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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

RUBICON REAL ESTATE HOLDINGS, LLC;
BROWNE DESIGN CONSULTANTS, LLC;
JOSEPH BROWN,

Plaintiffs-Appellants,

v.

CITY OF PONTIAC, MICHIGAN; GARLAND S.
DOYLE,

Defendants-Appellees.

No. 25-1631

Appeal from the United States District Court for
the Eastern District of Michigan at Detroit.

No. 2:23-cv-10439—David M. Lawson, District
Judge.

Argued: June 4, 2026

Decided and Filed: June 18, 2026

Before: GRIFFIN, LARSEN, and READLER, Circuit
Judges.

COUNSEL

ARGUED: Cindy Rhodes Victor, THE VICTOR FIRM, PLLC, Southfield, Michigan, for Appellants. Michael T. Berger, ROSATI SCHULTZ JOPPICH & AMTSBUECHLER PC, Farmington Hills, Michigan, for Appellees. **ON BRIEF:** Cindy Rhodes Victor, THE VICTOR FIRM, PLLC, Southfield, Michigan, for Appellants. Michael T. Berger, ROSATI SCHULTZ JOPPICH & AMTSBUECHLER PC, Farmington Hills, Michigan, for Appellees.

OPINION

READLER, Circuit Judge. As our nation celebrates its semiquincentennial, many Americans have taken the opportunity to reflect on our shared history, both its highs and its lows. The highs are many, marked by places such as Yorktown, Gettysburg, and Midway, each well deserving of remembrance. But the lows bear contemplating as well for the lessons they teach.

One long running example of the latter has been the challenges presented by a consuming yet unresponsive bureaucratic government. Two hundred and fifty years ago, the American rebels cited King George’s repressive government, which sent “hither swarms of Officers to harass our people, and eat out their substance,” *The Declaration of Independence* para. 12 (U.S. 1776), as one of many reasons for declaring our independence from England, *id.* paras. 3–29. Although our forthcoming United States government became more responsive to public concern, the ensuing American experiment

has not fully solved the weariness of large bureaucracy.

A century ago, those matters were on the mind of our thirtieth president, Calvin Coolidge, as he addressed an audience at the College of William and Mary in colonial Williamsburg on the nation's sesquicentennial. His timeless words—which Silent Cal was famously careful in choosing, *see* Amity Shlaes, *Coolidge* 308–09 (2013)—focused on what drove the American Revolution and the parallel challenges facing the United States in the Roaring Twenties. Of particular concern were his fears of a growing bureaucracy in American government, describing it as the “one element in our institutions that sets up the pretense of having authority over everybody and being responsible to nobody.” *See* Calvin Coolidge, *States' Rights and National Unity* (May 15, 1926), <https://coolidgefoundation.org/resources/address-at-william-and-mary-college/>. For President Coolidge, “[o]f all forms of government, those administered by bureaus are about the least satisfactory to an enlightened and progressive people.” *Id.*

Still today, entrenched bureaucracies—from Washington, D.C., to our local communities—maintain their firm grip. That was the reality facing Rubicon Real Estate Holdings, LLC, a Michigan-based real estate developer, who complains of the trials and tribulations it faced in working with the bureaucracy of the City of Pontiac. In 2019, Rubicon began efforts to revive a beleaguered commercial property in the reemerging city with the hope that future tenants could operate several medical

marijuana cultivation and processing facilities at the site. Yet that process proved to be easier said than done. Approvals for various zoning changes lagged. Licensing for Rubicon's future tenants bounced back and forth between the city clerk's office for a year and a half. At one point, the city clerk created another bottleneck by pressing an arguably specious argument that the entire project violated the City's medical marijuana ordinances. Ultimately, the venture fell apart in 2021 when Rubicon's prospective tenants backed out of their commitments. And following the project's collapse, a separate business owned by Rubicon's managing member, Joseph Brown, lost out on a contract to assist another development project in Pontiac.

Blaming all these misfortunes on the City and its agents, Rubicon, Brown, and Brown's separate business sued the City and the city clerk. Their complaint alleged a host of civil rights violations arising from the delays in approving the project and the resulting fallout. Following discovery, however, the district court granted defendants' motion for summary judgment, leaving plaintiffs to seek recourse by way of an appeal.

Rubicon's saga with the City of Pontiac may have fallen short of an experience in good governance. Yet the undisputed record shows that City officials at worst simply lagged in granting discretionary zoning and licensing approvals to Rubicon and its potential tenants. As frustrating as those developments surely were for Rubicon, as they are for many others caught in bureaucratic webs, the record here falls well short of clearing the high bar

of a constitutional violation. Accordingly, we affirm.

I.

A. While federal law continues to prohibit the manufacturing, distribution, dispensing, or possession of marijuana, *see* 21 U.S.C. § 841(a), many states over the past two decades have liberalized their laws to allow for the use of the drug for medical and recreational purposes, *see generally* Joanna R. Lampe, Lisa N. Sacco & Hassan Z. Sheikh, Cong. Rsch. Serv., IF12270, *The Federal Status of Marijuana and the Policy Gap with States* (2026). That is the case in Michigan. *See, e.g.*, Seth Quidachay-Swan, *Researching Marijuana Law*, 100 Mich. Bar J. 52, 52 (2021). Among other developments, Michigan now licenses the farming of marijuana by a “grower,” which is a commercial entity that “cultivates, dries, trims, or cures and packages” marijuana for sale to a third party. *See* Mich. Comp. Laws § 333.27102(g). Michigan law likewise recognizes the role a “processor” plays in the distribution scheme—a commercial entity that purchases marijuana from a grower and “extracts resin” from it or creates a marijuana- infused product for resale. *Id.* § 333.27102(v).

Yet even in this post-prohibition era, state and local oversight is not absent. Far from it, in fact. In the Wolverine State, for example, elaborate state and local rules now govern those who wish to engage in the state’s burgeoning marijuana business. *See, e.g., Green Genie, Inc. v. City of*

Detroit, 63 F.4th 521, 524–25 (6th Cir. 2023). Consider, for instance, what it takes to start a medical marijuana growing or processing business in the City of Pontiac, a well-known Detroit suburb. First, an entity needs to find a properly zoned site to engage in such activity. But those locations are limited in number. Concerned about the “potential adverse impacts” of medical marijuana facilities on “adjacent property owners,” the City has restricted where growing or processing facilities can reside. *See Pontiac, Mich., Zoning Ordinance*, art. 3, ch. 11, § 3.1101 (2025). For starters, any such facility is permitted only in a district zoned for industrial use. *See id.* art. 2, ch. 2 § 2.204; *id.* art. 3, ch. 11, § 3.1109; *see also id.* art. 2, ch. 1, § 2.101 (explaining zoning classifications). From there, the City envisions medical marijuana cultivation and processing occurring primarily within the City’s medical marijuana “overlay” districts— discrete geographic areas in Pontiac where medical marijuana businesses would operate. *Id.* art. 3, ch. 11, §§ 3.1102, 3.1108. The City’s Planning Commission, however, has the discretion, after considering a number of factors (e.g., the impact on the surrounding neighborhood and public welfare), to approve a “special exception permit” (SEP) for medical marijuana uses outside the overlay district. *Id.* art. 3, ch. 11, §§ 3.1106–3.1107; *id.* art. 6, ch. 3, §§ 6.302–6.303.

Assuming a properly zoned site is found within the City, an entity wishing to engage in medical marijuana growing or processing there must still obtain licenses from both the State and the City before beginning operations. *Id.* art. 3, ch. 11, §

3.1105, Pontiac, Mich., Municipal Code ch. 26, art. XXX, § 26-1498(a)–(b) (2025); Mich. Comp. Laws §§ 333.27501, 333.27502.

Each license requires detailed disclosures to the government. *See* Mich. Comp. Laws § 333.27401 (state licensure requirements); Pontiac, Mich., Municipal Code, ch. 26, art. XXX, § 26-1498(c) (City licensure requirements). For instance, the City’s application requires information on 31 separate topics, including the grower’s or processor’s business plans, finances, proof of insurance, and plans for the property, including how the facility will economically benefit Pontiac. *See* Pontiac, Mich., Municipal Code, ch. 26, art. XXX, § 26-1498(c). Inspections by relevant City departments are likewise required before the final issuance of any permit. *Id.* § 26-1499(b). Ultimately, the city clerk is tasked with assessing any permit application and “shall award a permit to any applicant” who provides a completed application, receives the necessary approvals, and otherwise satisfies the City’s many rules for medical marijuana growing and processing facilities. *Id.* § 26-1499(d); *see also* Pontiac, Mich., Zoning Ordinance, art. 2, ch. 5, §§ 2.545–2.546 (listing the rules for medical marijuana growing or processing facilities).

B. Rubicon Real Estate Holdings, LLC, an area real estate developer, had its eyes on a derelict 20-acre parcel of land on Glenwood Avenue in Pontiac. In better days, Glenwood Plaza was the home to storefronts of two former Michigan-based retailers, a K-Mart and Farmer Jack, among other tenants. Hoping to restore Glenwood Plaza to its former

glory, Rubicon aimed to develop a shopping area with a grocery store and facilities for medical marijuana growing and processing. So the developer entered into a purchase agreement for the property in March 2019. From there, Rubicon's plan was to have the property rezoned for industrial use, and, once it did, to acquire tenants and have those tenants obtain necessary licenses from the City. As a final step, Rubicon would obtain an SEP for the site, as Glenwood Plaza was located outside of the Pontiac overlay zone.

The plan was launched from solid footing. At the time of purchase, the Glenwood property was zoned for business or residential mixed use. To comply with the City's zoning requirements, the developer applied in July 2019 to rezone the parcel for industrial use. *See Pontiac, Mich., Zoning Ordinance*, art. 2, ch. 2, § 2.204. At a December 2019 hearing, the Pontiac Planning Commission unanimously recommended that the City Council approve Rubicon's application. In turn, the City Council approved the zoning change the next month to "allow [for] medical mari[j]uana facilities to locate" at the Glenwood property. R. 57-11, PageID 785–86. The City and Rubicon also executed a Conditional Rezoning Agreement, which memorialized the zoning change and the parties' mutual understandings for the project. At the same time, City officials reminded Rubicon that permitting requirements were still pending—specifically, permitting for each tenant operating at Glenwood Plaza, as well as an SEP for the site, given the plaza's location outside the overlay district.

Meanwhile, Rubicon began looking for potential tenants for the Glenwood property. The developer garnered interest from several entities, including Pharmaco, Inc., and Family Rootz, LLC—two state licensed medical marijuana growers and processors. Pharmaco applied for two permits from the City in August 2019 (before the Glenwood property was even zoned for industrial use). Nearly a year later, Garland Doyle, then-interim city clerk, wrote to Pharmaco to inform the company that its applications were deficient on a number of fronts. For instance, Doyle explained, one application neglected to include descriptions of Pharmaco’s financial structure; neither included Pharmaco’s business plan or its plans to comply with Pontiac sanitation rules. Pharmaco’s submissions likewise lacked proof of liability and casualty insurance. Pharmaco supplemented its applications in a timely manner.

In the interim, Pharmaco executed a lease agreement with Rubicon. The agreement contemplated that Pharmaco would need to obtain governmental approval and consents for its operations before it could incur any liability under the lease. The agreement also envisioned the lease commencing once Rubicon provided written notice to its tenant “that has received a certificate of occupancy.” R. 57-13, PageID 797.

Around the same time the City identified deficiencies in Pharmaco’s applications, Family Rootz applied for permits to operate as a medical

marijuana grower and processor at Glenwood Plaza. While Family Rootz contemplated entering into a lease agreement with Rubicon, no agreement was ever executed.

Another six months passed without resolution to either Pharmaco's or Family Rootz's applications. Growing concerned about the delays and prospects for the Glenwood project, Rubicon shifted strategies. Instead of having the SEP application be the last step in the project, the developer opted to move things forward; it applied for a permit in December 2020 to allow any medical marijuana facilities at Glenwood Plaza to operate outside the overlay zone. This effort, however, became a flashpoint between the developer and the City, as evidenced by a pointed letter Rubicon sent to the City Council in early January 2021. The letter's ire was directed at Doyle and the supposed reasons why he was holding up Pharmaco's and Family Rootz's applications. Rubicon understood Doyle to be claiming that, barring an amendment to the City's ordinances, all medical marijuana growing and processing needed to occur within the City's overlay district, meaning that, without such an amendment, no license could be approved. It pointed to the City ordinance that specifically contemplated medical marijuana uses outside the overlay district upon the approval of an SEP. Maintaining that its lender was refusing to disburse any loan funds for the development until the City issued Pharmaco's and Family Rootz's licenses, Rubicon demanded that the City direct Doyle to issue the licenses immediately.

Doyle, however, was unmoved. On January 29, 2021, he wrote to both Pharmaco and Family Rootz to reject their pending applications, explaining that both entities failed to include information required under the City's ordinances. Notably, Doyle did not reject the applications for failing to comply with Pontiac zoning ordinances, as the site was zoned for industrial use and the applicant was going to "obtain [an SEP] and Site Plan approval from [the] Planning Commission." R. 57-24, PageID 887. Upon receiving Doyle's letter, Pharmaco and Family Rootz timely updated their respective applications.

A number of events in February 2021 further informed Rubicon's development campaign. On February 3, 2021, the Planning Commission allowed for medical marijuana operations outside the City's overlay district and approved Rubicon's SEP, seemingly rejecting Doyle's position. Roughly two weeks later, the City Council met to hear from Rubicon and Doyle over the Glenwood Plaza project. At the meeting, Rubicon reiterated its position articulated in its earlier letter, while Doyle maintained that it would be illegal for the City to license any medical marijuana growing or processing outside the City's overlay district. The City Council, however, took no action following the meeting.

Seemingly having reached its own Rubicon, the developer, along with Family Rootz, forwent further efforts to navigate Pontiac's bureaucracy

and instead opted to sue Doyle and the City in Oakland County Circuit Court in late March. The lawsuit sought preliminary injunctive and declaratory relief requiring Doyle to issue the permits for medical marijuana growing and processing, as well as damages. The court initially denied any preliminary relief as it considered the plaintiffs' other requests. Meanwhile, Doyle returned to reviewing the Pharmaco and Family Rootz license applications. On May 21, 2021, the interim clerk again rejected the applications, finding that several previously identified deficiencies had yet to be rectified. But, the same day, the state court overseeing Rubicon and Family Rootz's lawsuit awarded declaratory relief against Doyle and the City, requiring the "forthwith" "approval of all pending Pharmaco, Inc[.], and Family Rootz applications for grower and processor licenses." R. 57-34, PageID 996. (The plaintiffs voluntarily dismissed the rest of the suit in October 2021, as they understood Pontiac to be "issuing permits" in a "timely" manner.) In the weeks after the court's May order, Doyle issued letters to both applicants indicating that all deficiencies had been rectified, and, in turn, conditionally approving the licenses pending, among other things, City inspections for compliance with local building codes.

Those approvals did not save the project. Pharmaco terminated its lease agreement with Rubicon on June 18, 2021. Three months later Family Rootz similarly pulled out of the project. According to both entities, by the "time the [state court] matter was

resolved” on May 21, 2021, the die was already cast, as “it was too late” for either entity to continue with the project. R. 57-55, PageID 1100; R. 63-10, PageID 1219. With the exit of these potential tenants, Rubicon’s lender refused to disburse any funds and the project collapsed.

Yet Rubicon’s saga with Pontiac government was not over. One of Rubicon’s managing members, Joseph Brown, was also the managing member of a separate company called Browne Design Consultants (BDC). BDC provided design services for developers, including for a developer called SK Properties. In August 2022, SK’s principal met with Pontiac Mayor Tim Greimel, a city councilwoman, and the city planning manager to discuss a potential project. At the meeting, Greimel allegedly told SK that for the project to proceed the developer needed to sever ties with BDC. SK thereafter ended its relationship with BDC.

C. All of this prompted Rubicon, along with Brown and BDC, to return to state court. Relying on 42 U.S.C. § 1983, plaintiffs sued the City of Pontiac and Doyle. Rubicon generally claimed that the delays incurred by the project were either so egregious or discriminatory as to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment as well as the Fifth Amendment’s Takings Clause. Against the City specifically, Brown and BDC alleged that the City had violated the First Amendment, retaliating against Brown and BDC for Rubicon’s earlier state litigation by pressuring SK to end its contract with

BDC. Defendants removed the case to federal court, where discovery proceeded. Ultimately the City and Doyle moved for summary judgment on all counts, a request the district court granted. Plaintiffs' timely appeal followed.

II.

We review the district court's grant of summary judgment to the City and Doyle de novo. *See Walden v. Gen. Elec. Int'l, Inc.*, 119 F.4th 1049, 1056 (6th Cir. 2024). Summary judgment is warranted if, viewing the evidence in the light most favorable to the nonmoving parties, the City and Doyle can show that "there is no genuine issue as to any material fact" and that they are "entitled to judgment as a matter of law." *Chancellor v. Geelhood*, 168 F.4th 388, 394 (6th Cir. 2026) (citation omitted); *see also* Fed. R. Civ. P. 56(a). If they do so, the burden shifts to plaintiffs to set forth "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis omitted) (citation omitted). As to this latter stage, "significant probative evidence," as opposed to conjecture or conclusory allegations, are needed by the nonmoving parties. *Walden*, 119 F.4th at 1056–57 (citation modified). We start with the claims Rubicon lodged against Doyle in his individual capacity before considering the remaining claims against the City.

Doyle contends that the constitutional claims against him fail to overcome his assertion of

qualified immunity. To prove otherwise, Rubicon must make two showings. *See Mosier v. Evans*, 90 F.4th 541, 546 (6th Cir. 2024). One, that Doyle violated the Constitution. *Id.* And two, that the constitutional right at issue was clearly established at the time of the violation. *Id.* We may consider these questions in either order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Like the district court, we focus on the first.

Before delving into Rubicon’s specific claims, it is worth pausing to note the somewhat unusual nature of those claims, which focus on Doyle’s role as to both the Glenwood site zoning and the applications of Rubicon’s potential tenants Pharmaco and Family Rootz to operate medical marijuana businesses there. To the extent Rubicon’s claims hinge on Doyle’s treatment of Pharmaco and Family Rootz, those appear to be legal harms suffered by entities other than Rubicon. For instance, Rubicon’s due process and takings claims concern, at least in part, the delays that resulted in reviewing the potential tenants’ applications, whereas Rubicon’s equal protection claim focuses on how Pharmaco and Family Rootz were treated differently than other medical marijuana permit seekers.

Rubicon’s assertion of a nonparty’s constitutional claims raises a few distinct strands of modern standing doctrine. Start with third party standing—the principle that a “plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or

interests of third parties.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Typically, a plaintiff like Rubicon seeking to vindicate the rights of its tenants would need to establish that it has a sufficiently “close relationship with the person who possesses the right” and that “there is a hindrance to the possessor’s ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (citation modified). At the same time, the third-party standing doctrine is grounded in prudential concerns and does not implicate our jurisdiction under Article III. *See June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2117–18 (2020), *abrogated on other grounds by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment). *But see id.* at 2145 (Thomas, J., dissenting) (“The rule against third-party standing is constitutional, not prudential.”). And prudential standing arguments can be forfeited. *See United States v. Knipp*, 138 F.4th 429, 433 n.1 (6th Cir. 2025). *But see Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 n.2 (6th Cir. 2014) (maintaining a court can raise third-party standing sua sponte, but doing so in a context where the plaintiffs also lacked Article III standing). With defendants declining to make a standing argument here, we can avoid this issue and conclude the City and Doyle forfeited any argument as to third party standing.

Getting past the third-party standing issue does not relieve Rubicon of its obligation to independently establish its own Article III

standing to pursue its future tenants' claims. *Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 547 (6th Cir. 2021). And, as Article III standing is a jurisdictional requirement, we must independently verify its existence. *See Burt v. Playtika, Ltd.*, 132 F.4th 398, 406 (6th Cir. 2025). Yet we see little problem with Rubicon's ability to demonstrate (1) an injury that is (2) attributable to defendants' conduct and (3) redressable by the requested relief. *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1555 (2024). The first and third prongs are plainly satisfied here, as Rubicon has suffered an economic injury from the collapse of the Glenwood project that would be remedied by a damages award. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 462–64 (2017). A slightly harder question is whether Rubicon's economic injury is traceable to any violations of its future tenants' rights. As the Supreme Court has recently reminded us, in cases where a plaintiff is not the "object of a government regulation" traceability depends on how the party that is the object will predictably react to the government action. *See Diamond Alternative Energy, LLC v. EPA*, 145 S. Ct. 2121, 2134 (2025). And, in this setting, we think a "commonsense economic inference[]" is that an unlawful interference with a tenant's license needed to operate a business at its landlord's property will predictably cause "downstream" "economic injuries" to the landlord. *Id.* at 2136–38. Put another way, vindicating the tenants' rights "likely (not certainly, but likely) would make a difference for" Rubicon because, with permits, the tenants "would likely" pay Rubicon rent. *Id.* at

2137. Given all this, we see no need to parse Rubicon's claims based on whose constitutional rights are directly implicated; Rubicon has Article III standing to pursue its claims against Doyle, so we proceed to the merits.

A. *Due Process Claims.* We start with Rubicon's allegation that Doyle violated the Fourteenth Amendment's Due Process Clause. That familiar provision prohibits governmental deprivations of "life, liberty, or property, without due process of law." *See* U.S. CONST. amend. XIV, § 1. While the amendment's text concerns the "process" owed to individuals when suffering such deprivations, the clause has also been construed to protect against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Yet no matter the exact nature of the due process claim, Rubicon must show a deprivation of a constitutional right—here, a property interest. *Green Genie*, 63 F.4th at 526. Specifically, Rubicon asserts that Doyle pushed a frivolous legal argument that medical marijuana growers and processors could never operate outside Pontiac's overlay zone, and thereby delayed the project and deprived the developer and potential tenants of their interests in having medical marijuana facilities operate at Glenwood Plaza. All of this raises a threshold question of what constitutes "property" under the Fourteenth Amendment.

We know that, to claim a property interest protected by the Fourteenth Amendment, a plaintiff needs more than an “abstract need or desire” or “unilateral expectation” of some property right. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). There is likewise no protected entitlement in an interest that “government officials may grant or deny . . . in their discretion.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005); *see, e.g., Med Corp. v. City of Lima*, 296 F.3d 404, 411 (6th Cir. 2002) (no property interest because city code failed to provide an “explicit guarantee” as to the benefit awarded). Rather, a property interest requires “a legitimate claim of entitlement,” one that “stem[s] from an independent source such as state law.” *Roth*, 408 U.S. at 577.

Here, neither Rubicon nor its potential tenants possessed a “legitimate claim of entitlement” in using the Glenwood site for medical marijuana cultivation or processing prior to when its injuries were inflicted in May 2021. Pontiac does not award zoning and permitting allowances for medical marijuana businesses as a matter of right. Quite the opposite. Pontiac’s regime requires a number of regulatory hoops before a medical marijuana business can operate in the City, with each step in the process contingent on the subjective judgment of City officials on whether to award a zoning change or a license. *See* Pontiac, Mich., Zoning Ordinance, art. 2, ch. 2, § 2.204; *id.* art. 6, ch. 8, § 6.802 (general zoning changes); *id.* art. 3, ch. 11, § 3.1106–3.1107, art. 6, ch. 3, § 6.302–6.303 (SEPs);

Pontiac, Mich., Municipal Code, ch. 26, art. XXX, § 26-1498 (licensing). For instance, in reviewing an SEP application to operate outside the overlay district, City officials consider the project's "impact" on surrounding neighborhoods and its effect on the "public welfare of the community." *See* Pontiac, Mich., Zoning Ordinance, art. 3, ch. 11, § 3.1107(A), (E). Likewise, securing a license to operate a medical marijuana business depends on the city clerk's assessment of the applicant's compliance with 31 different requirements, from whether the applicant adequately describes the economic benefits of the facility to the City to whether the applicant's plans to cultivate marijuana comport with City rules. Pontiac, Mich., Municipal Code, ch. 26, art. XXX, § 26-1498. Far from providing an "explicit guarantee" to operate a medical marijuana business in Pontiac, *see Med Corp.*, 296 F.3d at 411, the City's ordinances go so far as to disclaim any individual right or entitlement in a permit, Pontiac, Mich., Municipal Code, ch. 26, art. XXX, § 26-1499(i). Given the breadth of what City officials were allowed to consider and the capacious metrics by which they could gauge a zoning or a permit request, "[i]t is difficult to imagine a more flexible standard." *See Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993) (Wilkinson, J.) (assessing rules requiring consideration of a requested zoning exception's impact on the town's "general welfare" in light of "eighteen separate factors"); *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992) (rejecting notion that plaintiff was entitled to a zoning change when such

a change was made contingent on subjective findings about the desirability of the proposed use). Because City officials “retain[ed] discretion” in allowing medical marijuana facilities to operate at Glenwood Plaza, neither Rubicon nor its tenants had any cognizable interest in obtaining such benefits from the City. *See Williams v. City of Detroit*, 54 F.4th 895, 899 (6th Cir. 2022).

Rubicon responds that when the City Council approved a resolution to rezone the Glenwood property to industrial use and executed the Conditional Rezoning Agreement memorializing the zoning change, the developer’s interests in using the property for medical marijuana purposes evolved into an entitlement. True, once a discretionary zoning change has been conferred, a property interest may sometimes exist. *See EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 856 (6th Cir. 2012). But where a property owner can only demonstrate that it satisfied “certain minimum, mandatory” thresholds needed for land use approval, with further authorizations tied to a city officials’ discretion still pending, no property interest exists. *See Silver*, 966 F.2d at 1036. That latter rule aptly describes this case. The January 2020 zoning change was isolated to rezoning the Glenwood site to allow for industrial use. Many steps remained to secure authorization to operate medical marijuana businesses at Glenwood Plaza. Nothing in the zoning change or the Conditional Rezoning Agreement purported to eliminate those remaining steps. Instead, the agreement envisioned Rubicon continuing to pursue the

“necessary permits” for the project. R. 57-10, PageID 772–73. Confirming as much, City officials, in informing Rubicon about the approval of its initial zoning change, reminded the developer that medical marijuana permits for each facility operating at Glenwood as well as an SEP for the site were still needed. So even with the initial rezoning hurdle out of the way, Rubicon’s right to develop the property for medical marijuana business purposes remained at the discretion of the City. Stated another way, the hopes that marijuana businesses would eventually operate at Glenwood Plaza were just that—entirely aspirational and contingent on further discretionary decisions by the City—leaving the developer well short of a property interest cognizable under the Due Process Clause. *See Silver*, 966 F.2d at 1036; *Lifestyle Cmty., Ltd. v. City of Worthington*, 165 F.4th 1013, 1027 (6th Cir. 2026); *cf. Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1332 (Fed. Cir. 2012) (“[R]elying on representations by [the government] in the hope that the government will grant a discretionary [benefit] does not create a compensable property interest.”).

Yet, says Rubicon, a broader interest is at stake—namely, that defendants deprived the developer of its property interest in its ownership of Glenwood Plaza, for which it had expectations of obtaining rental income from its potential tenants. These generalized interests, however, do not fit the governing legal framework. Take Rubicon’s base interest in the property itself. In cases where a

plaintiff alleges a due process violation stemming from a thwarted attempt to obtain governmental approval for a particular use for real property, we have long rejected the argument that the “only property interest requirement” necessary to demonstrate a protected entitlement “is ownership of land.” *Triomphe Invs. v. City of Northwood*, 49 F.3d 198, 201 (6th Cir. 1995). Instead, we ask a more specific question: whether the plaintiff had a legitimate claim of entitlement in the underlying governmental benefit. *Id.*; *Braun v. Ann Arbor Charter Township*, 519 F.3d 564, 573 (6th Cir. 2008) (“[T]o establish a property right in a future, rezoned land use, an individual must point to some policy, law, or mutually explicit understanding that both confers the benefit and limits the discretion of the City to rescind the benefit.” (citation modified)); *see, e.g., Silver*, 966 F.2d at 1036 (describing the plaintiff’s “property interest” in the “use of the undeveloped parcel as a condominium complex” and then applying the *Roth* entitlement test). Any other approach would nullify the legions of cases that analyze zoning or permitting challenges under the *Roth* entitlement test. After all, if property ownership alone is sufficient to trigger the due process inquiry, there would be no need to fuss with any purported property interest in the underlying zoning change or permit. Instead, we would skip straight to the question of whether there has been a deprivation. But that will not do.

As we have explained, Rubicon’s interest in the underlying activities its tenants sought to undertake—and the rent and income generated

from those activities—rested on discretionary government approvals. *See EJS Props., LLC*, 698 F.3d at 858. Accordingly, Rubicon’s due process claims necessarily fail.

B. *Takings Claim.* With Rubicon’s due process claims resolved, we turn to its related takings claim against Doyle. The crux of Rubicon’s argument is that Doyle “claim[ed] that the zoning ordinance did not permit medical marijuana facilities on the Glenwood Property” and thereby delayed the City’s zoning and permitting approvals and “effectively destroyed Rubicon’s entire developmental project,” amounting to a compensable taking. Appellants’ Br. at 24, 26. Rubicon’s claim brings into view the Takings Clause of the Fifth Amendment, which, as applied to the states through the Fourteenth Amendment, prohibits the government from taking “private property” for “public use, without just compensation.” *Novak v. Federspiel*, 140 F.4th 815, 820 (6th Cir. 2025) (per curiam) (first quoting U.S. CONST. amend. V; and then citing *Sheetz v. County of El Dorado*, 144 S. Ct. 893, 899 (2024)). A takings claim necessarily requires proof of a cognizable property interest as well as a government taking of that interest without just compensation. *See Puckett v. Lexington-Fayette Urb. Cnty. Gov’t*, 833 F.3d 590, 609 (6th Cir. 2016).

1. *Property Interest.* The property interest required to support a takings claim differs from that required for a due process claim. Even so,

Rubicon’s mere interest in owning the Glenwood site does not “automatically establish[] the property interest needed to pursue its takings claim.” *See Andrews v. City of Mentor*, 11 F.4th 462, 473 (6th Cir. 2021). In some cases, assessing a claimed property interest may turn on a “searching inquiry” into “background principles” of state law and the “nature of the land use proscribed” to “determine whether the plaintiff actually held the property interest that [it] claim[s] to have been taken.” *Id.* (citations omitted). As neither party’s briefing attempted to aid us in that inquiry, we will assume for today’s purposes that, as to the takings claim, Rubicon has a sufficient property interest through its ownership of Glenwood Plaza. Doing so allows us to proceed to address whether any delay created by Doyle amounted to a taking. *See Lifestyle Cmtys., Ltd.*, 165 F.4th at 1022.

2.a. *Taking*. Answering that question requires examining what a taking entails. Given the recognized “bundle” of legal rights that stem from property ownership (e.g., the right to possess, use, exclude others from, and dispose of the property), a taking can come in different forms. *Knight v. Metro. Gov’t of Nash. & Davidson Cnty.*, 67 F.4th 816, 822 (6th Cir. 2023). Most varieties are not at issue here, so we need not address them.

The chief theory Rubicon advances is that, even if the City’s zoning and licensing rules are permissible, the delay that Doyle injected into the proceedings amounted to a regulatory taking. When, then, does a government’s delay in issuing a

permit or zoning change amount to a taking? Seldom, if ever. Built into the “incidents of [property] ownership” is the understanding that “governmental decisionmaking” takes time, meaning that delays in obtaining approval before a property can be altered ordinarily does not amount to a taking. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980), *abrogated on other grounds by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). Recognizing the understandable frustration with all-too-often belabored government process, this rule nonetheless makes sense. Requiring compensation “for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking.” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 335 (2002). Nor should federal courts serve as a regular timekeeper over local governmental approval processes. *Cf. Lingle*, 544 U.S. at 538; *Norton v. Village of Corrales*, 103 F.3d 928, 933 (10th Cir. 1996) (“Federal courts should be reluctant to interfere” with local land use decisions, as we “do not sit as a zoning board of appeals.” (citation modified)).

With these understandings in mind, for governmental delay to amount to a taking, the lag must be “extraordinary.” *Agins*, 447 U.S. at 263 n.9. In making that assessment, we consider the length of the delay, any bad faith on the part of the government, and any delay that Rubicon caused. *See Richmond Rd. Partners, LLC v. City of*

Warrensville Heights, No. 24-3502, 2025 WL 737342, at *3 (6th Cir. Mar. 7, 2025).

No extraordinary delay occurred here. Recall that Rubicon’s claim turns on Doyle purportedly throwing sand in the gears of the Glenwood project by maintaining (at least for a time) that medical marijuana facilities could not exist outside of the City’s overlay district. *See* Appellants’ Br. at 24. While the record is not entirely clear as to when Doyle began pressing the point, he seems to have first articulated his concerns in late 2020 or early January 2021. It is also unclear as to when he relented. He seemed to have relented a few weeks later, on January 29, 2021, when he declined to reject any pending licenses on zoning grounds and suggested that Rubicon just needed to apply for an SEP. Yet he re-raised his concerns at the City Council meeting on February 16. Regardless, Doyle’s position apparently did not have much sway on the Planning Commission, as it granted Rubicon’s SEP, which allowed for medical marijuana operations outside the overlay district. We likewise lack evidence that Doyle pressed the zoning argument in any other way that slowed the project. Instead, he seems to have focused on other concerns with the permitting applications before providing approvals in May and June 2021.

In the end, Doyle’s “refus[al] to recognize” that medical marijuana operations could occur outside the overlay zone at most delayed the project a couple of months. Appellants’ Br. at 24. That is far from an “extraordinary” delay—courts have

“condoned” far longer ones. *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001) (citing examples of “approximately eight years,” “forty months,” and “sixteen months” as not constituting a taking); *Richmond Rd. Partners, LLC*, 2025 WL 737342, at *4 (recognizing that “[i]n the bureaucratic world” a delay of one year is not extraordinary). Delay was plainly expected, as the City took six months to approve its initial zoning change to allow for industrial use at Glenwood Plaza, a delay over which Rubicon voices no concerns. Doyle’s understanding of the City’s ordinances, we recognize, may not have been entirely sound. But nothing suggests that Doyle’s actions were done in bad faith. *Cf. U.S. ex rel. Wall v. Circle C Constr., LLC*, 868 F.3d 466, 471 (6th Cir. 2017) (recognizing bad faith to exclude a “honest mistake as to one’s rights or duties” and to instead require some “interested or sinister motive” (citation modified)). Finally, as the district court recognized, many of the delays in the licensing and permitting process were due either to Rubicon dragging its feet in applying for the SEP or to various admitted deficiencies in Rubicon’s future tenants’ license applications. *See* R. 69, PageID 1321–22. All told, the delay here is about what one might expect in dealing with local government bureaucracy and is far from an actionable deprivation under the Takings Clause.

b. Rubicon views the delay as far longer and far more problematic. To that end, it emphasizes that Doyle received Pharmaco’s applications in August 2019 yet did not approve them until June 2021,

nearly two years later. Rubicon’s position falls short on a few fronts, beginning with the fact that, as already explained, even a 22-month delay pales in comparison to anything close to what courts have deemed to be extraordinary. *See Wyatt*, 271 F.3d at 1098.

Rubicon’s portrayal of the record is similarly lacking. The developer presents no evidence that the various deficiencies identified in either of its tenants’ applications were unjustified or could have been ignored by Doyle. In any event, Rubicon’s takings claim was never premised in district court (nor here) on Doyle dawdling during his 2019 review of the permitting applications. Instead, Rubicon’s argument was that Doyle began slow walking the permitting and zoning on account of his understanding of the overlay district rules, a view he seemingly first pressed in late 2020. Rubicon may not bootstrap to its claim unrelated delays for which Doyle cannot be blamed.

Shifting gears, Rubicon turns its attention to the sizable proposed investment in Glenwood Plaza, maintaining that “regardless of length,” the economic effects of the delay—the asserted elimination of all value in the property—are sufficiently sizeable to amount to a taking. Appellants’ Br. at 26. The record, however, does not support that claim. For example, no evidence shows the Glenwood site is now worthless or cannot be developed for other purposes. Nor is there evidence that Doyle’s temporary advocacy of a strict understanding of the overlay zone for a few

months is what led to the project's collapse. The tenants' affidavits attest that the process as a whole simply dragged on to the point that by May 2021, it was just "too late" to continue with the project. R. 57-55, PageID 1100; R. 63-10, PageID 1219. Either way, any investment-backed expectations Rubicon had in the property needed to be "reasonable" in relation to its regulatory taking theory. *See Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 684–85 (6th Cir. 2004). In other words, Rubicon had to expect the few months of delay as the City appropriately resolved the various complex zoning and permitting questions surrounding a multi- million dollar development.

Nor is it extraordinary that Rubicon had to resort to state court litigation to get Doyle to move on the applications. While we typically expect public officials to carry out their duties without a court ordering as much, we generally reject the notion that delays created by state court litigation amount to a taking, as "the time necessary for review, including judicial review," is simply a normal delay in the world of government. *Richmond Rd. Partners, LLC*, 2025 WL 737342, at *3 (citing Edward H. Ziegler, Jr., *First English and normal delays—Illegal permit denial and temporary takings*, 1 Rathkopf's The Law of Zoning and Planning § 6:28 (4th ed.)).

We do not discount the prospect that significant and long-term delays of a project caused by government foot dragging could amount to a taking. *See Tahoe-Sierra Pres. Council, Inc.*, 535

U.S. at 356 (Thomas, J., dissenting) (maintaining that a “temporary restriction” that prohibited all land use for half a decade can function akin to a *Lucas* taking because “[i]n the long run we are all dead” (quoting J. Keynes, *Monetary Reform* 88 (1924))). That said, today’s case does not nearly approach that situation. For better or worse, an “incident[] of ownership” in pursuing an ambitious development in a “bureaucratic world” is the expectation that the project will not occur overnight and will need sufficient review by public officials. *See Agins*, 447 U.S. at 263 n.9; *Richmond Rd. Partners, LLC*, 2025 WL 737342, at *4. Here, no taking resulted from the relatively short delays created by Doyle.

C. Equal Protection Claim. Rubicon’s remaining claim against Doyle maintains that the interim clerk violated the Equal Protection Clause of the Fourteenth Amendment. Rubicon presses a class-of-one theory. To prevail, the developer must show that (1) Doyle “intentionally treated” either Rubicon or its potential tenants “differently from others similarly situated”; and (2) “there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). At the outset, all agree that Rubicon lacks any direct evidence that Doyle engaged in intentional discrimination. That leaves Rubicon to maintain that circumstantial evidence exists from which a jury could infer that Doyle’s conduct was driven by intentional irrationality toward those involved with the Glenwood development. In this setting, it bears noting, we

require circumstantial evidence beyond mere differential treatment between a plaintiff and a comparator; were the rule otherwise, any erroneous, unequal application of the law could be the basis for a class of one claim. *See Green Genie*, 63 F.4th at 527–28. That leaves Rubicon to show that any adverse treatment by Doyle was a “stark outlier from an otherwise consistent pattern of favorable treatment in similarly situated cases.” *Id.* at 528 (quoting *SECSYS, LLC v. Vigil*, 666 F.3d 678, 689 (10th Cir. 2012) (Gorsuch, J.)). So Rubicon’s steep hurdle at step one of an *Olech* claim requires significant evidence of relevant comparators whose treatment by Doyle was unambiguously different than those involved with the Glenwood development. *Id.*

How does Rubicon fare on this front? Much of its briefing before both the district court and this Court merely rehashes similar complaints to those undergirding its due process and takings claims. In particular, Rubicon protests Doyle’s understanding of the overlay district rules and complains that Pharmaco’s and Family Rootz’s permits lingered for years before approval. Largely absent from Rubicon’s submissions, however, is any evidence of relevant comparators. *See Andrews*, 11 F.4th at 481 (Larsen, J., concurring in part and dissenting in part) (observing that the “similarly situated” requirement must go beyond establishing the plaintiff’s “side of the equation” and instead “[w]e must also know something about” the comparators). For instance, there is nothing in the record showing that Doyle treated Rubicon

differently than another developer similarly seeking to establish a medical marijuana commercial venture outside the City’s overlay district. *See Loesel v. City of Frankenmuth*, 692 F.3d 452, 462–63 (6th Cir. 2012) (requiring an assessment of “relevant similarity” by looking at the “facts and context of the case” (citation modified)); *see also Anders v. Cuevas*, 984 F.3d 1166, 1180 (6th Cir. 2021) (similar). And there is scant evidence of any relevant comparators to Pharmaco or Family Rootz, such as a medical marijuana business that obtained a permit in a far faster timeframe than those entities seeking to operate at Glenwood Plaza. Rubicon’s only evidence that even references a potential comparator is what *Doyle* provided at summary judgment. And that evidence—letters Doyle sent to other permit seekers *rejecting* their applications for deficiencies similar to those in Pharmaco’s or Family Rootz’s applications—understandably will not suffice. Those items, after all, do not show any similarly situated entity that received favorable treatment from the City relative to Rubicon’s potential tenants. *See Green Genie*, 63 F.4th at 528.

Rubicon disagrees. To begin, it faults Doyle and the City for not producing comparator evidence, for example, other businesses that had to wait as long as Pharmaco did to obtain its license. But in many respects, Rubicon’s criticism gets things backwards, both procedurally and substantively. As a matter of procedure, consider the dynamics at the Rule 56 stage. There, Doyle had the initial burden to show that there was no dispute of

material fact. Doyle did so. He maintained that “there is no evidence that Family Rootz or Pharmaco were treated differently than any other applicant, much less that Rubicon was treated differently than any other property owner attempting to lease property to a marijuana business.” *See* R. 57, PageID 613; *see also Hall v. Navarre*, 118 F.4th 749, 756 (6th Cir. 2024) (observing that the initial burden of production at summary judgment is “little more than a formality” and that “a movant need only assert the lack of any genuine disputes of material fact in the record” (citation modified)). At that point, the burden shifted to Rubicon to provide “significant probative evidence” such as evidence of disparate treatment of a comparator showing the need for trial. *Walden*, 119 F.4th at 1056–57 (citation modified). On that metric, Rubicon came up short.

And then consider substance. We generally presume that state actors properly discharge their official duties, meaning we assume that if Doyle subjected Rubicon and its potential tenants to lengthy delays, he did the same for similarly situated entities. *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997). To overcome the presumption of regularity, Rubicon (not Doyle) needed to present “clear evidence to the contrary,” which it failed to do. *Id.*

Having properly framed the summary judgment inquiry, we agree with the district court that Rubicon failed to carry its burden. Focusing on the letters Doyle sent to other permit seekers, Rubicon

complains that others were allowed more time to repair deficiencies in their applications than was Pharmaco. This attempt to manufacture disparate treatment is too clever by half, as it is a reversal from the central thesis of Rubicon’s equal protection claim. Instead of complaining that Doyle slow walked the Glenwood permits relative to other permit seekers, Rubicon now complains that Doyle expedited review of Pharmaco’s application. Nor, we note, has Rubicon established that the entities at issue are relevant comparators to Pharmaco, such that any differences in timing could only be due to irrationality on Doyle’s part. *See EJS Props., LLC*, 698 F.3d at 866 (“Gaps in time and context may suggest a change in policy rather than differential treatment.” (citation modified)). And, like the district court, we fail to see how Pharmaco was injured by the disparate treatment, in that all agree it complied with the shorter deadline. *See R.* 69, PageID 1308. In any event, even if there was a discrepancy between the time Doyle provided to Pharmaco relative to another similarly situated medical marijuana business seeker, Doyle’s treatment of Pharmaco was not the kind of “stark outlier” required to show intentional discrimination. *See Green Genie*, 63 F.4th at 528. Meanwhile, the record shows that Family Rootz received a more generous deficiency response period. All told, Rubicon has provided no evidence of intentional discrimination, so we affirm the dismissal of the equal protection claim against Doyle.

III.

Having affirmed the dismissal of the claims lodged against Doyle, we turn to the claims against the remaining defendant, the City of Pontiac. Seeking to hold a municipality liable under 42 U.S.C. § 1983 raises distinct issues. A municipality is a “person” under § 1983 that can be held liable for its *own* illegal acts, such as when a governmental body has a policy or custom that “itself ‘subjects’ a person to a deprivation of rights or ‘causes’ a person ‘to be subjected’ to such deprivation.” *See Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 692 (1978)); *see also City of Canton v. Harris*, 489 U.S. 378, 389 (1989). But a municipality cannot be held liable simply because one of its employees has violated the Constitution. *See Monell*, 436 U.S. at 694. Instead, the party must connect the employee’s conduct to a municipal policy or custom. *Gambrel v. Knox County*, 25 F.4th 391, 408 (6th Cir. 2022). A plaintiff has four discrete avenues for proving the municipal policy or custom requirement: (1) a legislative enactment or policy; (2) an action taken by an official with final decisionmaking authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). For any chosen path, a plaintiff must then satisfy § 1983’s “rigorous” causation standard—it must show that it was the municipality’s unconstitutional policy or custom (and not just the employee’s action) that caused the plaintiff’s injury. *See Pineda v. Hamilton County*,

977 F.3d 483, 495 (6th Cir. 2020) (quoting *Bd. of Cnty. Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 405 (1997)). Otherwise, no liability can flow to the municipality. *See Andrews v. Wayne County*, 957 F.3d 714, 725 (6th Cir. 2020). These principles resolve the remaining claims on appeal.

A. *Rubicon’s Claims Against the City.*

First up are the due process, takings, and equal protection claims lodged against the City. Critical here is the fact that all three claims stem from Doyle’s conduct, not an independent Pontiac policy or custom. Indeed, Rubicon’s theory is that Doyle expressly ignored the City’s zoning policies in violating the developer’s rights. So with no underlying constitutional violation by Doyle, these claims cannot proceed against the City. *See Dibrell v. City of Knoxville*, 984 F.3d 1156, 1165 (6th Cir. 2021).

B. *Brown and BDC’s Claim Against the City.* All that remains is the First Amendment retaliation claim lodged by Brown and BDC against the City. To prevail on their free speech retaliation claim, Brown and BDC must show that they (1) engaged in constitutionally protected speech; (2) an adverse action was taken against them; and (3) a causal connection exists between the speech and the adverse action. *See Lemaster v. Lawrence County*, 65 F.4th 302, 307 (6th Cir. 2023). Brown and BDC’s theory addresses those elements as follows. One, that Brown (through his company Rubicon) engaged in constitutionally protected speech by engaging in litigation in state

court in 2021 over the Glenwood development. Two, that Brown and BDC suffered an adverse action when Pontiac's mayor, Tim Greimel, more than a year later, successfully encouraged another developer (SK) to cancel its contract with BDC at the risk of not obtaining zoning approval for a project. And three, that Greimel's request emanated from his lingering bitterness from the Rubicon lawsuit. Brown and BDC add that the City is on the hook for Greimel's retaliation because his conduct amounted to a policy that the City "adopted." R. 63, PageID 1153. To our mind, there are deep flaws in both the merits and *Monell* arguments. But we need not address the merits, for the City cannot be held liable.

Assuming, without deciding, that Brown and BDC can survive summary judgment on their retaliation claim, they still must link the constitutional violation to a City policy or custom. *See Gambrel*, 25 F.4th at 408. An employee's "single unconstitutional act" may do the trick if it was "taken by an authorized decisionmaker" of the municipality, meaning that individual had ultimate authority to establish the underlying policy or custom with respect to the subject matter in question. *See Bible Believers v. Wayne County*, 805 F.3d 228, 260 (6th Cir. 2015) (en banc) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 483 (1986)). All seem to agree that the underlying policy at issue was conditioning a zoning change approval upon the act of the applicant (here, SK firing BDC). But the Pontiac mayor lacks any final authority over the rezoning process; the seven-

member City Council approves or rejects zoning requests. *See* Pontiac, Mich., Zoning Ordinance, art. 6, ch. 8, § 6.802(D); Pontiac, Mich., Home Rule Charter, art. III, § 3.101. And while the mayor has veto authority over most actions of the City Council, *see* Pontiac, Mich., Home Rule Charter, art. III, § 3.112(g), the City Council can override that veto, *id.*, meaning the veto does not imbue the actor with final decisionmaking authority for purposes of *Monell*, *see Flagg v. City of Detroit*, 715 F.3d 165, 174–75 (6th Cir. 2013) (holding that an official has “final authority” only if his decisions are “final and unreviewable and are not constrained by the official policies of superior officials” (citation modified)); *see, e.g., Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 638 (11th Cir. 1991) (holding that mayor was not the ultimate policymaker with respect to zoning decisions where the city charter provided that the council could override mayor’s veto of zoning ordinances). Lacking any evidence that the City Council ever approved of Greimel’s action—at most, only one of the seven council members was even aware of the mayor’s comments—Brown and BDC simply cannot show a connection between the City and any unconstitutional act by Greimel.

Brown and BDC do not engage on the limits of the mayor’s power. Instead, they argue that regardless of whether Greimel was a final decision maker, liability can be imputed to the municipality under a cat’s paw theory. That theory, more commonly invoked in employment discrimination cases, allows the illicit “animus” of an individual who

influenced the decisionmaker in certain cases to be imputed to the employer. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 415–16 (2011). Think of a biased subordinate who intentionally manipulates a clueless boss into taking an adverse action against an employee. *See Marshall v. The Rawlings Co.*, 854 F.3d 368, 380 (6th Cir. 2017). But there is no evidence here that Greimel influenced any final decisionmaker to take an adverse action against Brown or BDC. The mayor’s 2022 conversation pressing SK to fire BDC is the extent of the allegation, one that does not involve the City Council. Nor should we extend the cat’s paw theory into the land of *Monell*. The concept of a municipality, through no fault of its own, being held liable for the single act of its agents sounds a lot like respondeat superior, which *Monell* expressly forecloses. *See Jones v. City of Hutto*, 154 F.4th 332, 342 (5th Cir. 2025) (“[T]he cat’s paw claim is based in agency principles, so it is incompatible with *Monell*’s bar on *respondeat superior* and unavailable to Jones.”); *Waters v. City of Chicago*, 580 F.3d 575, 586 n.2 (7th Cir. 2009) (similar). Likewise, the causation rules for *Monell* require proof that the municipality, through its “deliberate conduct,” was the “moving force behind the injury alleged.” *See Kovalchuk v. City of Decherd*, 95 F.4th 1035, 1038 (6th Cir. 2024) (citation modified). Obliviousness by the boss will not do. To the extent Brown contends the City Council simply acquiesced in Greimel’s conduct, the rule remains that a final decisionmaker’s “after-the-fact approval” of a single constitutional violation by a subordinate is insufficient to

establish a *Monell* claim. *Burgess v. Fischer*, 735 F.3d 462, 479 (6th Cir. 2013). Which makes sense. With a one-time violation, the employee causes the underlying harm and the municipality at most gets involved after the fact. *Id.* (recognizing an alternative rule would “effectively make” the municipality “liable on the basis of *respondeat superior*”); *see also Pineda*, 977 F.3d at 495 (observing that a municipality can ratify the conduct of one of its employees only after a pattern of failing to act in response to several prior incidents of the alleged rights violation).

As a last gasp, Brown and BDC argue that the City forfeited any argument that the mayor was not a decisionmaker by saving it until its reply brief in district court. But Brown and BDC, in opposing summary judgment, maintained that a final decisionmaker “adopted” the mayor’s action, raising the question of who the decisionmaker was as to the underlying zoning decision. R. 63, PageID 1153. Said another way, it was fair game for the City to reply to arguments made in Brown and BDC’s response brief. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008). At all events, the burden remains with Brown and BDC to demonstrate *Monell* liability, whether it be through proving the mayor was a final decisionmaker or some other avenue. *See Burgess*, 735 F.3d at 478. That the City waited until its reply brief to challenge the exact avenue plaintiffs were using to establish *Monell* liability does not relieve Brown and BDC of having to prove a basic element of their claim at summary judgment. *See*

United States v. 15 Bosworth St., 236 F.3d 50, 55 (1st Cir. 2001) (“[I]t is a bedrock rule that when there is insufficient evidence on a particular issue, that issue must be resolved against the party who bears the burden of proof.” (emphasis omitted)). With no record support satisfying Brown and BDC’s burden on the merits or *Monell*, the district court did not err in dismissing the final claim in this suit.

* * * * *

We affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RUBICON REAL ESTATE HOLDINGS, LLC,
BROWNE DESIGN CONSULTANTS, LLC,
and JOSEPH BROWN

Plaintiffs,

Case No. 23-10439

Honorable David M. Lawson

v.

CITY OF PONTIAC, MICHIGAN, and
GARLAND S. DOYLE,

Defendants,

_____/

OPINION AND ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND
DISMISSING COMPLAINT

In 2019, plaintiff Rubicon Real Estate Holdings, LLC, a real estate developer, undertook a project to develop commercial property in Pontiac, Michigan that it intended to lease to tenants operating a grocery store and several medical marijuana cultivation and processing facilities. Rubicon set about lining up potential tenants while also securing zoning changes and obtaining the necessary permits and licenses. It did not encounter smooth sailing with the City of Pontiac and its city clerk, defendant Garland Doyle,

who, based on his reading of the local ordinances and a conditional zoning agreement signed by the City and Rubicon, believed that a further ordinance amendment was required before he could issue the necessary licenses and permits. Eventually, the project fell apart, and Rubicon blames the City and Doyle for delaying the necessary approvals, which caused the prospective tenants to pull out of the project. Rubicon accuses the defendants of violating its rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and it posits that the imposition of the City's regulations effectuated a taking of its property in violation of the Fifth Amendment.

Rubicon's managing member is plaintiff Joseph Brown, who also operates a separate business, plaintiff Browne Design Consultants, LLC. Brown alleges that the City and its mayor caused one of Brown's customers to cancel a lucrative contract in retaliation for the litigation Brown shepherded for Rubicon over the aborted real estate deal. Included in this case is a claim by Brown and his design firm for violation of his rights under the First Amendment.

After discovery closed, the defendants moved for summary judgment on all claims. Because the evidence in the record does not establish any material fact issues, and the uncontested facts do not support all the elements of the plaintiffs' claims, the motion will be granted and the complaint will be dismissed.

I.
A.

Plaintiff Rubicon Real Estate Holdings, LLC sought to transform an approximately 20-acre parcel of derelict land located on Glenwood Avenue in Pontiac, Michigan into a mixed-use development with a grocery store and light manufacturing facilities focused on medical marijuana growing and cultivation. To achieve that goal, the zoning of the property had to be changed.

Although the use, possession, and manufacture of marijuana was illegal under federal law in 2019 when the project was initiated — and still is, *see* 21 U.S.C. §§ 841(a), (b)(1)(A)(vii), (B)(vii), 844a(a) — over time, Michigan citizens warmed to the idea and liberalized the state’s regulation of marijuana. In 2008, the production and use of medical marijuana was approved by Michigan voters. In 2016, Governor Rick Snyder signed a law regulating medical marijuana businesses. And in 2018, voters approved a ballot initiative legalizing recreational marijuana use, which became the Michigan Regulation and Taxation of Marihuana Act, Mich. Comp. Laws § 333.27951.

The following year, the City of Pontiac adopted ordinances permitting recreational marijuana uses in the City. It also amended its zoning ordinances to create Medical Marijuana Overlay Districts, which granted permission for certain medical marijuana businesses to operate within certain portions of the City. *See* Pontiac, Mich., Code § 3.1101-3.1102. Outside those districts, properties with the requisite business zoning must obtain a special exception permit from the City’s Planning Commission. *Id.* §

3.1106. In addition, marijuana businesses also must obtain a business license from the City (which has a detailed set of requirements) and a license from the State. *Id.* §§ 3.1105, 26-1498(c) (listing required information).

Rubicon began the redevelopment process on March 29, 2019, when it acquired the Glenwood property pursuant to a purchase agreement that required it to “undertake in good faith to take all such steps necessary to submit all required plans and applications to the City of Pontiac necessary for a marijuana license as soon as reasonably practicable.” ECF No. 63-2, PageID.1163. All parties agree that the Glenwood property falls outside of the Overlay Districts. On July 3, 2019, Rubicon applied to rezone the property from C-1 (local business/residential mixed use) to C-3 Corridor Mixed Use and M-1 Limited Industrial designations, but not to expand the Overlay Districts. ECF No. 57-3. Although the City’s marijuana ordinance permits certain medical marijuana uses outside the Overlay Districts in these zones, medical marijuana growing and processing facilities — the primary uses Rubicon intended for the site — are explicitly excluded. *See* Pontiac, Mich., Code § 3.1109. It appears that City planning staff intended to resolve this issue by having the City Council place the Glenwood property within an Overlay District. *See* ECF No. 57-8, PageID.758. But that never happened.

Rubicon’s zoning application ultimately received a favorable recommendation from the City’s Planning Commission, and on January 21, 2021, the City

Council voted to approve the zoning change. The Council also entered into a Conditional Rezoning Agreement (CRA) with Rubicon, which included the following language: “The zoning use district regulations for the Property shall be based upon the C-3 Corridor Commercial and M-1 Light Manufacturing for the purposes of allowing cannabis growing and processing facilities along with a mix of traditional users allowed under the C-3 and M-1 zoning districts.” ECF No. 57-10, PageID.772. However, it does not appear that the City acted on a staff recommendation to add the property to the Overlay Districts.

While Rubicon’s zoning application was pending, it began formalizing relationships with potential tenants. Pharmaco, Inc., a medical marijuana company, applied for City business licenses to operate as a medical marijuana grower and processor on the property. ECF No. 57-4. It then executed a lease agreement with Rubicon in February of 2020, shortly after the re-zoning had been approved by the City Council. ECF No. 57-13. The operative terms of that lease governing when Rubicon would be entitled to rent payments are disputed. In March of 2020, Rubicon signed a letter of intent with Hollywood Markets to operate a grocery store on the site. ECF No. 57-14. And in July of 2020, Family Rootz, LLC filed its applications for City licenses to grow and process medical marijuana on the site, but there is no evidence in the record that it signed a lease with Rubicon. ECF Nos. 57-21, 57-22.

On July 15, 2020, City Clerk Garland Doyle notified Pharmaco that its applications were missing several required items and gave it fourteen days to rectify the issues. ECF Nos. 57-15, 57-16. Pharmaco appears to have timely corrected the problems Doyle had identified. After nearly six months, however, neither Pharmaco nor Family Rootz had obtained City approval. On January 7, 2021, Rubicon's attorneys wrote a letter to the City Council complaining about the delays in Doyle's processing Pharmaco's and Family Rootz's applications. ECF No. 63-6. According to the attorney's letter, Clerk Doyle had indicated to the applicants that he was unable to issue licenses because of his belief that the proposed uses were not allowed outside the Medical Marijuana Overlay Districts. *Id.* at PageID.1188. Rubicon's counsel insisted, however, that Doyle's interpretation of the City's ordinances was incorrect, because section 3.1106 allows medical marijuana uses outside an Overlay District subject to Planning Commission approval, and the CRA expressly contemplated growing and processing operations on the site. *Ibid.* It is not clear if the letter prompted any Council action. Nevertheless, on January 29, 2021, Doyle wrote to both Pharmaco and Family Rootz identifying further deficiencies with their applications, including their lack of a security plan, an appropriate scale diagram, and a location map signed by a licensed surveyor. ECF Nos. 57-24, 57-25, 57-26, 57-27. They were allowed 21 days to provide additional documentation. Curiously, each of the notices states that the applicant's compliance with Zoning Ordinance (application section 9(b)(2)) was "satisfactory" because the site was zoned M-1. But the form included this

comment: “Applicant to obtain Special Exception Permit and site plan approval by Planning Commission.” *E.g.*, ECF No. 57-27, PageID.901.

At its February 16, 2021 meeting, the City Council heard from Clerk Doyle and representatives from Rubicon about the dispute over the issuance of the permits. ECF No. 63-7, PageID.1192. The Rubicon team stated that they had anticipated obtaining the Special Exception Permits from the Planning Commission *after* Pharmaco and Family Rootz had received their City business licenses but had secured them earlier that month “in an attempt to move things forward.” ECF No. 63-8, PageID.1201. Clerk Doyle continued to assert that it would be illegal for him to issue a “license” to a marijuana business operating outside an Overlay District. ECF No. 63-9, PageID.1214. In his presentation notes, Doyle wrote that the CRA contemplated an amendment to the zoning ordinance — likely to amend the Overlay Districts — and faulted the Planning Commission for failing to bring the amendment forward. ECF No. 63-5, PageID.1184-85. The record contains no indication that the City Council took action after the hearing.

Rubicon ultimately decided to take legal action. Along with Family Rootz, it filed a complaint against the City and Doyle in the Oakland County, Michigan circuit court seeking mandamus and declaratory relief in an effort to secure the business licenses. ECF No. 57-32. The court denied the request for mandamus but ultimately granted a motion for declaratory relief on May 21, 2021. The court ordered

the City to issue licenses to Family Rootz and Pharmaco. ECF No. 57-34, PageID.996. The same day, Doyle issued yet another round of deficiency notices to Pharmaco and Family Rootz, *see* ECF Nos. 57-28, 57-29, 57-30, 57-31, but he ultimately complied with the court order and issued Family Rootz's approval on May 27, 2021 and Pharmaco's on June 3, 2021. ECF Nos. 57-37, 57-38.

Apparently, the approvals came too late to save the project. In a written statement styled as an "affidavit," which is neither dated nor sworn to, Pharmaco vice president Fernando Carlo stated that he terminated the lease agreement with Rubicon on June 18, 2021 "due to lengthy delays." ECF No. 57-55, PageID.1100. Family Rootz pulled out of the project on September 11, 2021. Aff. of Jeremiah Kromrei, ECF No. 63-10, PageID.1219. (This document suffers from the same defects.) As its partners pulled out, Rubicon was unable to secure financing for the project from its lenders.

B.

Plaintiff Joseph Brown, Rubicon's managing member, alleges that Rubicon's state court lawsuit sparked recriminations from City officials. He leads Browne Design Consultants, LLC, also a plaintiff. In an undated declaration, Brown states that Browne Design was retained by SK Properties (another developer) to assist with a separate project in Pontiac. Undated Decl. of Joseph Brown, ECF No. 63-3, PageID.1177.

On August 22, 2022, SK Properties' principal, Tzvi Koslowe, met with Pontiac Mayor Timothy Greimel, councilwoman Melanie Rutherford, and former Planning Manager Vern Gustafsson. *Ibid.* During the meeting, Mayor Greimel allegedly told Koslowe that if he wanted to obtain City approval for his project, he needed to fire Browne Design. *Ibid.* Somewhat oddly, the plaintiffs' discovery responses indicate that Councilwoman Rutherford made the statement about canceling the contract, ECF No. 67-4, PageID.1276, but their briefing indicates that the mayor said that. In any event, Brown says that SK Properties ultimately canceled the contract with Browne Design as a result of the request. For his part, Greimel denies telling Koslowe that he needed to cancel the contract and insists that he merely shared his opinion that Brown had not performed well at a meeting intended to explain SK's project to the public and that Koslowe might want to find an alternate spokesperson for future events. ECF No. 67-6, PageID.1290-91.

C.

In January of 2023, Rubicon, Browne Design, and Brown filed this lawsuit against the City and Doyle in Oakland County, Michigan circuit court. The defendants removed the case to this Court. The four-count complaint alleges that the "defendants" denied Rubicon the equal protection of the laws via 42 U.S.C. § 1983 by selectively "targeting" the plaintiffs and their property for enforcement of certain procedures, presumably for approval of zoning permits of business licenses for their prospective tenants (Count I);

deprived Rubicon of property without due process (Count II); unlawfully retaliated against the “plaintiffs,” presumably Brown and his company, based on the protected activity of filing the first case in the state circuit court (Count III); and committed a taking of Rubicon’s property without just compensation in violation of the Fifth Amendment (Count IV).

Discovery is closed and the defendants move for summary judgment on all counts.

II.

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). When reviewing the motion record, “[t]he court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). “The court need consider only the cited materials, but it may consider other materials in the record.” Fed. R. Civ. P. 56(c)(3).

The party bringing the summary judgment motion must inform the court of the basis for its motion and identify portions of the record that demonstrate that

no material facts are genuinely in dispute. *Id.* at 558 (citing *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002)). “Once that occurs, the party opposing the motion then may not ‘rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact’ but must make an affirmative showing with proper evidence in order to defeat the motion.” *Ibid.* (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)).

A.

At oral argument on the motion, the parties acknowledged that the pleadings actually frame two lawsuits in one. One involves Rubicon’s various constitutional violation theories based on the delay in issuing business licenses and permits to its prospective tenants, which, it says, doomed the development project. The other is the First Amendment retaliation claim.

Before turning to the parties’ arguments, it is useful to identify the claims that pertain to each of the plaintiffs and which claims are directed at either or both of the defendants. First, there are no allegations — and certainly no evidence — that Browne Design Consultants or Brown personally suffered any harm due to the unraveling of the Glenwood project; the plaintiffs’ due process, equal protection, and takings claims all are associated with that issue. Those claims will be dismissed as to plaintiffs Brown and Browne Design. Second, there is no evidence that Rubicon was harmed by the alleged retaliation, which took place

more than a year after the failure of the development. That claim will be dismissed as to plaintiff Rubicon. Third, there is no suggestion in the record that defendant City Clerk Doyle played any role in the alleged retaliation by the City against Brown and Browne Design. That claim (Count III) will be dismissed as to defendant Doyle.

B.

On Counts I, II, and IV, the defendants argue that Clerk Doyle is entitled to qualified immunity, and that the plaintiffs have identified no custom or policy that would justify *Monell* liability against the City. The plaintiffs maintain that Doyle is not entitled to qualified immunity because he violated their constitutional rights by refusing to issue business licenses to which Rubicon was entitled under the CRA and could not reasonably have believed that his position was correct. Responding to the *Monell* argument, they contend that Doyle had final decision-making authority with respect to the issuance of approvals for medical marijuana facilities and that the City Council ultimately adopted his position during its February 2021 meeting when they heard from Doyle and representatives of Rubicon.

The qualified immunity doctrine insulates state actors from liability as long “as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Once the qualified immunity defense is raised, a plaintiff “must show that (1) the defendant violated

a constitutional right and (2) that right was clearly established.” *McDonald v. Flake*, 814 F.3d 804, 812 (6th Cir. 2016) (citing *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680 (6th Cir. 2013)). Defendant Doyle argues that Rubicon cannot establish either element. The motion can be decided on the first element.

For the first component, the constitutional claims are brought via 42 U.S.C. § 1983, which provides a vehicle for individuals to seek redress in court for violations of rights secured by the Constitution and laws of the United States. To state a claim under that section, “a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law.” *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009) (quoting *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006)). It is well settled that a civil rights plaintiff must allege the personal involvement of a defendant to state a claim under section 1983 and that liability cannot be based upon a theory of *respondeat superior* or vicarious liability. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691-92 (1978). “Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see also Frazier v. Michigan*, 41 F. App’x 762, 764 (6th Cir. 2002) (citing *Hall v. United States*, 704 F.2d 246, 251 (6th Cir. 1983)) (holding that the “complaint must allege that

the defendants were personally involved in the alleged deprivation of federal rights.”).

To prevail on a section 1983 claim against a municipal authority, the plaintiffs must show that (1) they suffered a constitutional violation and (2) either a custom of toleration for illegal practices or the ratification of a violation by an official with final decision-making authority directly caused the constitutional injury. *Monell*, 436 U.S. at 691 (holding that “a municipality cannot be held liable under § 1983 on a *respondeat superior* theory”); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (holding that a plaintiff can demonstrate an official policy by pointing to a decision of an official with final decision-making authority over the matter at issue).

1.

Rubicon bases its Equal Protection claim in Count I of its complaint on the theory that the City treated marijuana businesses located in the Overlay District differently from Rubicon’s property, despite the zoning approval. It also contends that there is evidence that Rubicon was intentionally targeted for mistreatment based on the fact that its tenants received less time to cure deficiencies in their applications.

To prevail on its equal protection claim, Rubicon must show that “the government treated [it] ‘disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational

basis.” *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Township of Shelby, Michigan*, 470 F.3d 286, 299 (6th Cir. 2006)). Where, as here, a plaintiff does not contend that a municipality’s actions burden any fundamental right and has not suggested that it is a member of any suspect class, then the plaintiff still may proceed as a “class of one,” but to do so it must put forth evidence that it “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

That is no easy task, because “there is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary.” *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). “If there is any reasonably conceivable state of facts that could provide a rational basis for the state’s conduct, then the state has not violated the constitution.” *Systematic Recycling LLC v. City of Detroit*, 635 F. App’x 175, 181 (6th Cir. 2015) (citations and quotations marks omitted).

Rubicon’s framing of its equal protection class-of-one claim requires that it demonstrate that “(1) the City ‘intentionally treated’ [it] ‘differently from others similarly situated’ and (2) ‘there is no rational basis for the difference in treatment.’” *Green Genie, Inc. v.*

City of Detroit, 63 F.4th 521, 527 (6th Cir. 2023) (quoting *Vill. of Willowbrook*, 528 U.S. at 564). Starting with the first element, Rubicon does not point to any direct evidence that resembles intentional discrimination. Although the complaint includes allegations of First Amendment retaliation, the factual allegations are tied to its co-plaintiffs, not to it; and the underlying allegations are based on statements by City officials allegedly made more than a year after the denial of permits to Rubicon’s tenants. Rubicon’s briefing does not suggest that the statements are evidence of intentional discrimination.

This lack of direct evidence is not necessarily fatal. A common approach “is to attempt to demonstrate intentional discrimination through circumstantial evidence.” *Green Genie*, 63 F.4th at 527-28 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977)). That requires showing “that the adverse treatment . . . was such a stark outlier from an otherwise consistent pattern of favorable treatment in similarly situated cases.” *Stanislaw v. Thetford Twp.*, No. 23-1756, 2025 WL 233215, at *6 (6th Cir. Jan. 17, 2025) (quoting *Green Genie*, 63 F.4th at 528). “Similarly situated’ is a term of art — a comparator business must be similar in ‘all relevant respects.’” *Paterek v. Vill. of Armada*, 801 F.3d 630, 650 (6th Cir. 2015) (quoting *United States v. Green*, 654 F.3d 637, 651 (6th Cir. 2011)). This comparison is a product of the specific “facts and context of the case.” *Loesel v. City of Frankenmuth*, 692 F.3d 452, 463 (6th Cir. 2012).

Rubicon maintains that Doyle and the City treated it differently than similarly-situated entities, in this case, property owners whose properties fell inside the City's Medical Marijuana Overlay Districts. They point out that other businesses, including PGSH Holdings, LLC, PAAJK Holdings and Nature's Gold, received letters from Doyle that provided additional time to furnish missing information compared with its prospective tenants and that these businesses never needed to seek legal redress to obtain permits. Rubicon's position about the relevance of these potential comparators is somewhat confusing. For instance, it does not represent that they also are property owners. This difference could be overlooked, but its argument that these businesses received more favorable treatment than its own prospective tenants is at odds with the record. There is no evidence that any of the three businesses it identifies ever received a City business license. Instead, it appears that one of the proposed comparators' applications ultimately was denied. *See* ECF No. 57-36. And the deficiency notices received by the proposed comparators and its own tenants are notable for their similarity. Among other things, the deficiency notices issued to PGSH Holdings, LLC, PAAJK Holdings and Nature's Gold identify issues with the businesses' security plans, diagrams, proposed graphic materials, floor plans, business plans, community outreach strategies, and proof of insurance. *See* ECF Nos. 57-17, 57-18, 57-19. Pharmaco and Family Rootz's applications faced similar issues, according to their deficiency notices. *See* ECF No. 57-16 (identifying Pharmaco's lack of a capital investment plan, explanation of economic benefits, facilities sanitation plan, and proof of

insurance); ECF No. 57-24 (noting that application lacked compliant security plan, floor plan, scale diagram, and location map); ECF No. 57-26 (listing similar issues with Family Rootz's applications). Rubicon's position that its tenants received fewer days to correct deficiencies (14 compared to 21) also appears overstated and only seems to have been the case for Pharmaco's deficiency notice in July of 2020, the earliest in the record. Pharmaco's second deficiency notice in January of 2021 — issued concurrently with Family Rootz's first notice — offers 21 days to correct deficiencies. ECF Nos. 57-24; 57-26. Even if there were some discrepancy, Rubicon does not explain how this timing difference rises to the level of an equal protection violation, especially since Pharmaco supplied the additional information on time. *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 866 (6th Cir. 2012) ("Gaps in time and context may suggest a change in policy rather than differential treatment."). Rubicon never suggests that its tenants were harmed by any shortened response window. The record simply does not bear out Rubicon's assertion that its tenants were treated differently than the comparators it identifies in any material way. The failure of proof on this basic element is fatal to its equal protection claim.

Even if Rubicon had demonstrated that its proposed comparators were similarly situated and the record revealed a stark difference in treatment, it runs headlong into Sixth Circuit caselaw holding that a City's "sloppy administration of its permitting system and misapplication of local law is insufficient to show an equal protection violation." *Green*

Genie, 63 F.4th at 529. At most, its proofs show that Doyle's assertion that he could not issue permits to the marijuana cultivation and processing tenants was incorrect, not that it was driven by any ill-will or intentional discrimination. Rubicon has not created a fact question on the essential elements of its equal protection claim. That claim will be dismissed.

2.

In Count II of its complaint, Rubicon confounds procedural and substantive theories in its denial-of-due-process claim. For each theory, however, Rubicon must show a deprivation of a constitutionally protected right (life, liberty, or property). In this case, the parties agree that the right at issue would be a property right. *See Prater v. City of Burnside*, 289 F.3d 417, 431-32 (6th Cir. 2002). The parties part ways about whether the plaintiffs' claimed interest is constitutionally protected, at least as to Rubicon.

a.

The defendants contend that the property interests in this case belong to Rubicon's tenants, Pharmaco and Family Rootz. That argument does not persuade. Rubicon's property interest is in the rents it would have earned from its confirmed tenants had they secured the business licenses that the City delayed issuing. "Under principles established in prior United States Supreme Court cases, . . . a landlord's interest or expectation in receiving monies due under a rental agreement is a 'property interest' within the meaning of the fourteenth amendment." *Chernin v. Welchans*,

844 F.2d 322, 325 (6th Cir. 1988) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972)). The evidence establishes that Rubicon’s expectation of rents was sufficiently certain to extend beyond speculation, hope, or desire. See *Green Genie, Inc. v. City of Detroit, Michigan*, 63 F.4th 521, 526 (6th Cir. 2023) (recognizing that “one must have a ‘legitimate claim of entitlement to’ the purported property interest, as opposed to an abstract need or desire”) (citing *Roth*, 408 U.S. at 577). Pharmaco had signed a lease, and both it and Family Rootz had applied for business licenses with the intention of occupying the buildings.

The viability of those prospective leases, however, was contingent on the issuances of the business permits and licenses, which Rubicon had attempted to secure through its zoning negotiations with the City. “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire” and “more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (quotations omitted). In the land-use context, the Sixth Circuit has explained that a property owner may have a protected property interest in an existing zoning classification or in a re-zoning after it is approved. *EJS Properties*, 698 F.3d at 856. In some cases, a property interest arises pre-approval if the public body lacks discretion to deny it. See *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th

Cir. 1992). If, however, a public body retains discretion “to deny . . . a conditional zoning certificate . . . even if [it] complie[s] with certain minimum, mandatory requirements,” then the owner does not have a legitimate claim of entitlement to that use. *Ibid.* But “[s]uch a property interest would exist . . . if the board’s discretion were so circumscribed that approval of the plaintiff’s proposed use of the property became mandatory once he complied with the minimal requirements imposed on him.” *Brown v. City of Ecorse*, 322 F. App’x 443, 445-46 (6th Cir. 2009).

Here, Rubicon argues that it had the zoning change in hand by virtue of the CRA signed by the City converting the zoning on the property to C-3 and M-1, which was necessary for the tenants’ businesses to operate. That is true. However, that zoning change while necessary, was not a sufficient condition for the leases to have any value. A marijuana business seeking to open its doors also must obtain a city business license, which comes with its own host of eligibility criteria and discretionary determinations. Clerk Doyle initially turned back the tenants’ business license applications because of deficiencies, which they attempted to correct. But he eventually expressed the opinion that the zoning change itself was insufficient to allow him to issue those licenses because the Glenwood property had not yet been included in an Overlay District, or, alternatively, no one had obtained a Special Exception Permit, *see* Pontiac, Mich., Code § 3.1106, which, he thought, was a required condition precedent for the uses that the tenants contemplated.

Doyle's reading of the Pontiac ordinances was reasonable. Certainly, the CRA included certain representations about the operation of medical marijuana growing and processing businesses on the site, stating that the purpose of the rezoning was to "allow[] cannabis growing and processing facilities." ECF No. 57-10, PageID.772. But these uses only are permitted in the C-3 and M-1 zoning district once a business applicant obtains a special exception from the Planning Commission. *See* Pontiac, Mich. Code § 3.1109. It is far from clear that the language in the CRA exempted Rubicon's project from the typical requirement for these uses in the zoning code that they receive Planning Commission approval. But because a factfinder could conclude reasonably that the City's intention when executing the CRA was to allow a marijuana business to operate on the Glenwood property (and in fact the state circuit court actually reached that conclusion in an earlier lawsuit), Rubicon's expectation in its tenants' entitlement to the issuance of the business licenses was "legitimate." *Castle Rock*, 545 U.S. at 756; *Silver*, 966 F.2d at 1036. And a reasonable factfinder, in turn, could find that Rubicon might have received rents from both tenants had their applications not been held up.

The defendants also argue, however, that even if Rubicon does have a property interest, it is not a legitimate one protected by the Due Process Clause because marijuana cultivation remains illegal under federal law. Michigan has legalized many aspects of marijuana cultivation, but that

is not necessarily dispositive. The Supreme Court has explained that “[a]lthough the underlying substantive interest is created by ‘an independent source such as state law,’ *federal constitutional law* determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.” *Castle Rock*, 545 U.S. at 757 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)). As the defendants point out, some courts have expressed deep skepticism that marijuana-affiliated businesses have legitimate protectable interests in their property because marijuana possession remains illegal under federal law. *See, e.g., Borges v. Cnty. of Mendocino*, 506 F. Supp. 3d 989, 998-99 (N.D. Cal. 2020) (“[M]arijuana cultivation remains illegal under federal law. As such, the Court agrees with the reasoning of the other courts that have addressed this question and concludes that plaintiffs do not have federally protected property interest in cultivating medical marijuana and thus that they cannot state a claim under § 1983 for violation of their due process rights.”); *Grandpa Bud, LLC v. Chelan Cnty. Wash.*, No. 19-51, 2020 WL 2736984, at *4 (E.D. Wash. May 26, 2020) (“The Court finds that the alleged property interest in this case is indistinguishable from federally unauthorized cannabis cultivation, which is not a protectable property interest under the U.S. Constitution.”); *Benno v. Shasta Cnty., Calif.*, No. 16-01110, 2020 WL 7024059, at *7 (E.D. Cal. Nov. 30, 2020) (“[T]here is no property right in medical marijuana that is recognized by the Fourteenth Amendment.”).

The defendants also cite *Virdis Laboratories, LLC v. Kluytman*, No. 22-283, 2023 WL 5058087, at *2-3 (W.D. Mich. June 20, 2023), *report and recommendation adopted*, 2023 WL 4861698 (W.D. Mich. July 31, 2023), where the district court reached a similar conclusion. In that case, two licensed Michigan marijuana facilities sued members of the State’s Marijuana Regulatory Agency after it conducted a recall of certain products, alleging that the officials violated their rights under the Fourteenth Amendment. *Virdis*, 2023 WL 5058087, at *1. The court held that the plaintiffs had failed to state a claim, reasoning that although Michigan had legalized the use of marijuana, it remained contraband under federal law, so there could be no federal constitutional property interest “in [the plaintiff’s] license to perform marijuana safety tests [or] a liberty interest to engage in this endeavor.” *Id.* at *2. The court rejected the plaintiffs’ argument that it held a property interest in its state-issued license to conduct marijuana testing, emphasizing that this alleged interest “do[es] not exist in a vacuum” and must be considered alongside the fact that the license “authorizes Plaintiff to perform testing on a product which the United States has prohibited.” *Ibid.*

The plaintiffs here make little effort to respond to the argument and instead merely repeat their contention that Rubicon had “interests in using its land for the purpose for which it had been re-zoned” ECF No. 63, PageID.1134. But that oblique reference is sufficient to distinguish this case from the decisions cited above, which deal with a claimed property right to possess, cultivate, test, or distribute marijuana,

medical or otherwise. Rubicon’s claimed property right is in the rents that it would derive from the leases that were never consummated because of the City’s delay issuing business licenses. It is worth emphasizing that the right was not in the business licenses themselves, but in the revenue that would have been generated had their prospective tenants been allowed to conduct business on the Glenwood property. Compare *Naturale & Co. v. City of Hamtramck*, 614 F. Supp. 3d 575 (E.D. Mich. 2022), where the court held that two marijuana companies had a protectable property right in a certificate of occupancy for buildings they had leased and outfitted pursuant to permits issued by the City. *Id.* at 579. Despite the City’s contention that the plaintiffs had no due process rights in the possession or cultivation of marijuana, the court found that this argument “conflate[s] plaintiffs’ potential right to sell marijuana with plaintiffs’

added that a certificate of occupancy is not necessarily determinative of its ultimate state approval to sell marijuana at the site and, in fact, was *not* a final approval to sell marijuana. *Ibid.*; *see also Santa Barbara Patients’ Collective Health Co-op. v. City of Santa Barbara*, 484 F. App’x 153, 154 (9th Cir. 2012) (affirming the holding that the district court acted reasonably in finding that a medical marijuana dispensary was likely to succeed on its claim that it had a vested property right in operating the dispensary).

Recognizing Rubicon’s property right would not require the Court to endorse activity that has been

declared unlawful under federal law. Rubicon, after all, is not seeking redress for the defendants' interference with its own marijuana business. "[T]he fact that [the plaintiffs'] economic harms [are] related to cannabis is not relevant to whether a court could, theoretically, fashion a remedy to redress their injuries." *Shulman v. Kaplan*, 58 F.4th 404, 409 (9th Cir. 2023). Rubicon's property interest is "a 'legitimate claim of entitlement' protected by the Due Process Clause." *Castle Rock*, 545 U.S. at 757.

b.

Once the plaintiffs have established that they have a property interest protected by the Due Process Clause, they then must show "that they were deprived of this property interest; and that the [government] did not afford them adequate pre-deprivation procedural rights." *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 900 (6th Cir. 2019). In addition, where the allegation is that the plaintiffs were denied a fair hearing, the "procedural due process claim requires a showing of prejudice." *Mendoza-Garcia v. Barr*, 918 F.3d 498, 508 (6th Cir. 2019) (citing *Graham v. Mukasey*, 519 F.3d 546, 549 (6th Cir. 2008) ("In order to prevail on a procedural due process challenge, Graham must also show prejudice. Indeed, we need not address the merits of a claim if there is no demonstration of prejudice."); *Al Khouri v. Ashcroft*, 362 F.3d 461, 466-67 (8th Cir. 2004) (property right to certificates of occupancy for their leaseholds." *Id.* at 580. The court 2004); *Agyeman v. INS*, 296 F.3d 871, 884 (9th Cir. 2002)). "To prove prejudice, he must show that his 'claims could have

supported a different outcome.” *Ibid.* (quoting *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006)). In order words, they must establish that the information that they wanted to present could have changed the outcome of the proceeding, if they had been afforded the full benefit of the process to which they were entitled. *Ibid.*

The plaintiffs’ complaint does not plead facts suggesting that Rubicon suffered a “deprivation” as such, or that the City failed to afford it adequate procedures to address the delay encountered with the business licenses of its prospective tenants. They take a different position in their brief opposing the defendants’ summary judgment motion, asserting that Clerk Doyle’s refusal to issue the business licenses was the critical deprivation. However, the record does not disclose a formal denial by the City of the business license applications, and there is no discrete act that effectuated an interference with a business license, as one might see, for example, with a license revocation, *e.g.*, *Barry v. Barchi*, 443 U.S. 55, 65-66 (1979), or the imposition of a penalty, *e.g.*, *Daily Servs., LLC v. Valentino*, 756 F.3d 893 (6th Cir. 2014). Identifying the deprivation that the plaintiffs allege is important for determining the appropriate procedures that the City should have afforded in advance. *See Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976) (declaring that other than giving a person “notice of the case against him and [an] opportunity to meet it,” there are no hard and fast rules that prescribe the adequacy of process demanded by the Constitution).

Here, the dispute centered on Clerk Doyle's reading of the city ordinances and his understanding of the requirements for issuing the business licenses to Pharmaco and Family Rootz. Rubicon was able to take that issue to the city council and air it before any final decision was made to refuse the license. Doyle had notified the applicants on January 29, 2021 of deficiencies in their applications, further indicating the expectation that they would "obtain [a] Special Exception Permit and site approval from the Planning Commission." ECF No. 57-27, PageID.901. Rubicon took exception that any further approvals were needed after the CRA was executed, and its attorneys and representatives presented a fulsome rebuttal in writing and at the City Council meeting of February 16, 2021. Letter from Attorney Weikert, ECF 63-6, PageID.1187-89; Meeting Minutes, ECF 63-7, PageID.1192.

Again, the record does not contain a specific denial of the license applications after that Council meeting, although one certainly can infer one from the City's inaction, coupled with the litigation Rubicon commenced in the state court to obtain the approvals. However, no matter how one might characterize the alleged "deprivation," the record does not support the claim that it was due to constitutionally inadequate procedures. The plaintiffs' procedural due process claim fails on this record.

c.

Courts have recognized that the Due Process Clause includes a substantive component, which acts as a

check on the power of the government vis-à-vis its citizens. “[S]ubstantive due process . . . serves the goal of preventing governmental power from being used for purposes of oppression, ‘regardless of the fairness of the procedures used.’” *Howard v. Livingston Cnty., Michigan*, No. 21-1689, 2023 WL 334894, at *11 (6th Cir. Jan. 20, 2023) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). It prohibits the government from infringing on “fundamental rights” without sufficient justification. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). To establish a substantive due process claim, a plaintiff must show that “(1) a constitutionally protected property or liberty interest exists, and (2) the constitutionally protected interest has been deprived through arbitrary and capricious action.” *Paterek v. Vill. of Armada, Mich.*, 801 F.3d 630, 648 (6th Cir. 2014) (quoting *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 573 (6th Cir. 2008)).

“[T]he plaintiff must allege ‘conduct intended to injure in some way unjustifiable by any government interest’ and that is ‘conscience-shocking’ in nature.” *Mitchell v. McNeil*, 487 F.3d 374, 377 (6th Cir. 2007) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). “What seems to be required is an intentional infliction of injury . . . or some other governmental action that is ‘arbitrary in the constitutional sense.’” *Stemler v. City of Florence*, 126 F.3d 856, 869 (6th Cir. 1997) (quoting *Lewellen v. Metro. Gov’t of Nashville & Davidson Cnty.*, 34 F.3d 345, 351 (6th Cir. 1994)). If a party’s actions survive rational basis scrutiny, it has not acted arbitrarily or capriciously. *Shavers v. Almont Twp., Mich.*, 832 F.

App'x 933, 940 (6th Cir. 2020) (citing *Brody v. City of Mason*, 250 F.3d 432, 438 (6th Cir. 2001)).

The Sixth Circuit has explained that “[t]o sustain a substantive due process claim[] in the context of zoning administrative action, a plaintiff must show that the state administrative agency has been guilty of ‘arbitrary and capricious action’ in the strict sense, meaning that there is no rational basis for the administrative decision.” *Systematic Recycling LLC v. City of Detroit*, 635 F. App'x 175, 182 (6th Cir. 2015) (quoting *Brody v. City of Mason*, 250 F.3d 432, 438 (6th Cir. 2001). “The administrative action will withstand substantive due process attack unless it is not supportable on any rational basis or is willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case.” *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992) (citation modified).

The plaintiffs maintain that Doyle’s delay in approving the permits was arbitrary and capricious because it was contrary to the City’s zoning policy, and it was obvious that the CRA permitted marijuana grower and processor businesses on the site. They also dispute that they must demonstrate that Doyle’s actions “shock the conscience.” But in *Golf Village North, LLC v. City of Powell*, the Sixth Circuit held that in the zoning context, a plaintiff must demonstrate a level of arbitrariness “so extreme that it ‘shocks the conscience’” in order to state a substantive due process claim. 42 F.4th 593, 601 (6th Cir. 2022) (quoting *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014)). The court of appeals observed

that “there are very few zoning cases that meet this mark.” *Ibid.* As guideposts, it pointed to two cases where substantive due process claims had been allowed to proceed: where “the government prosecuted a plaintiff for not having a land permit even though the prosecutor knew a permit had run with the land,” *ibid.* (citing *Paterek*, 801 F.3d at 648-49), and “an ordinance requiring homeowners to mow large swaths of land entirely unrelated to their residences,” *id.* at 601-02 (citing *Shoemaker v. City of Howell*, 795 F.3d 553, 567 (6th Cir. 2015)).

Rubicon’s evidence fails to meet this standard. Viewing the facts in Rubicon’s favor, the plaintiffs have not presented a cognizable substantive due process claim based on conscience-shocking conduct. It asserts that Doyle and the City “deliberately def[ie]d” the terms of the rezoning agreement and points to the fact that it had to resort to state court litigation to compel the issuance of permits. ECF No. 63, PageID.1140. But there is no evidence that Doyle’s rationale for refusing to grant the permits was motivated by ill will or was arbitrary in the constitutional sense. At most, the plaintiffs’ proofs show that Doyle erred in determining whether marijuana cultivation and processing businesses were entitled to operate on the Glenwood parcel based on his reading of the CRA and relevant ordinances. And that reading was not unreasonable; the city ordinances allowed the applicants’ proposed business uses only in Overlay Districts or in other areas properly zoned after the Planning Commission issued a Special Exception Permit. Pontiac, Mich., Code §§ 3.1101-3.1102, 3.1105, 26-1498(c). True, the state

court later determined that his interpretation was incorrect, but the Sixth Circuit has held that there is no authority suggesting that a “simple misinterpretation and misapplication of a municipal ordinance” rises to the level of a substantive due process violation. *Johnson v. City of Saginaw*, 980 F.3d 497, 514 (6th Cir. 2020). If it were otherwise, “zoning administrators would be on the hook for every wrong interpretation they make.” *Golf Vill. N., LLC*, 42 F.4th at 602.

Contrary to displaying hostility to the plaintiffs’ tenants’ proposed uses, the evidence suggests that Doyle presented to the City Council his view of action it should take so that he could approve Pharmaco’s and Family Rootz’s proposals. ECF No. 63-5, PageID.1185. That suggests a *lack* of ill will, hardly conscience shocking. It is not apparent from the record whether the City took any action on his suggestion, but the plaintiffs filed their action for mandamus and declaratory relief in Oakland County Circuit Court shortly thereafter, which ultimately resulted in the issuance of permits in May and June of 2021. At most, the evidence suggests that the permits were held up for a few months. Considering that deficiencies were identified in Pharmaco’s and Family Rootz’s applications as late as January 2021, it is not clear that they would have been entitled to permits immediately in any event. Even crediting Rubicon’s assertion that the delay caused the project’s demise, it simply has not pointed to facts suggesting that the delay itself was conscience shocking or that Doyle’s opinion about his authority to issue permits to its tenants was clearly unjustified.

The defendants are entitled to summary judgment on Count II of the complaint.

3.

Rubicon also alleges that the City's actions amounted to a regulatory taking of its property for which it is entitled to just compensation.

The Fifth Amendment forbids the government from taking private property for public use without just compensation contrary to the Fifth Amendment, which applies to the states. *See* U.S. Const. amdt. V.; *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897) (applying takings clause to the states). In some circumstances, the government's regulation of private property may "be so onerous" that it requires compensation under the Fifth Amendment. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021). The test for whether a so-called "regulatory taking" has occurred requires the Court to assess whether a claimant "has established a cognizable property interest for the purposes of the Just Compensation Clause." *Puckett v. Lexington-Fayette Urb. Cnty. Gov't*, 833 F.3d 590, 609 (6th Cir. 2016) (citation omitted). Then the court evaluates the factors set out by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which include "the economic impact of the regulation," its interference with reasonable investment-backed expectations, and the character of the government action. *Penn Cent.*, 438 U.S. at 124.

Rubicon has not presented evidence supporting a compensable taking claim. It does not dispute that its tenants ultimately received approval to operate. Instead, it focuses its claim on the *delay* encountered by its tenants receiving their approval, first caused by Doyle's alleged misinterpretation of the City's ordinances and then by Doyle's delay in issuing the permits after the state court ordered him to do so.

It is true that a delay to recognizing a rightful entitlement can be compensable. *See Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993)). But delays come in degrees. "[T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 334 (2002); *see also Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980). If it were otherwise, "every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking." *Tahoe-Sierra Pres. Council*, 535 U.S. at 335. In the zoning context, the Supreme Court has distinguished between situations amounting to "extraordinary delay" and "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 321 (1987). Narrowing further to the situation presented here, in circumstances where a state or local body denies a permit that a reviewing court later determines should have been issued,

courts “generally have rejected’ the claim that the delay amounted to a ‘compensable [] regulatory taking’ under the Fifth Amendment.” *Richmond Rd. Partners, LLC v. City of Warrensville Heights*, No. 24-3502, 2025 WL 737342, at *3 (6th Cir. Mar. 7, 2025) (quoting Edward H. Ziegler, Jr., *First English and normal delays—Illegal permit denial and temporary takings*, 1 Rathkopf’s *The Law of Zoning and Planning* § 6:28 (4th ed.)). The ultimate question whether the delay here is more “extraordinary” or “ordinary” is answered by considering the length of the delay, “the nature of the permitting process,” the reasons offered by the government, and whether the government acted in bad faith. *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001).

Any delay here is not so “extraordinary” as to require compensation. The date the alleged taking began is somewhat uncertain, and Rubicon does not cite a specific date it believes the taking occurred. Its theory appears to be that it was deprived of its property when Doyle determined that he could not grant any marijuana grower or cultivation license on the Glenwood property. It does not cite any evidence regarding the date Doyle first came to this determination, and the record suggests that this belief was not the entire basis for any delays, since Pharmaco’s and Family Rootz’s applications were marked as deficient for from the Planning Commission. The tenants received their permits in late May and early June, so the delay lasted approximately four months. That delay is insufficient to maintain a taking claim. Although the delay’s length is not the sole dispositive factor, courts

have denied claims based on delays that were far longer. *See Wyatt*, 271 F.3d at 1098 (collecting cases where delays ranging from sixteen months to eight years were held not to be extraordinary); *Richmond Rd. Partners*, 2025 WL 737342, at *4 (holding that one-year delay between permit denial and court order requiring issuance was not extraordinary). Even under the best-case scenario for Rubicon, which would consider the roughly year-and-a-half gap between the date of the CRA and the date Pharmaco and Family Rootz received their licenses, there was no extraordinary delay. The licensing process for marijuana businesses in the City of Pontiac appears relatively complex, Doyle offered cogent reasons for his views about whether he could issue the permits, and there is no suggestion that the City acted in bad faith. *Cf. Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447 510 (2009) (stating that “[a] year or two of delay, without bad faith, is exceedingly unlikely to be extraordinary”).

Rubicon seems to suggest that Doyle dithered in issuing permits after the state court’s order directing their issuance, but the record does not support that theory either. He issued Family Rootz’s permits five days after the court order and Pharmaco’s a few days later. ECF Nos. 57-37; 57-38; 57-39; 57-40. Rubicon has not pointed to any cases suggesting that delays of such duration are extraordinary. Because Rubicon cannot establish that its tenants experienced an extraordinary delay in receiving their permits, it cannot maintain a taking claim.

C.

The other self-contained lawsuit included in the complaint pits Joseph Brown and his company, Browne Design Consulting LLC — the “Brown plaintiffs” — against the City with a reasons other than the zoning issue. *E.g.*, Deficiency Notices, ECF Nos. 57-16; 57-26. For the reasons discussed previously, Rubicon’s tenants were not entitled to the permits before February 3, 2021, pending the Special Exception retaliation claim based on the protected conduct of suing the City to compel issuance of the business permits and licenses. The retaliatory act consisted of Pontiac Mayor Tim Greimel allegedly telling another developer — SK Properties — that it needed to cancel its contract with Browne Design to obtain City approval for its project.

To prevail on a First Amendment retaliation claim, the plaintiffs must offer evidence that (1) they were engaged in protected conduct; (2) an adverse action was taken against them that would deter a person of ordinary firmness from continuing to engage in that conduct; and “(3) there is a causal connection between elements one and two — that is, the adverse action was motivated at least in part by the plaintiff’s protected conduct.” *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (*en banc*); *see also Evans–Marshall v. Board of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 337 (6th Cir. 2010).

The parties do agree on some key points. The City, as it must, does not contest that filing a lawsuit is protected First Amendment activity. *See Eckerman v. Tenn. Dep’t of Safety*, 636 F.3d 202, 208 (6th Cir.

2010) (“The filing of a lawsuit to redress grievances is clearly protected activity under the First Amendment.”). It also does not appear to contest that conditioning SK Properties’ zoning approval on it terminating its relationship with Browne Design would constitute an adverse action against the Brown plaintiffs. *Powers v. Hamilton Cnty. Pub. Def. Comm’n*, 501 F.3d 592, 609 (6th Cir. 2007) (“Even if an intervening third party is the immediate trigger for the plaintiff’s injury, the defendant may still be proximately liable, provided that the third party’s actions were foreseeable.”).

The City argues, however, that the Brown plaintiffs did not engage in the protected conduct because they did not file the state court lawsuit. The plaintiffs acknowledge that they were not parties to the state court lawsuit, but they contend that courts have recognized that third-party victims of retaliation can maintain claims based on another party’s protected speech. *See Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011).

The Brown plaintiffs have the better argument on this point. Brown was a managing member of Rubicon, in addition to his role as principal of Browne Design. Decl. of Joseph Brown, ECF No. 63-3, PageID.1176. Rubicon brought suit under his leadership. It is no great stretch to infer that he exercised his First Amendment rights directly by causing Rubicon to file its lawsuit. If the City attempted to injure him by retaliating against his property (Browne Design), it is easy to conclude that he has a direct claim, and that Browne Design has a

third-party claim under established jurisprudence. Consider *Thompson*, where the Supreme Court recognized that a plaintiff who was fired after his employer was notified that his fiancée had filed an EEOC charge could maintain a claim under Title VII for unlawful retaliation because he was within the zone of interests the statute sought to protect. *Thompson*, 562 U.S. at 174, 178. That rationale has been recognized in the First Amendment retaliation context. See, e.g., *Fakhoury v. O'Reilly*, 837 F. App'x 333, 340-41 (6th Cir. 2020); *Nailon v. Univ. of Cincinnati*, 715 F. App'x 509, 516 (6th Cir. 2017); *Henley v. Tullahoma City Sch. Sys.*, 84 F. App'x 534, 540-42 (6th Cir. 2003); see also *Benison v. Ross*, 765 F.3d 649, 661 (6th Cir. 2014) (“The Benisons have provided evidence to support the reasonable inference that the Defendants decided to file a lawsuit against Kathleen to recover sabbatical pay because of her husband’s involvement in the no-confidence resolution.”).

The scope of relationships for which third-party retaliation is unconstitutional is somewhat hazy, and in the Title VII context where the theory originated, the Supreme Court recognized that there may be “difficult line-drawing problems concerning the types of relationships entitled to protection.” *Thompson*, 562 U.S. at 174. This uncertainty is relevant here, where the relationship between plaintiff Browne Design and Rubicon, the entity that engaged in the protected conduct, is not “familial” in the human sense of the term, despite their common parentage. Nevertheless, the Supreme Court has declined “to identify a fixed class of relationships for which third-

party reprisals are unlawful,” but counseled that the firing of a close family member probably always is sufficient while inflicting milder hardship on a “mere acquaintance” likely will not be enough. *Id.* at 175. Neither the Supreme Court nor the Sixth Circuit have restricted the theory to human family relationships and have emphasized that the inquiry ultimately is contextual. *Id.* at 175 (stating that “the significance of any given act of retaliation will often depend upon the particular circumstances.”). The policy motivations justifying the extension of First Amendment interests to related parties seem also to encompass corporate relatives. *Cf. Behne v. Halstead*, No. 13-0056, 2014 WL 1689950, at *18 (M.D. Pa. Apr. 29, 2014) (“[T]he First Amendment would be severely undermined if its protective ambit would not also encompass an employee who was retaliated against for his expressive association with a person who engaged in protected speech.”). In any event, any concern is mitigated by the City’s failure to present any argument that corporate relationships are categorically exempt from constitutional protection under a First Amendment retaliation claim. Browne Design maintains a sufficiently close legal relationship with Rubicon, by virtue of Brown’s leadership of both entities, to maintain a First Amendment retaliation claim.

But the Brown plaintiffs face other problems with this claim, based on the lack of supporting record evidence. The City correctly observes that there is no admissible evidence that any City official took an adverse action or that the Brown plaintiffs had a contract that was cancelled. There is a document in

the record from Brown asserting that SK Properties' manager, Tzvi Koslowe, told him that the mayor informed him that he needed to cancel its contract with Browne Design because Rubicon had sued the City. Brown decl., ECF No. 63-3, PageID.1177. The City contends that Brown's declaration should not be considered because it does not contain a date, is replete with hearsay statements, particularly as to his conversations with SK Properties' managers, and is not based on personal knowledge — presumably because he was not present at the meeting between City officials and SK Properties leaders. The last two points, although relevant, could be overcome by the statement of Vern Gustafsson, the City's former planning manager, who wrote that he attended the meeting where Mayor Greimel reportedly said that "if SK Properties wanted to obtain approval of its Shores at Crystal Lake project, then he needed to terminate the relationship between SK Properties and Browne Design Consultants, LLC." Gustafsson decl., ECF No. 63-11, PageID.1222-23. But the statements by both Brown and Gustafsson suffer from fatal defects that disqualify them from evidentiary consideration.

Neither of these two statements were made under oath. Nor do they comport with the statutory requirements for unsworn declarations. Section 1746 of Title 28 prescribes the manner of providing evidence in an unsworn declaration. There are four requirements: "unsworn declarations can be used as evidence 'only if' they are 'subscribed as true,' sworn under penalty of perjury, dated, and signed." *In re FirstEnergy Corp. Sec. Litig.*, No. 20-03785, 2024 WL 1984802, at *4 (S.D. Ohio May 6, 2024). The Sixth

Circuit has held that undated affidavits or declarations should not be considered as evidence. *See Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994). There is an exception to this rule where extrinsic evidence “demonstrate[s] the period when the document was signed.” *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 475 (6th Cir. 2002). However, in *Peters*, the defendant proffered an additional affidavit with further context. *Id.* at 476. There is no record evidence here that would place Gustafsson’s affidavit in a narrower time frame than after the events recited therein (2022) and the date the plaintiffs filed their response to the motion for summary judgment (December 20, 2024). Neither of these documents amount to competent proof that may be considered when deciding a motion for summary judgment. *See* Fed. R. Civ. P. 56(c)(1)(A); *Bonds*, 20 F.3d at 702 (holding that when deciding a motion for summary judgment, “unsworn affidavits . . . [that] were technically deficient . . . should not be considered Unsworn declarations are permitted to be used as evidence only if ‘subscribed . . . as true under penalty of perjury, and dated [.]’”) (citing 28 U.S.C. § 1746). Absent the statements of Brown and Gustafsson, the only evidence in the record regarding the alleged retaliation is Mayor Greimel’s own declaration that he did not retaliate but instead merely suggested to Koslowe that Brown was not an effective spokesperson for its development project at public town hall meetings. Tim Greimel decl., ECF No. 67-6, PageID.1291. That is not sufficient to establish adverse action.

Even if the statements of Brown and Gustafsson are considered, however, the Brown plaintiffs’ claim still

suffers from another flaw: the plaintiffs did not plead a claim against Mayor Greimel. And in order to hold the City liable for his actions, they must demonstrate that (1) they suffered a constitutional violation and (2) either a custom of toleration for illegal practices or the ratification of a violation by an official with final decision-making authority directly caused their deprivation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978) (holding that “a municipality cannot be held liable under § 1983 on a *respondeat superior* theory”); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (holding that a plaintiff can demonstrate an official policy by pointing to a decision of an official with final decisionmaking authority over the matter at issue).

When a plaintiff proceeds on a single-act theory of liability against a municipality, it must point to a “deliberate choice to follow a course of action . . . from among various alternatives by the official . . . responsible for establishing final policy with respect to the subject matter in question.” *Pembaur*, 475 U.S. at 483. Under *Monell*, the Court must determine as a matter of law the identities of final policymakers capable of binding a municipality. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (“As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury.”); *see also Baar v. Jefferson Cty. Bd. of Educ.*, 476 F. App'x 621, 638 (6th Cir. 2012) (“[T]he actions of a single official can only

create liability for the local government where that official has final policymaking authority, and whether an official has such final authority is a question of state law.”). The “[m]ere authority to exercise discretion while performing particular functions does not make a municipal [official] a final policymaker unless the official’s decisions are final and unreviewable and are not constrained by the official policies of superior officials.” *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir. 1993).

In their response brief, the plaintiffs insist that Mayor Greimel’s statement amounted to a policy that the City would not approve SK Properties’ development unless it canceled its contract with Browne Design, apparently abandoning their representation in discovery responses that councilwoman Rutherford made the statement. The City responds that Mayor Greimel is not a final decisionmaker with respect to zoning issues. The City has the stronger position.

According to the Pontiac’s Zoning Code, the responsibility for approving or rejecting re-zoning requests, such as SK Properties’, ultimately lies with the City Council. *See* Pontiac, Mich. Code § 6.802. Although a mayor may veto the Council’s action, the Council ultimately retains authority to override the veto. *See* City of Pontiac Charter (adopted 1982), § 3.112. In analogous circumstances, courts have found such override authority means that a mayor’s decisions reviewable and therefore not final. *See Advanced Tech. Bldg. Sols., L.L.C. v. City of Jackson*, 817 F.3d 163, 165-67 (5th Cir. 2016); *Rasche v. Vill. of*

Beecher, 336 F.3d 588, 601 (7th Cir. 2003) (holding that a village president lacked final policymaking authority with regard to zoning since under state law the Board of Trustees was given authority to enact policy, the president only had tie-breaking authority, and the president's veto power could be overridden); *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 637-38 (11th Cir. 1991) (holding that a mayor was not final decision maker with respect to allegations that he allegedly extorted a developer because the city council had the authority to override the mayor on zoning issues). Because Mayor Greimel is not a final-decision maker with respect to zoning issues and the plaintiff has not described any other viable *Monell* theory, the City cannot be held liable for his alleged statement.

The City is entitled to summary judgment on this claim.

III.

Plaintiff Rubicon brought a development project to the City of Pontiac that very well would have benefitted the City and its residents, particularly through new employment opportunities and access to a new grocery store. It is unfortunate that it never took root, stifled by bureaucracy and shortsightedness. But the evidence does not establish triable issues that render the project's demise the result of constitutional violations for which either of the defendants are liable.

Accordingly, it is **ORDERED** that the defendants' motion for summary judgment (ECF No. 57) is **GRANTED**.

It is further **ORDERED** that the complaint is **DISMISSED WITH PREJUDICE**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: July 2, 2025