No. 23-218

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

835 HINESBURG ROAD, LLC,
Plaintiff - Appellant,
v.
CITY OF SOUTH BURLINGTON, et al.,
Defendants - Appellees.

On Appeal from the United States District Court
for the District of Vermont,
Honorable Geoffrey W. Crawford, District Judge

PLAINTIFF-APPELLANT'S OPENING BRIEF

KATHRYN D. VALOIS
Fla. Bar No. 1010150
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
(561) 691-5000
KValois@pacificlegal.org

MATTHEW B. BYRNE
Gravel & Shea PC
76 St. Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369
802.658.0220
mbyrne@gravelshea.com

CHRISTOPHER M. KIESER
Cal. Bar No. 298486
Pacific Legal Foundation
555 Capitol Mall, Ste 1290
Sacramento, CA 95814
(916) 419-7111
CKieser@pacificlegal.org

Counsel for Plaintiff – Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, 835 Hinesburg Road, LLC, a private nongovernmental party, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §§ 1331, 2201, and 42 U.S.C. § 1983, the district court had original jurisdiction over this dispute arising under the United States Constitution. This appeal arises from the district court's January 27, 2023, dismissal of Plaintiff-Appellant's: (1) takings claims under both the Vermont and United States Constitutions, (2) due process claims under both the Vermont and United States Constitutions, (3) common benefits clause claim under the Vermont Constitution, (4) equal protection clause claim under the United States Constitution, and (5) other state statute based claims. App. 0002−30. Plaintiff-Appellant timely appealed the district court's decision on February 21, 2023. App. 0119. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether 835 Hinesburg's regulatory takings claims are ripe where the City of South Burlington's Land Development Regulations ("LDRs") categorically forbid development within Habitat Blocks on 835 Hinesburg's property and the City rejected 835 Hinesburg's development proposal.
2. Whether 835 Hinesburg's substantive due process claim is ripe where a City Councilor violated the City's conflict of interest policy by taking an active role in the consideration of the LDR amendments despite her

employer's direct financial interest in the outcome of the consideration of the amended LDRs.

RELIEF SOUGHT ON APPEAL

The district court's Order on the Defendants-Appellees' Motion to Dismiss [App. 0093−117] should be reversed or vacated, and the case remanded to the district court for consideration of 835 Hinesburg's claims on the merits.

INTRODUCTION

A property owner need not file a costly formal permit application to ripen a claim for just compensation against a city where the city's law categorically prohibits development, and its city council has rejected a preliminary proposal for development by the owner. Yet, Appellant 835 Hinesburg Road, LLC ("835 Hinesburg") is being required to do just that. A substantial portion of 835 Hinesburg's property lies within an area that the City of South Burlington[1] has designated as a "Habitat Block." The City's LDRs require that "all lands within a Habitat Block ... be left in an undisturbed, naturally vegetated condition." 2022 LDR § 12.04(F), (H). And the City confirmed that it adheres to this prohibition when it rejected out of hand during an open city council hearing 835 Hinesburg's proposal to develop its parcel. Nevertheless, the City maintains—and the district court held—

[1] Defendants-Appellees City of South Burlington, South Burlington City Council, Meaghan Emery, Timothy Barritt, and Helen Riehle are jointly referred to as "the City."

that 835 Hinesburg cannot maintain a takings case until it completes a formal application that, as the city council confirmed, must end in rejection. App. 0093-117.

Recent Supreme Court precedent confirms this case is ripe. In *Pakdel v. City & Cnty. of San Francisco*, 141 S.Ct. 2226 (2021), the Court clarified that ripeness is a "relatively modest" requirement, and only "de facto" finality is required, emphasizing that a takings claim ripens when "there [is] no question … about how the 'regulations at issue apply to the particular land in question.'" *Id*. at 2230 (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)). The district court wrongly focused only on whether 835 Hinesburg had filed a formal development application, not whether the permissible uses of the property are known to a reasonable degree of certainty. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court emphasized that ripeness is not only triggered by a formal development application, as long as there is a concrete indicator about what uses the challenged regulation allows and what uses it does not. Thus, a takings claim is ripe "once it becomes clear … [that] the permissible uses of the property are known to a reasonable degree of certainty[.]" *Id*. at 620. Here, a reviewing court knows how the City's LDRs apply to 835 Hinesburg's property because the city council said so. The City cannot authorize development in the Habitat Blocks under its own ordinances, and the city council confirmed. Therefore, this case is ripe. The judgment below

should be reversed, and the case remanded to the district court to consider the merits of 835 Hinesburg's takings claims.

STATEMENT OF THE CASE

A. South Burlington's Interim Bylaws

In 2018, the City adopted interim zoning bylaws. App. 0007−11, 0032−36, 0049−52, 0095−98. These bylaws aimed at restricting development to protect habitat for valued wildlife and open space. App. 0007−11, 0032−36, 0095−98. Specifically, the interim bylaws contemplated the completion of an "extensive study of Planned Unit Developments and Master Plans by the Planning Commission as well as a cost-benefit analysis of hypothetical development on existing developable open spaces, forest blocks, and working landscapes." App. 0049−52, 0095−96. For the land areas to which the interim bylaws applied, the City outlawed new planned unit developments, subdivisions, principal buildings, and amendments to certain master plans, site plans, and plats. App. 0049−52, 0095−96. However, despite the ban on all new development, the City retained the authority to "authorize the issuance of permits for the development" that the interim bylaws prohibited "after public hearing preceded by notice" and "only upon a finding by the [City] that the proposed use is consistent with the health, safety, and welfare of" South Burlington. App. 0032, 0049−52, 0096. The interim bylaws established five standards for the City to consider when reviewing such applications; these included an analysis of the water

resources, wildlife habitat, forest resources, aesthetics, and agriculture located on the property. App. 0008−9, 0049−52, 0096.

In an attempt to further protect existing open spaces, the City formed the Open Space Interim Zoning Committee ("Committee") to consider "the prioritization for conservation of existing open spaces, forest blocks, and working landscapes in South Burlington in the sustenance of our natural ecosystem, scenic viewsheds, and river corridors." App. 0033−34. The Committee assessed 190 parcels of undeveloped land and identified 25 highest priority parcels for conservation. App. 0007−11, 0096−97. 835 Hinesburg's 113.8-acre property was one of the identified 25 parcels. App. 0007−11, 0096−97.

Soon after, the City Council considered the proposed amendments to the LDRs. App. 0012−13, 0097. These proposed amendments included the recognition of "Habitat Blocks" and "Habitat Connectors" both of which triggered land use restrictions including the requirement that "all lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition." App. 0012−15, 0097-98. On February 7, 2022, the City voted to adopt the amended LDRs. App. 0016, 0098.

B. 835 Hinesburg's Development Proposal

While the interim bylaws were in effect during 2021, 835 Hinesburg submitted a preliminary plan for construction of twenty-four commercial buildings on its 113.8-acre parcel of undeveloped land. App. 0038−43. The City rejected 835

Hinesburg's proposal, finding it was subject to the prohibition on development for Habitat Block areas that would likely be adopted when the amendments were finalized. App. 0015−16, 0032−36, 0098−101 ("[b]ased on these unknowns and an initial review of the application of the draft amendments approved by the Planning Commission, ... the proposed project will or could be contrary to the amendments to the [LDRs] that the City adopts."). Specifically, the City Council, in reference to its denial of 835 Hinesburg's proposal, stated:

> Under the draft [Land Development Regulations], development is generally prohibited on lands within a Habitat Block. The application does not include any information regarding the location of this overlay district, but it is apparent that the proposed development includes several buildings and associated infrastructure within the proposed Habitat Block Overlay district.

App. 0039−43, 0108. The City then formally amended and adopted the LDRs just months later—including the Habitat Block overlay. App. 0101.

C. The City's Habitat Block LDRs

The amended LDRs created a separate Habitat Block overlay district that completely prohibits development of any land located within a Habitat Block.[2] 2022 LDR § 12.04(F), (H). Specifically, the Habitat Block LDRs require that "all lands

[2] The only permitted uses within a habitat block are: (1) the "establishment and maintenance of unpaved, non-motorized trails not to exceed ten (10) feet in width", (2) the "removal of invasive species, removal of diseased vegetation, and removal of dead or dying trees posing an imminent threat to buildings or infrastructure, and (3) construction of fences that enclose cleared areas, are erected for agricultural purposes, or are lower than four feet to the ground. 2022 LDRs §§ 12.01(C), 12.04(G).

within a Habitat Block must be left in an undisturbed, naturally vegetated condition." 2022 LDR § 12.04(F). The LDRs also prohibit "[t]he encroachment of new development activities into, and the clearing of vegetation, establishment of lawn, or other similar activities in Habitat Blocks."[3] 2022 LDR § 12.04(H). These broadly-written LDRs preclude all development within areas designation as Habitat Blocks.[4]

D. This Lawsuit

The City's formal inclusion of portions of 835 Hinesburg's property within the amended LDR Habitat Block designation triggered this lawsuit. App. 0002−4.

[3] Section 12.04(H) does contemplate the development of restricted infrastructure encroachment (restricted infrastructure encroachments are limited to underground public utilities systems, public sidewalks and recreation paths, public and private street crossings, public and private driveway crossings, and stormwater facilities), development for outdoor recreation uses, and development for research and educational activities. 2022 LDRs §§ 12.02(B), 12.04(H). This type of development is not contemplated by 835 Hinesburg and only refers to infrastructure the City itself could develop. Consequently, this development, too, is inapplicable to 835 Hinesburg.

[4] Notably, while the amended LDRs do include a procedure for Habitat Block modification, those modification procedures fail to cure the development preclusion in 835 Hinesburg's case. The first modification procedure, a Minor Habitat Block Boundary Adjustment, only allows for the modification of a Habitat Block by 50 feet in any direction. 2022 LDR § 12.04(D)(1). This adjustment must be offset with an equal addition of the lost area somewhere else within the same parcel and must be contiguous to the Habitat Block. *Id.* Such a small concession on the City's part would not cure the development preclusion 835 Hinesburg seeks to overcome. *Id.* Additionally, the second modification procedure, Small On-Site Habitat Block Exchange, only permits an applicant to exchange two acres or ten percent of the application's total land area for an equal amount of land in the same planned unit development (PUD). *Id.* § 12.04(D)(2). Thus, even though this second modification procedure allows for the moving of a habitat block within a PUD, the habitat block would still have to exist within the bounds of the PUD, effecting the efficacy of the 835 Hinesburg's development. *Id*. Finally, the third modification procedure, Larger Area Habitat Block Exchange, only permits an exchange of a portion of habitat block for an equal amount of contiguous land within the same habitat block, once again preventing development on 835 Hinesburg's property. *Id*. § 12.04(D)(3). 835 Hinesburg is also unable to take advantage of the relief enumerated for substantially habitat block covered lots, or lots with at least a 70% habitat block overlay, as only 37.7% of its property is listed as habitat block. 2022 LDR § 12.04(E).

835 Hinesburg raised several claims,[5] including both physical and regulatory takings claims. App. 0020−29.

The district court granted the City's motion to dismiss. App. 0093−117. It concluded that the case was unripe because 835 Hinesburg had not filed a formal application for development, depriving the City of the chance to make a final decision on 835 Hinesburg's proposal. App. 0102−113. The court partially relied on its interpretation of state law, under which it concluded that the proposal submitted to the City by 835 Hinesburg submitted was a formal development application. App. 0102−113. It also concluded that the Habitat Block boundaries could be adjusted and that 835 Hinesburg might be able to apply for a variance. App. 0102−113. Thus, the district court dismissed 835 Hinesburg's takings claims.[6] App. 0102-113. This appeal followed. App. 0119.

SUMMARY OF ARGUMENT

835 Hinesburg's takings claims are ripe for review because the City has taken a formal position on the developability of 835 Hinesburg's property by designating parts of it a Habitat Block—an area where development is entirely foreclosed.

[5] 835 Hinesburg did raise several other claims, including claims under Vermont's Common Benefits Clause, both the Federal and Vermont Equal Protection Clauses, and several other state constitutional claims. These claims are not at issue in this appeal.

[6] The district court also dismissed 835 Hinesburg's remaining due process and equal protection claims as unripe and declined to exercise its supplemental jurisdiction over the remaining state-law causes of action. App. 0113−117.

As the Supreme Court recently clarified, to demonstrate ripeness, takings plaintiffs need only make the "relatively modest" showing that no question exists about how the regulations at issue apply to the property in question. *Pakdel*, 141 S. Ct. at 2231. 835 Hinesburg has made this showing because the Habitat Block designation categorically prohibits all development within those areas. 2022 LDR § 12.04(F), (H).

The district court made three basic errors in dismissing 835 Hinesburg's case on ripeness grounds. First, the district court created uncertainty regarding the permissibility of development where none exists. The district court speculated several times that the Habitat Block designation was merely "one consideration among others" and its prohibition on development could be overruled at any time. App. 0109. But the language of the amended LDRs is sufficient to defeat this speculation. 2022 LDR § 12.04(F), (H). The amended LDRs leave no room for the City to issue a development permit. Instead, the City must deny any such application that does not comply with the regulations themselves. Consequently, any formal application 835 Hinesburg might submit would meet the same fate as its preliminary application—certain denial. There is no uncertainty as to the City's position on the developability of 835 Hinesburg's property.

Second, the district court conflated the proof required to prevail on the merits of a regulatory takings claim with the legal certainty required to ripen one.

According to the district court, 835 Hinesburg needs to file a formal development application lest the court not know how much use or value the regulations at issue took. App. 0110−113. But this is a merits question, not a jurisdictional one. All 835 Hinesburg must do to ripen its claim is show that the City has reached a *de facto* final decision on the developability of its land. Because the City has done so, 835 Hinesburg's claims are ripe now.

Third, the district court incorrectly thought 835 Hinesburg could avoid the effect of the total development preclusion through a variance or modification. But the City lacks any discretion to grant a variance or modify the regulations in any meaningful way. The amended LDRs do contain some modification procedures, but none of them provide any relief for the development prohibition covering almost half of 835 Hinesburg's parcel. 2022 LDR § 12.04(D), (E). Nor may the City simply ignore its own ordinance. The amended LDRs represent the City's definitive position that 835 Hinesburg may not develop this area. Thus, 835 Hinesburg's takings claims are ripe for review.

Finally, it should be noted that 835 Hinesburg's due process claim is also ripe for review. 835 Hinesburg alleged a separate claim for a violation of the due process clause when a City Councilor violated the City's conflict of interest policy because her employer has taken an active role in consideration of approving the amended LDRs. App. 0006−10, 0022−24. Because due process claims ripen when the

purported violation occurs, 835 Hinesburg's due process claim ripened the moment the City Councilor voted to approve the amended LDRs in violation of the City's conflict of interest policy. Consequently, 835 Hinesburg's due process claim is also ripe.

STANDARD OF REVIEW

This Court conducts *de novo* review of a lower court's dismissal under Fed. R. Civ. P. 12(b)(6). *Bacon v. Phelps*, 961 F.3d 533, 540 (2d Cir. 2020). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashford v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When reviewing dismissal orders, courts "presume all factual allegations in the complaint to be true and view them in a light most favorable to the plaintiff." *Ferran v. Town of Nassau*, 11 F.3d 21, 22 (2d Cir. 1993).

ARGUMENT

I. 835 Hinesburg's Takings Claims are Ripe

In recent years, the Supreme Court has gone to great lengths to emphasize that the Takings Clause may no longer be relegated "'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2169 (2019) (quotation omitted). Accordingly, it has pared back doctrines that stop federal courts from deciding takings claims on the merits. In *Knick*, the Court

abrogated the requirement that takings litigants "pursue state procedures for obtaining compensation before bringing a federal suit." *Id.* at 2173; *see id.* at 2179 ("The state-litigation requirement of [*Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)] is overruled. A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government."). Then, in *Pakdel*, it clarified that a local government's regulatory decision is "final," and may be challenged as a taking, upon the "relatively modest" showing that "there is no question about how the regulations at issue apply to the particular land in question." 141 S. Ct. at 2230 (quoting *Suitum*, 520 U.S. at 739 (1997)). After *Knick* and *Pakdel*, a claim for just compensation is ripe once "the government has reached a conclusive position." *Id.* at 2231.

In this case, there is no question that development is precluded on the large portions of 835 Hinesburg's property that falls within the Habitat Block designation. South Burlington's LDRs are clear on that point, and that is why 835 Hinesburg's proposal was rejected even before the LDRs became permanent. Because development is categorically forbidden in these areas, 835 Hinesburg need not file a formal application to determine whether the property within the Habitat Blocks can be developed. *See Suitum*, 520 U.S. at 739 (the final decision requirement was satisfied where the agency had determined the subject was within a "Stream

Environment Zone," an area which, under the agency's own regulations, no development could be permitted). "Ripeness doctrine does not require a landowner to submit applications for their own sake." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

The district court made three basic errors in dismissing this case.

A. The district court erred by inserting uncertainty where none exists

The district court's first mistake was that it created uncertainty regarding the permissibility of development where none exists. For example, the court speculated that "[t]he Habitat Block may be no more than one consideration among others in a relatively flexible planning process" or that 835 Hinesburg may get what it wants "through a land exchange or boundary adjustment reached through agreement with the zoning authority." App. 0109. Imagining the existence of such a process, the court then concluded that it was simply "not possible to tell how far the regulations encroach on [835 Hinesburg's] right to develop its property." App. 0109.

Yet, no such uncertainty actually exists. The City has already made it clear through its amended LDRs—in the plainest possible terms—that any new development within Habitat Blocks is prohibited. 2022 LDR § 12.04(F), (H) ("[A]ll lands within a Habitat Block must be left in an undisturbed, naturally vegetated condition" and "[t]he encroachment of new development activities into ... [the] Habitat Blocks is prohibited."). The amended LDRs leave no room for the City to

consider, or issue, a development permit. Any such application must be denied because the resulting permit would not conform to the City's environmental protection standards. 2022 LDR § 12.01(D) ("All development that may encroach upon a natural resource regulated in Article 12 *shall* be subject to Site Plan Review by the Development Review Board.") (emphasis added).

In effect, the district court's speculation that a permit might be granted for development within the Habitat Block designation invited 835 Hinesburg to apply for a development permit in the vain hope that South Burlington would ignore its own law—and the ground on which it already rejected the prior proposal—to grant a permit. But the law does not require this sort of exhaustion. Instead, the finality requirement is a pragmatic one that simply requires the permitted uses to be known "to a reasonable degree of certainty." *Palazzolo*, 533 U.S. at 620. Put another way, a takings claim ripens "once it becomes clear that the agency lacks the discretion to permit any development []." *Id.* Requiring a property owner to pursue further process once "de facto finality" has been reached would be akin to requiring administrative exhaustion for Section 1983 takings claims, which something the Supreme Court has roundly rejected. *Pakdel*, 141 S. Ct. at 2230–31.

This case is exemplary of why it is not always required to file a formal application for a development permit to ripen a takings case. To begin with, 835 Hinesburg *has* filed a development plan, which was rejected on the precise grounds

now codified in the LDRs. App. 0032−43. The question is only whether it must now file a more *formal* application to find out what it has already been told by the City. But where the final outcome is preordained by law, a requirement to file a formal application would place an expensive, unnecessary barrier in front of property owners seeking just compensation when they are denied the right to put their property to productive use. As the Supreme Court has emphasized, "[g]overnment authorities ... may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Palazzolo*, 533 U.S. at 621.

To be sure, before *Pakdel*, this Court and others have required a "meaningful" application meant to give local decisionmakers a chance to apply regulations before an as-applied takings claim may proceed. *See, e.g., Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005) ("Four considerations, all of which motivate our decision today, undergird prong-one ripeness ... Thus, requiring a meaningful variance application as a prerequisite to federal litigation enforces the long-standing principle that disputes should be decided on non-constitutional grounds whenever possible."); *Vacation Vill., Inc. v. Clark Cnty.*, 497 F.3d 902, 912–13 (9th Cir. 2007). But even before *Pakdel*, this Court recognized the principle that *de facto* finality did not require a landowner to file a fruitless application to ripen a takings case. *See Murphy*, 402 F.3d at 349 ("A property owner ... will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or

seeking a variance would be futile. That is ... when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied."). After *Pakdel*, it is clear that an application is not "meaningful" if it has no chance of ever being granted as a matter of law. *See Vill. Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 298−99 (2d Cir. 2022) (finding *de facto* finality even without a formal vote of the Town Council and noting that a dispute "surely ripens" when "the entity makes plain that it has reached a decision that, by all accounts, it intends to be final"). Here, as in *Village Green*, 835 Hinesburg need not speculate that it will not be able to develop its property within the Habitat Blocks—it knows it cannot do so. *Cf. 74 Pinehurst LLC v. New York*, 59 F.4th 557, 565 (2d Cir. 2023) (takings claim was unripe because the plaintiffs only "speculate[d] that the hardship provisions offer economic relief "in theory" but practically "result in few applications ... being granted"). Requiring a formal application in these circumstances would be a costly exercise in futility amounting to an exhaustion requirement for takings claims.

The purpose of the final decision requirement is not to impose an exhaustion requirement on property owners like 835 Hinesburg. Instead, the modest final decision requirement serves two purposes. First, to ensure that a property owner actually has standing, *Williamson Cnty.*, 473 U.S. at 193 (requirement ensures that the decisionmaker has "arrived at a definite position on the issue that inflicts an

actual, concrete injury"), and, second, to ensure that the reviewing court "kno[ws] how far the regulation goes" so that it may conduct a regulatory takings analysis on the merits, *Pakdel*, 141 S. Ct. at 2230. Here, since there is no question that development is prohibited on the Habitat Blocks, there is no doubt 835 Hinesburg is injured, and no ambiguity will complicate the takings analysis, whether that analysis is appropriate under the relevant principles of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), or *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). This is why an as-applied takings claim is ripe when a regulation on its face prohibits all beneficial use of land. *See Suitum*, 520 U.S. at 739; *Palazzolo*, 533 U.S. at 621 (takings claim based on prohibition on filling wetlands was ripe because "[o]n the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use").

The district court effectively imposed an exhaustion requirement by requiring 835 Hinesburg to apply for a development permit that the City of South Burlington cannot grant. Because there is no actual uncertainty, however, the case is ripe now.

B. The district court erred by conflating the proof required to prevail on a regulatory takings claim with the legal certainty required to ripen one

Second, the district court erred by concluding that it could only evaluate 835 Hinesburg's regulatory takings claim once the owner files an application because

otherwise, the court would not know how much use or value 835 Hinesburg has actually lost. App. 0110−113. But this conflates the standard for evaluating whether an owner should prevail on a takings claim with the standard for determining whether the claim is ripe for adjudication. All 835 Hinesburg must do to *ripen* its claim is to show that it is clear that the City has deprived it of productive use of its land, which the LDRs themselves conclusively show. It need not offer proof sufficient to actually win under either *Lucas* or *Penn Central*. At this stage, it need only plausibly plead a taking under those theories.

Of course, plenty of questions remain on the merits. For example, to prevail under *Lucas*, a property owner must show that he has been deprived of "all economically beneficial or productive use" of his land. *Lucas*, 505 U.S. at 1015. As the district court noted, "[i]t is possible that the 'Habitat Block' located on [835 Hinesburg's] property may preclude any commercially viable development plan." App. 0109. But whether any viable uses for 835 Hinesburg's parcel despite the Habitat Block development prohibition is not a ripeness question, but the question at the heart of the merits of a *Lucas* claim. That it cannot be answered now does not render the claim unripe. It simply means that the record is undeveloped because the case remains at the pleadings stage.[7]

[7] A *Penn Central* inquiry might be even more fact intensive, requiring assessment of the "economic impact" of the Habitat Block designations on 835 Hinesburg, the extent to which the designations interfere with 835 Hinesburg's "reasonable investment-backed expectations," and the "character"

Simply put, once a reviewing court knows how the regulations at issue apply to the property, it has all the information needed to consider a takings claim on the merits. The question whether 835 Hinesburg can prevail under *Lucas* or *Penn Central* must be answered on remand, but the case is ripe now.

C. The City lacks any discretion to grant a variance or exception

Finally, the district court erred when it concluded that even if the amended LDRs preclude all development within a Habitat Block, 835 Hinesburg still could have asked for a variance or other exception. App. 0107. ("In this case, there is considerable uncertainty about how [the City] will apply the "Habitat Block" provisions of the amended LDRs. The LDRs include provisions for variance and for adjustments of the location and boundaries of the Habitat Blocks."). But, contrary to the district court's conclusion, while the City may slightly alter the boundaries of its Habitat Blocks, it may not eliminate them, leaving the same development prohibitions in place for certain parts of 835 Hinesburg's property. 2022 LDR § 12.04(D), (E).

1. Modification Under Section 12.04(D) Fails to Alleviate 835 Hinesburg's Injury

Under the City's amended LDRs, if a property owner's property is within a Habitat Block, he/she can ask the City to modify that Habitat Block. 2022 LDR §

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of the LDRs. *Penn Central*, 438 U.S. at 124. These questions must be answered on the merits. That we cannot answer them now is not because the case is unripe, but because it is young.

12.04(D). There are three types of modifications, each of which permit the alteration of a Habitat Block's boundary but does not entirely eliminate the no development prohibition. *Id.* The first subtype, Minor Habitat Block Boundary Adjustment, allows an applicant to "modify the boundary of a Habitat Block by up to fifty (50) feet in any direction[.]" *Id.* § 12.04(D)(1). However, "any proposed reduction in Habitat Block area must be offset with an equal addition elsewhere within the same subject parcel or [PUD]." *Id.* The offset though "must be contiguous to the Habitat Block" and "[i]n no case shall the [City] approve a new reduction of the area of a Habitat Block." *Id.*

Thus, while the first modification type would allow 835 Hinesburg to slightly alter the boundaries of its various Habitat Blocks, the overall size and prohibited uses would remain the same. Consequently, modification one would not help 835 Hinesburg. There remains no chance that applying for a development permit would limit the size of the Habitat Block on 835 Hinesburg's property nor the scope of the development restriction within the Habitat Block.

Similarly, the second modification type, Small On-Site Habitat Block Exchange, would allow an applicant to "exchange a portion of a Habitat Block not to exceed two (2) acres or ten (10) percent of an application's total land area, whichever is less, for an equal amount of land within the same [PUD] or Site Plan." *Id.* § 12.04(D)(2). However, the proposed exchange "must not include Core Habitat

Block Areas" and while the exchange does not have to be contiguous with an existing Habitat Block it must still be within the confines of the applicant's property. *Id*. Hence, this modification would not allow 835 Hinesburg to commercially develop its property.

Meanwhile, the third modification subtype allows an applicant "to exchange a portion of a Habitat Block for the addition of an equal amount of contiguous land within the same Habitat Block." *Id*. § 12.04(D)(3). That exchange can occur "within one parcel or on separate parcels." *Id*. In 835 Hinesburg's case, this subtype would be the most practical, however, even it would require 835 Hinesburg to purchase additional property outside of the property it already owns and then exchange the various Habitat Blocks from its current property to the new property. *Id.* Such a requirement is not necessary to ripen 835 Hinesburg's takings claims. *See Palazzolo*, 533 U.S. at 622 ("Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.").

Thus, all three modifications listed within the amended LDRs concretely fail to cure the Habitat Block's preclusive development effect on 835 Hinesburg's property. For the reasons stated throughout this brief, 835 Hinesburg is not required

to exhaust this administrative remedy that provides no hope of achieving a helpful result.

2. Modification Under Section 12.04(E) is Futile

Modification under amended LDR section 12.04(E) would also be futile. *Id.* § 12.04(E). Section 12.04(E) allows substantially habitat block covered lots—lots where over 70% of the property is covered by Habitat Blocks—to seek relief by rejiggering the Habitat Block designations to allow for a 30% buildable area. *Id*. However, in 835 Hinesburg's case only 43 acres of its 113.8-acre parcel—or 37.7%—falls within a Habitat Block. App. 0041−42. Consequently, 835 Hinesburg cannot seek relief under § 12.04(E).

3. No Other Variance Procedure Exists

Additionally, the City's amended Habitat Block LDRs are devoid of any other variance procedure. 2022 LDR § 12. Other LDR provisions include express subsections on how to seek a variance. 2022 LDR § 12.08(I). That same provision is absent from the Habitat Block section, leaving only the possible modification procedures listed above as relief mechanisms for 835 Hinesburg. 2022 LDR § 12.04(A)−12.04(J). Modification procedures that, again, are inapplicable to remedy 835 Hinesburg's situation, making any application futile.[8] 2022 LDR §

[8] Additionally, even if a variance application did exist, a variance application cannot be used to ask the City to override its land use regulations if strict application of those regulations would be a taking. An exception to avoid "unnecessary hardships" is "not deemed equivalent to the taking

12.04(D), (E); *see also Suitum*, 520 U.S. at 739 ("Because the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County's* requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel.").

4. The City Cannot Ignore Its Own Ordinance

Finally, it should be noted that both the City and its representatives lack the ability to simply ignore the amended LDRs and issue a development permit. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014) (A "core administrative-law principle [is] that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). The only option available to the City would be to amend its own existing LDRs, again. And while it is free to do so, 835 Hinesburg cannot be held hostage, forced to apply for an impossible to receive building permit. *See Coal. for Responsible Regul., Inc. v. E.P.A.*, No. 09-1322, 2012 WL 6621785, at *1, *16 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting) ("Allowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Brach's power at the expense of Congress's and

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of property, in the constitutional sense ..." 8 Eugene McQuillin, *The Law of Municipal Corporations*, § 25.167, at 761 (3d ed. 1991) (footnote omitted), *cited in Belvoir Farms Homeowners Ass'n v. North*, 734 A.2d 227, 240 (Md. 1999) ("We reject the proposition that the unnecessary or unwarranted hardship standard is equal to an unconstitutional taking standard. If this were true, it would be a superfluous standard because the constitutional standard exists independent of variance standards.").

thereby alter the relative balance of powers in the administrative process. I would not go down that road.").

Thus, as 835 Hinesburg cannot avail itself of the listed modifications, a variance procedure the does not exist, or ask the City to simply ignore its own ordinance, 835 Hinesburg is categorically barred from developing its property and did not need a formal "red stamp" denial from the City to solidify that fact.

II. 835 Hinesburg's Due Process Claim is Ripe for Review

835 Hinesburg has alleged a separate claim for a violation of the Due Process Clause when the City of South Burlington City Council enacted the Land Development Regulations. App. 0022−24. 835 Hinesburg alleges that a City Councilor violated the City's enacted conflict of interest policy because her employer had taken an active role in consideration of the amendments to the LDRs. App. 0006−10, 0022−24. In particular, 835 Hinesburg alleges that Meaghan Emery voted on the amendment to the LDRs when she was acting under a conflict of interest. App. 0006−7. That violation of the Due Process Clause was complete after the vote and the LDRs should be invalidated. That claim is also separate from its Takings related Due Process claims and has a separate ripeness standard.

Courts recognize that substantive Due Process claims that differ from the Takings Claims do not apply the *Williamson County* ripeness ruling. *John Corp. v. City of Houston*, 214 F.3d 573, 585 (5th Cir. 2000). The Court's decision in

Southview Associates, Ltd. v. Bongartz, 980 F.2d 84, 96−97 (2d Cir. 1992), is not to the contrary because it did not involve a bias claim in the enactment of a city ordinance. The district court erred in failing to recognize the distinction. App. 0113−115. Instead, it appears to have dismissed the claim as a state law claim. App. 0113−115. It is not. The Due Process Clause bars decisions in certain situations that involve too high a risk of actual bias. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009). Under this inquiry, the "Court asks not whether the judge is actually subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"

CONCLUSION

835 Hinesburg's takings and due process claims are ripe for judicial review, and the district court wrongly dismissed the Complaint. This Court should reverse the district court's order and remand the case for a consideration of the merits.

DATED: May 5, 2023.

Respectfully submitted,

Kathryn D. Valois
Fl. Bar No. 1010150
Christopher M. Kieser
Cal. Bar No. 298486
Matthew B. Byrne

/s/ *Kathryn D. Valois*_____
Kathryn D. Valois
Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation for Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,254 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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DATED: May 5, 2023

/s/ Kathryn D. Valois_____
KATHRYN D. VALOIS

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

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