking occurred here. As discussed above, the *Penn Central* factors are neither mandatory nor exclusive, and the heart of a takings' inquiry is whether justice and fairness require compensation. Here, the Trust voluntarily annexed the Property into the City in 2000, thereby voluntarily subjecting the Property to the City's

zoning and land use restrictions. Although the decision to annex may have been an unfortunate financial decision in hindsight given how far the Property is located from the City's water system, Plaintiffs have not met their burden to establish that the City is responsible for bearing the consequences.[9]

The Court recognizes that the regulations themselves must still be constitutional. Plaintiffs have not cited to any cases which have found similar regulations to be unconstitutional; nor does the takings' jurisprudence suggest that requiring property owners to pay for the cost of extending city services to their property when they choose to develop it is inherently unreasonable, much less unconstitutional. Indeed, other jurisdictions have conclusively found that government requirements to pay extension fees are not takings. *See Town Council of New Harmony v. Parker*, 726 N.E.2d 1217, 1226 (Ind. 2000), amended on reh'g in part, 737 N.E.2d 719 (Ind. 2000) (explaining that "certain services, such as fire and police protection, have traditionally been provided to all citizens of a municipality, financed through property taxes. [And] certain other services, such as water, sewer, gas, electric, and roads, were traditionally thought of as proprietary and are still largely provided through assessments to the landowners of the parcels benefiting from the installation of utilities."); *see also Boles v. Town of Oak Island*, 837 S.E.2d 871, 872 (N.C. 2020) (finding that fee assessed in accordance with extending town sewer system to undeveloped properties was not a taking be-

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[9] As set forth above, it is unclear what the City's response would be if Plaintiffs formally requested de-annexation in the proper forum.

cause it was a reasonable user fee) (citing *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989) ("[A] reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services."). There is nothing in the record to suggest that the City's request that Plaintiffs pay the costs to extend water services to their Property is anything other than a reasonable user fee.

## CONCLUSION

In consideration of the record as a whole, including all of Plaintiffs' well-supported evidence and arguments, no reasonable fact finder could conclude that the regulations at issue here constitute a taking under federal or state law.[10]

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment is DENIED. Doc. No. 35.

IT IS FURTHER ORDERED that Defendant City of Hillsboro's motion for summary judgment is GRANTED. Doc. No. 38.

All claims against all parties having been resolved, a separate Judgment shall accompany this Memorandum and Order.

/s/ Audrey G. Fleissig
U.S. District Judge

Dated this 17th day of October, 2023.

[10] Given the complete overlap of the legal analysis here, the Court will exercise its supplemental jurisdiction pursuant to 28 U.S.C. § 1367 and rule on both the federal and state claims.

**JUDGMENT, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION (OCTOBER 17, 2023)**

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

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WILLIAM BECKER, ET AL.,

*Plaintiffs,*

v.

CITY OF HILLSBORO, MISSOURI,

*Defendant.*

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Case No. 4:22-cv-00886-AGF

Before: Audrey G. FLEISSIG, U.S. District Judge.

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**JUDGMENT**

Pursuant to the Memorandum and Order filed herein on this date,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judgment is entered on behalf of Defendant City of Hillsboro and against Plaintiffs William Becker and Darcy Lynch in their capacity as co-trustees for the Antionette Ogilvy Trust.

/s/ Audrey G. Fleissig
U.S. District Judge

Dated this 17th day of October, 2023.

**ORDER DENYING PETITION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT (FEBRUARY 11, 2025)**

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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WILLIAM BECKER; DARCY LYNCH, CO-TRUSTEES OF THE ANTOINETTE OGILVY TRUST UNDER THE WILL OF GEORGE OGILVY,

*Appellants,*

v.

CITY OF HILLSBORO, MISSOURI,

*Appellee.*

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No. 23-3367

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis (4:22-cv-00886-AGF)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 11, 2025

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Maureen W. Gornik

**PETITION FOR REHEARING EN BANC OF PLAINTIFFS-APPELLANTS WILLIAM BECKER AND DARCY LYNCH, TRUSTEES OF THE ANTOINETTE OGLIVEY TRUST (JANUARY 19, 2025)**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3367

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WILLIAM BECKER; DARCY LYNCH, TRUSTEES OF THE ANTOINETTE OGILVEY TRUST,

*Plaintiffs - Appellants,*

v.

CITY OF HILLSBORO, MISSOURI,

*Defendant - Appellee.*

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On Appeal from United States District Court for the Eastern District of Missouri (4:22-cv-00886-AGF)

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**PETITION FOR REHEARING *EN BANC* OF PLAINTIFFS-APPELLANTS WILLIAM BECKER AND DARCY LYNCH, TRUSTEES OF THE ANTOINETTE OGLIVEY TRUST**

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**STATEMENT PURSUANT TO FED. R. APP. P. 35(B)(1)**

A Panel of this Court affirmed the District Court's decision to grant summary judgment to Defendant-Appellee City of Hillsboro, Missouri (hereafter "City") on Appellants' claims for unconstitutional taking of property.

I. The Panel's decision directly conflicts with the Supreme Court's decision in *YEE v. CITY OF ESCONDIDO,* 503 US 519 (1992) which held that Appellants had not waived their argument of a regulatory taking, even though raised for the first time on appeal, since Appellants had made a general taking claim which includes a regulatory taking

II. The Panel's decision conflicts with Supreme Court takings precedents in that City's land use regulations require Appellants and all other property owners within the City to dedicate permanent utility easements to the City, without an individualized assessment of the impact of such a general requirement on any specific property or property owner

III. The Panel's decision conflicts with Supreme Court takings precedents in that the regulations render Appellants' property unusable for anything other than vacant land which amounts to a *per se* taking

IV. The Panel's decision conflicts with Supreme Court takings precedents in that the regulations require a dedication of permanent public utility easements without just compensation which amounts to a *per se* taking

Plaintiffs-Appellants ("the Trust") petition this Court to rehear this case *en banc* pursuant to *Fed. R. App. P. 35*. Appellants respectfully submit that the Panel's decision is contrary to the following land use decisions of the Supreme Court and that full court review is necessary to maintain decisional uniformity. *Dolan v. City of Tigard*, 512 US 374 (1994); *Koontz v. St. Johns River Water Management District*, 570 US 595 (2013); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 US 419 (1982); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Nollan v. California Coastal Commission,* 483 US 825 (1987); *Scheetz v. County of El Dorado*, No 22-1074, (decided April 12, 2024); *Yee v. City of Escondido,* 503 US 519 (1992).

The Trust also submits that this case raises an issue of exceptional importance concerning basic principles of government regulation of property and land use, namely the percentage of loss of value resulting from government regulation necessary to constitute a loss of all economic beneficial use under *Lucas v. S.C. Coastal Commission*, *supra.*

## STATEMENT OF THE CASE

This action was originally filed on July 11, 2022 in Missouri state court setting forth claims of an unconstitutional taking of Appellants' property by Defendant City without just compensation in violation of both the United States Constitution (Count II) and Missouri Constitution (Count I). (Appendix at 13-16) Defendant timely removed the action to the U.S. District Court for the Eastern District of Missouri pursuant to 28 USC Section 1446 on August 24, 2022.

At issue in the case was the policy and ordinances of the City that prohibited the construction of homes

on the Trust property unless the Trust paid for the extension of the City's water system and dedicated permanent utility easements to the City, all without compensation.

The District Court granted summary judgment to City, finding; first, that the City had not committed a *per se* taking since it had not yet taken any easements from the Trust, or otherwise physically invaded the property, but would only require such dedication in the event that homes were built on the property. It further concluded that the Trust could avoid any taking by simply choosing *not* to develop homes but instead leave its property vacant. (Appendix at 354-5)

The District Court also concluded that the evidence from the Trust's expert appraiser (the *only* expert valuation testimony in the record) that the regulations effected a 70% reduction in value of the Trust property was insufficient under *Lucas v. S.C. Coastal Commission, supra* to constitute a taking since the property still retained some residual value as vacant land even though the Trust could do nothing with it. (Appendix at 356-7)

Finally, the District Court refused to address whether the regulations were reasonably related and "roughly proportionate" to the impact of the proposed use as lot large country residences, concluding that the argument had been waived by the Trust because not sufficiently argued in its pleadings. (Appendix at 353, fn. 4)

The Panel affirmed the District Court's decision in all respects. It also concluded that there was no evidence in the record that the City would in fact require the dedication of public easements if any homes were

built on the Trust property. (Opinion at 8-9) Further it concluded that a 70% reduction in value from the regulations was not "substantial" enough to rise to the level of an unconstitutional taking under Supreme Court precedent, even though the property would be left vacant. (Opinion at 9-11) Finally, the Panel agreed that the arguments that the regulations amounted to a regulatory taking had been waived by the Trust, since it had not been sufficiently argued below. (Opinion at 11-12)

## ARGUMENT

### I. The Panel's Decision That Appellants Had Waived Arguments That the City's Regulations Were a Regulatory Exaction Is Directly Contrary to the Supreme Court's Decision in *Yee v. City of Escondido,* 503 US 519 (1992)

Both the District Court and the Panel noted that the analysis of *Nollan v. California Coastal Commission*, 483 US 825 (1987) and *Dolan v. City of Tigard,* 512 US 374 (1994), and related decisions, if applied to the facts presented here, might result in a conclusion that the regulations imposed on the Trust amount to a unconstitutional regulatory taking by "exaction" of property to expand the City's public water system. The District Court declined to consider the issue saying it had been waived by the Trust. The Panel affirmed that conclusion and refused to consider the issue on appeal, although fully briefed. That decision was erroneous.

The precise issue of waiver of argument on appeal in a case alleging unconstitutional takings by govern-

ment regulation was addressed by the Supreme Court in *Yee v. City of Escondido*, *supra*. In *Yee*, plaintiffs filed claims alleging that Escondido had effected an unconstitutional taking by enforcing a rent control ordinance which prohibited rent increases without City approval.

Before the lower courts, the *Yee* plaintiffs had not argued that the ordinance amounted to a regulatory taking. However, once before the Supreme Court, they argued not only that the regulations amounted to a "physical taking", as they had done below, but also claimed for the first time that the regulations constituted a "regulatory taking" under *Nollan, Dolan* and other precedents. Escondido argued that plaintiffs had waived this argument by not raising it in the lower courts. But the Supreme Court disagreed, holding that the property owners *had not waived the* argument since a regulatory taking is one of *several types of unconstitutional taking claims*, which had been the basis of plaintiffs' claims throughout.

Specifically, the Court stated, at 534-5:

> "We must also reject respondent's contention that the regulatory taking argument is not properly before us because it was not made below . . . Petitioners unquestionably raised *a taking claim* in the state courts. The question whether the rent control ordinance took their property without compensation, in violation of the Fifth Amendment's Takings Clause, is thus properly before us. *Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below*. *Bankers Life* &

> *Casualty Co. v. Crenshaw,* 486 U. S. 71, 78, n. 2 (1988); *Gates, supra,* at 219-220; *Dewey v. Des Moines,* 173 U. S. 193, 197-198 (1899). Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims.* They are, rather, separate *arguments* in support of a single claim-that the ordinance effects an unconstitutional taking." (emphasis added)

Here, there was a dispute in the record as to what extent and in what context the Trust had raised the arguments of a regulatory taking under *Nollan* and *Dolan* in the District Court. (Opinion at 11-12) However, under the analysis in *Yee*, even if the Trust had not raised the issue or cited *Nollan* and *Dolan* at all (which it did), it was still entitled to raise the argument for the first time or in a different form on appeal.

In affirming the District Court's waiver conclusion, the Panel suggests that the Trust failed to mention regulatory taking in its "Amended Complaint". (Opinion at 12) The original petition asserting claims of an unconstitutional taking was filed in Missouri state court and removed to this court. (Appendix at 8-10, 13-16) There was never any Amended Complaint filed or required in this case.

**(a) The Regulations Amount To A Regulatory Taking Under *Nollan, Dolan***

*Nollan* and *Dolan* identified a type of unconstitutional taking where the government imposes conditions on the use of property which are not "rationally connected" to the impact of the development on the area

or are disproportionate to that impact, sometimes referred to as an "exaction".

In *Nollan*, the owner of beachfront property sought a coastal development permit to replace an existing residence with a larger one. The California Coastal Commission imposed as a condition on the grant of this permit a requirement that the owner dedicate a permanent easement along the shoreline for public access.

While recognizing the general right of government to impose conditions on development, *Nollan* court held that right is limited to circumstances where a *rational nexus* exists between the permit sought and the condition imposed. The Court found that mandating the dedication of an easement across the owner's property for public access was not reasonably related to a building permit to construct a new residence but rather amounted to a governmental acquisition of land for unrelated public purposes without compensation. *Id.* at 438-432.

Seven years later, in *Dolan* the Supreme Court extended its holding in *Nollan* to require that any condition imposed on a permit sought by a property owner must also be *"roughly proportionate"* to the impact the development may have. In *Dolan*, the city had conditioned the grant of permits requested by a business owner to expand her store and parking lot on the dedication of land to the city for a public greenway and bicycle pathway. The Supreme Court held that, while there was an "essential nexus" between the required conditions and the impact of the development, *i.e.* increased traffic, the conditions were excessive and not "roughly proportionate" to that impact. The Court explained that while there was no precise math-

ematical calculation to determine "rough proportionality", the government seeking to impose such conditions must make an "individualized determination" that the conditions are related *both in nature and extent* to the impact of the proposed development. *Id.* at 388-391.

The holdings in *Nollan* and *Dolan* were extended by *Koontz v. St. Johns River Water Management Dist.*, 570 US 595 (2013) to situations where a permit was *denied* because the property owner *refused to comply* with an unreasonable condition. According to the Court, such threatened conditions themselves pose an "impermissible burden" on the owner's right not to have its property taken without just compensation. *Id.,* at 603-604. *See also Scheetz v. County of El Dorado*, No. 22-1074, (decided April 12, 2024) (citing need for an individualized determination of the effect of imposing a standard fee on all property owners).

Applying these principles to the facts presented here leads to the conclusion that the condition sought to be imposed here by the City requiring the Trust to construct and extend municipal utility improvements at substantial expense and thereafter dedicate permanent utility easements to support it, bears no reasonable nexus to the impact of the development of, and is substantially disproportionate to the impact from the proposed construction of homes on large lots of ten or more acres. There was no evidence from the City that these homes will have *any* impact on the area that necessitates forcing it to connect with the municipal water system.

Even if there were a rational nexus between the proposed development and the mandate to connect to the City's water system, the regulations are totally disproportionate. The Trust's evidence from its expert

appraiser was that it would be required to spend between $963,000 and $1,578,00 to comply with the regulations, not including the value of the land that must be dedicated as permanent utility easements. When added to other normal development costs, the appraiser witness testified that the costs to develop the property for homes becomes prohibitive.

The City refused to make an individualized determination of the impact of the regulations on the Trust's property as required by *Dolan*, but rather insisted on applying its policy uniformly to all properties in the City.

The only reasonable conclusion is that the proposed condition does not reasonably relate to the alleged impact of the proposed development and is not roughly proportionate thereto. Rather, the City is merely *using the permit process as a pretext to extort a dedication of land and money* to expand its own municipal water system from the Trust at no cost to itself.

The City was not entitled to judgment as a matter of law under *Nollan* and *Dolan*. Therefore, the District Court's granting summary judgment in favor of City was in error and should have been reversed by the Panel.

## II. The Panel's Decision Conflicts with Supreme Court Takings Clause Precedents Holding That Regulations Which Either (1) Eliminate All Economically Beneficial Use of Property for Anything but Vacant Land, or (2) Compel a Property Owner to Dedicate Permanent Easements in Order to Use Its Property, Are *Per Se* Takings

### Supreme Court *Per Se* Takings Precedents

The requirements imposed on the Trust by the City to extend the City's municipal water system at the Trust's expense and dedicate permanent public utility easements to the City amount to a *per se* taking in violation of the Fifth Amendment under *Lucas v. S.C. Coastal Commission*, 505 US 1003 (1992) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982).

#### (a) Loss of Economically Beneficial Use Under *Lucas*

The first type of *per se* regulatory taking at issue here was established in *Lucas v. South Carolina Coastal Council*, *supra*. It occurs when government regulation effectively denies the property owners "any economically beneficial use" of their property. In *Lucas*, a property owner had purchased seaside property on a barrier island intending to build residences. Subsequently, an agency of the state of South Carolina prohibited any further construction for conservation purposes. The result was that the only remaining use property owners could make of their property was as *for vacant recreational space*, just as here. The *Lucas* court held that any regulation which deprives

owners of all "economically beneficial use" of their land constitutes a *per se* taking under the Fifth Amendment.

In his majority opinion in *Lucas*, Justice Scalia did not quantify the term "all economically beneficial use" of property. Rather, the *Lucas* majority characterized the taking of all economically beneficial use as analogous to imposing a preservation easement over the land, at 1019:

> "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, *that is, to leave his property economically idle*, he has suffered a taking."(emphasis added)

As here, the *Lucas* property still retained residual value as recreational space. However, the *Lucas* court held that was insufficient to overcome the conclusion that an unconstitutional taking had occurred. As in *Lucas*, the Trust's property may retain residual value as open vacant recreational land, but it is being forced by the regulations to leave it economically idle. That amounts to a taking under the *Fifth Amendment.*

**(b) Physical Invasion of Property For Utility Structures and Easements under *Loretto***

In *Loretto,* a New York state statute required the owner of an apartment building to allow the installation of a CATV system on its property. The Supreme Court held that even if such regulation served the public health, safety and welfare, it went beyond merely

regulating the use of the property, because it involved a government-mandated permanent physical occupation. The facts presented here are similar to those found in *Loretto* but go well beyond them. Here, as a condition of being able to construct one or more residences on the property the City has mandated that the Trust must *not only allow and pay for* the physical construction on and permanent occupation of part of their property by the City's water system, but must *also dedicate to the City permanent utility easements over the land on which the extended municipal water system will sit.*

The City contends, and the Panel agreed, that *Loretto* does not apply because (1) no physical taking has yet occurred and (2) the City's regulations do not *compel* a physical invasion of the Property, since Appellants can avoid any such taking by simply deciding not to build any residences on the Property, *i.e.* not make any economically beneficial use of its property. This circular reasoning gives support to a government mandate to either dedicate property to it or abandon all rights of its use, no matter how small.

The Panel also relied on this Court's decision in *Iowa Assur. Corp. v. City of Indianola*, 650 F.3d 1094 (8th Cir. 2011) which held that a requirement by the City that a property owner install a fence to shield offensive activities on his property was not a mandated physical invasion, but only a regulation of use.

There are at least two key differences between the facts of *City of Indianola* and this case. First, the regulations here require not just the construction of improvements on the owner's property, but also a *permanent dedication of those improvements and the land* on which they sit to the City. Second, absent com-

pliance, the Trust cannot make *any use* of their Property, other than leaving it vacant and idle, whereas the property owner in *Indianola* could continue his auto business.

Therefore, under the undisputed facts in the record, the City's regulations amount to either a deprivation of all economically beneficial use of property under *Lucas,* or a mandated physical invasion for utility structures and easements as in *Loretto*. Both are unconstitutional takings under the *Fifth Amendment*.

## CONCLUSION

For the foregoing reasons, this Court should rehear this appeal *en banc,* reverse the District Court and remand the case for further proceedings.

Respectfully Submitted,

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