No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOUGLAS BRUCE, an individual,
Petitioner,

v.

OGDEN CITY CORPORATION, an incorporated city in the State of Utah; **MICHAEL P. CALDWELL**, in his official capacity as the Mayor of Ogden City Corporation.
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

Aaron C. Garrett, Bar No. 318386
Counsel of Record for Petitioner Douglas Bruce
NONPROFIT LEGAL SERVICES OF UTAH
623 East 2100 South, Suite B1
Salt Lake City, Utah 84106
Tel: (385) 419-4111
E-Mail: aaron@nonprofitlegalservices.com

QUESTIONS PRESENTED

Whether the statute of limitations for a Section 1983 takings claim for the unconstitutional deprivation of private property (specifically real estate) can begin to run before the municipal action that caused the property owner to sacrifice all economically beneficial uses has transpired?

And further, whether the Tenth Circuit Court of Appeals used the proper unit of property to measure if Mr. Bruce was forced to sacrifice all economically beneficial uses of his property?

And finally, whether the 14th Amendment's due process provisions permit the mayor of a city with a political or policy interest in the demolition of a building to act as the judge who determines whether a city will order the demolition of that building?

LIST OF PARTIES

1. Douglas Bruce, Petitioner.
2. Ogden City Corporation, Respondent.
3. Mayor Michael P. Caldwell, Respondent.

CORPORATE DISCLOSURE

Mr. Bruce is an individual and there is no corporate entity or ownership to disclose per Rule 29.6.

RELATED PROCEEDINGS

1. *Bruce v. Ogden City Corporation, et al.*, Case No. 1:20-cv-00034-DBB-DBP (D. Utah) (final judgment entered November 8, 2022).
2. *Bruce v. Ogden City Corporation, et al.*, Case No. 22-4114 (10th Circuit) (order denying petition for rehearing en banc entered January 2, 2024).

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Opinions Below

The unpublished opinion of the Tenth Circuit Opinion below is *Bruce v. Ogden City Corp., et al.,* Case No. 22-4114, issued December 1, 2023, available at 2023 U.S. App. LEXIS 31746 (10th Cir. Dec. 1, 2023). The citation to the District Court Order below is *Bruce v. Ogden City Corp., et al.*, Case No. 1:20-cv-00034, issued November 8, 2022, available at 640 F. Supp. 3d 1150.

Jurisdiction

This civil rights action was filed by Mr. Bruce pursuant to 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments of the United States Constitution. Accordingly, the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, when it entered the final judgment being appealed. The United States Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Tenth Circuit decided Mr. Bruce's appeal on December 1, 2023. Mr. Bruce timely filed a Petition for Rehearing En Banc on December 15, 2023. The Tenth Circuit denied Mr. Bruce's Petition for Rehearing En Banc on January 2, 2024.

This Petition is timely filed as it is filed within 90 days of the denial of Mr. Bruce's Petition for Rehearing En Banc. *See* US Supreme Ct. R. 13.1, 13.3.

Relevant Constitutional Provisions

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This case asks important questions regarding when the statute of limitations for a Section 1983 takings claim begins to run when a municipality enacts ordinances that slowly but surely eliminate the economic value to a parcel of property, but where diminution to zero takes longer than the existing statute of limitations? The decision of the Tenth Circuit places property owners in a double bind – either bring suit at the time the regulations are enacted, and have the case dismissed because there is still some economic value to the property; or, alternatively, wait until all economically beneficial use has been eliminated, and have the case dismissed because the regulation in question was enacted outside of the statute of limitations. This Court should grant this petition to rectify this situation and protect the fundamental Fifth Amendment rights of all American property owners.

This case also asks subsidiary questions related to the proper way to define the unit of property that must suffer the elimination of economically beneficial use in order for a takings claim to exist under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Rather than being an open and shut question of how the local municipality records the property with the county recorder, as held by the Tenth Circuit, this Court should reaffirm its prior holding in *Murr v. Wisconsin*, 582 U.S. 383, 397 (2017) that a number of factors come into play when measuring the "denominator" under *Lucas*.

And finally, this Court should confirm that when a mayor is so invested in the demolition of a building, as has been pursued over a course of years by the city which he helms, he cannot act as the judge

in the case to determine whether the city can order the building razed. Rather, the 14th Amendment's due process provisions require that the property owner be provided with a true neutral and detached decisionmaker to determine the property's fate.

1. Procedural History.

This case was filed on March 16, 2020. It proceeded through discovery, at the conclusion of which Ogden City filed a Motion for Summary Judgment arguing, inter alia, that the statute of limitations had run on some of Mr. Bruce's Section 1983 claims because more than four years had passed since the challenged ordinances were passed by the city, and that Mr. Bruce could not make a claim for unconstitutional taking because some of the economic value of the property in question remained. The District Court agreed, and entered an order granting the summary judgment motion and final judgment on November 8, 2022. Mr. Bruce timely filed his Notice of Appeal on November 22, 2022. The parties briefed the issues before the Tenth Circuit, which issued an unpublished opinion upholding the District Court's decision on December 1, 2023. Mr. Bruce timely filed a Petition for Rehearing En Banc on December 15, 2023. The Tenth Circuit denied Mr. Bruce's Petition for Rehearing En Banc on January 2, 2024.

2. Brief Facts.

Mr. Bruce is the owner of certain real estate located in Ogden, on which there are three residential buildings containing a total of five residential living spaces (the "Property"). The Property encompasses two street addresses, which are 3166 Grant Avenue

and 3172 Grant Avenue. The units located at 3166 Grant Avenue are a side-by-side duplex, and the units located at 3172 Grant Avenue contain both a side-by-side duplex as well as a two bedroom cottage, with a basement, in the rear of the property. In total, there are five kitchens, five bathrooms, five gas meters, five electric meters, and three water meters on the Property. The three buildings were built in approximately 1907, prior to any zoning by Ogden City. The Property is one tax parcel and is not subdivided into individual dwellings. Mr. Bruce became the owner of the Property on or about August 1983.

The history of the zoning of the Property is as follows: In 1951, the Property was zoned as "R-5," which permitted the types of structures that were built on the Property in approximately 1907. In 1984, along with the creation of a document called the "Jefferson Community Plan," the area in which the Property is located was re-zoned as "R-2A." However, as with all of Ogden's zoning changes, the structures existing on the Property at that time were grandfathered in. The next zoning change took place with the enactment of an ordinance in 2000, which again downzoned the geographic area in which the Property is located. In 2000, Ogden enacted this ordinance as a part of its policies, practices, customs, or procedures in favor of promoting single family home ownership. In its deposition, Ogden testified as follows:

> The concern of the city was that the R-2 zone was a zone of single family and duplexes, and traditionally duplexes were a small component of that. There was a large vacant area of the city that was zoned R-2, not developed, and the

> development that started to take place was strictly all duplexes and that the chance for single family homeownership was being lost. And so the concern was to do the pending regulation to study the impact that the R-2 zoning was having on both vacant ground and on existing developments and the potential of disruption to homeownership in the single family neighborhoods and the mixes of houses in those areas.

Ogden City further testified that there was an "inappropriate mix" of duplexes, and that there were "[j]ust all duplexes. No single family homes involved in creating the stability of the neighborhood." Ogden City has been issuing fines, notices, and the like regarding the Property having supposedly illegal structures on the Property at least as far back as 2004.

In approximately 2009, Ogden mailed a notice to Mr. Bruce that it had changed the zoning of the Property to a single-family residential zone as a part of an alleged area-wide downzoning effort, which decision was made as a part of Appellees' policy, practice, custom, or procedure to downzone multi-family units to single-family dwellings. Prior to 2009, Mr. Bruce had spent tens of thousands of dollars on renovations and upgrades to the residential units located on the Property. The decision to downzone the Property by Ogden was made despite the historical use of the Property and the undisputed existence of three residential buildings on the Property. Mr. Bruce received no hearing or other proper due process before the Property was downzoned.

Nonetheless, Mr. Bruce attempted an administrative appeal of the zoning change, which was ignored by Ogden. Ogden ordered that the two

units at 3166 Grant Avenue and the two-bedroom cottage in the back of 3172 Grant Avenue must remain unoccupied and empty forever. Ogden ordered Mr. Bruce to board up the units and otherwise close them from residential use. Mr. Bruce complied with this order against his will, losing substantial income he could generate from the units, and only had expenses related to the maintenance and ownership of the units.

Ogden used this illegal and unenforceable downzoning to institute a series of ever more draconian penalties against Plaintiff. Ogden would periodically mail so-called notices to Plaintiff that vandals had allegedly removed the boards from the units, that the yard needed to be maintained, and the like. Ogden would issue fines to Plaintiff in this regard, without giving Plaintiff basic due process in connection with these fines before issuing them, such as a hearing before a neutral party, the opportunity to be heard, or the right to an appeal. In 2019, it appears that vandals squatted in one of the units at 3166 Grant Avenue. A fire was started in the unit, which was extinguished by the fire department. Plaintiff was then told to re-secure the building. Ogden City would periodically issue paper orders and fines demanding that Plaintiff renovate the building, but with no chance to ever rent it again because Appellees had illegally downzoned the Property.

In January 2020, Appellees issued Mr. Bruce a notice that they would imminently demolish the units located at 3166 Grant Avenue (the "Building"), alleging that they had become dilapidated and dangerous, unless Plaintiff abated the problem or demolished the units himself within 15 days. Thereafter, Mayor Caldwell issued an Order to Show Cause to appear before the Ogden City Mayor on

March 6, 2020 at 10:00 a.m. to explain why Mr. Bruce had not complied with the unconstitutional order. The result of this hearing is that Mayor Caldwell ordered the demolition of two of the units in question. By ordering that Mr. Bruce demolish these units or the city will do it for him, Appellees have completely destroyed any economic value or use for the Property. This order is in clear violation of the 5th and 14th Amendments of the United States Constitution, which prohibit the government from depriving private property owners of their property, or taking it without just compensation and due process of law. The current condition of the Property was caused by Defendants' prohibition on Plaintiff's use of Plaintiff's property.

Reasons for Granting the Writ

1. The Decision of the Tenth Circuit Court of Appeals Incorrectly Held that the Statute of Limitations on Mr. Bruce's Takings Claim Began to Run Before his Property Was Taken, as Defined by *Lucas*.

Under Rule 10, a Writ of Certiorari may be granted if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." US Supreme Ct. R. 10(c).

The Tenth Circuit upheld the holding of the District Court that claims related to the rezoning of Mr. Bruce's property were time barred because he was aware of the existence of those claims as far back as 2009. See *Bruce v. Ogden City Corp., et al.,* Case No. 22-4114, at 22-23, issued December 1, 2023, available

at 2023 U.S. App. LEXIS 31746 (10th Cir. Dec. 1, 2023). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the United States Supreme Court ruled that local governments may regulate land use without it being a full taking, provided that the regulation does not require the "owner of real property . . . to sacrifice all economically beneficial uses in the name of the common good . . . ." 505 U.S. 1003, 1019 (1992). It is at that point, when the owner is required "to leave his property economically idle, [that the owner] has suffered a taking." *Id.* As the Supreme Court has also held, "the statute of limitations begins to run when the plaintiff has a 'complete and present cause of action.'" *Reed v. Goertz*, — U.S. —, 143 S.Ct. 955, 961 (2023) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997)).

The regulations challenged by Mr. Bruce with his lawsuit did not rise to the level of a total taking until Appellees ordered the demolition of the building at 3166 Grant Avenue on the Property. Prior to that point, there was some theoretical residual value for use of the Building. As such, no statute of limitations began to run on any of Mr. Bruce's claims until that order for demolition was issued, in January 2020. Mr. Bruce filed his lawsuit within months of that order, well within the 4-year statute of limitations for Section 1983 claims. *See Buck v. Utah Labor Comm'n*, 73 Fed. Appx. 345, 348 (10th Cir. 2003) ("The district court correctly determined that Utah's four-year statute of limitations for general personal injury actions applies to plaintiff's § 1983 . . . claims." (citing *Owens v. Okure*, 488 U.S. 235, 236, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989)).

Such a holding makes it impossible for property owners to challenge unconstitutional zoning

ordinances when the taking precipitated by those ordinances take longer to mature than the statute of limitations provides. As such, the Tenth Circuit's holding concerning the statute of limitations is contrary to binding Supreme Court precedent and this Court should grant this Petition.

2. The Tenth Circuit's Unit of Measurement for what Constitutes a Property for the Purposes of Determining Whether a Taking Has Occurred Conflicts with the Binding Precedent of this Court.

In its decision, the Tenth Circuit held that the "proper unit of property" to use as a measure to determine whether the subject regulations deprived Mr. Bruce of all economically beneficial uses of the land was the entire legal parcel, and not simply the building at 3166 Grant Avenue. *Bruce v. Ogden City Corp., et al.,* Case No. 22-4114, at 25-26, issued December 1, 2023, available at 2023 U.S. App. LEXIS 31746 (10th Cir. Dec. 1, 2023) However, as the United States Supreme Court has held:

> [N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land.

Murr v. Wisconsin, 582 U.S. 383, 397 (2017). Unfortunately, the Tenth Circuit only considered one

of these three factors, i.e., how the land is treated under state and local law, and even then, only partially considered the record evidence. While it is true that the 3166 Grant Avenue building does share a plot of land with two other buildings, the regulations at issue have prohibited Mr. Bruce from renting out one of those buildings in its entirety and only permits Ms. Bruce to rent 1 of the 2 units in the other building (once an existing tenant vacates). Furthermore, under local law, the 3166 Grant Avenue building has its own address and is treated as a separate parcel by the Appellee, including with respect to the enforcement actions that are at the heart of this litigation. Additionally, the Tenth Circuit did not consider at all that the prospective value of the regulated land, i.e., the building at 3166 Grant Avenue, has been eliminated in its entirety. When properly considered, these factors lead to the conclusion that the building at 3166 Grant Avenue should have been the "denominator" when determining whether Mr. Bruce had lost all economically beneficial uses of his land.

Rather than engage in the balancing test outlined in *Murr*, the Panel Decision treated *Murr* as forcing an open-and-shut determination that since Weber County taxes the parcel in question as a single property, therefore Mr. Bruce did not have a takings claim because he could continue to get some marginal economic value out of the remaining portion of the parcel. This Court should grant this Petition and

overturn the Tenth Circuit's misapplication of the balancing test in *Murr*.

3. The Tenth Circuit Misapplied the Binding Precedent Concerning Whether Mr. Bruce Received Proper Due Process in Connection with the Order to Demolish his Building.

The Tenth Circuit erroneously upheld the District Court's decision that Mr. Bruce received proper procedural due process with respect to the procedures employed by Appellee when it came to its issuance of an order to demolish the building located at 3166 Grant Avenue.

Due process requires "a neutral and detached hearing body[.]" *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (quotation omitted). "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In this case, Ogden City used its own mayor as the judicial officer who decided whether Mr. Bruce's building should be demolished, and under the circumstances, doing so provided Mr. Bruce with neither a neutral and detached hearing body nor a meaningful opportunity to plead his case.

As explained in the Statement of Facts above, the record reflects that Ogden City used its administrative authority to order Mr. Bruce to keep the units at issue unoccupied while at the same time requiring him to maintain and upkeep the Property. When they alleged that he did not properly maintain

the Property, Appellees appointed themselves prosecutor, judge, jury, and executioner in the form of an administrative hearing in which Ogden's mayor decided whether or not Ogden had presented sufficient evidence to permit itself, the City of Ogden, to order the demolition of Mr. Bruce's buildings in a case where Ogden very clearly wanted to see the Building demolished.

Due process requires a neutral and detached decision maker. In these circumstances, using the executive officer of the municipal body bringing the claim against Mr. Bruce as the presiding judge, which has a vested interest in the outcome of the proceedings, does not meet this basic due process requirement. *See Turney v. Ohio*, 273 U.S. 510, 535 (1927) (municipal official could not be a neutral arbiter as "his official motive to convict and to graduate the fine to help the financial needs of the village"); *Ward v. Monroeville*, 409 U.S. 57, 60 (1972) ("Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.").

The Tenth Circuit emphasized that the Ogden City Mayor did not have a pecuniary interest in the decision to demolish Mr. Bruce's building. *Bruce v. Ogden City Corp., et al.,* Case No. 22-4114, at 31-32, issued December 1, 2023, available at 2023 U.S. App. LEXIS 31746 (10th Cir. Dec. 1, 2023). However, the governing Supreme Court precedent goes much further in defining how using a mayor to oversee these quasi-judicial procedures can violate the procedural due process rights of individuals. In *Ward*, the Supreme Court stated:

> The fact that the mayor there shared directly in the fees and costs did not define the limits of the principle. Although the mere union of the executive power and the judicial power in him can not be said to violate due process of law, the test is whether the mayor's situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . . Plainly that possible temptation may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.

Ward, 409 U.S. at 60 (citations and quotations omitted; alterations in original). In *Ward*, a "Mayor's Court," which helped the Village of Monroeville to collect funds for its operations, was held to be unconstitutional because it placed the mayor in a position where "possible temptation" to rule in favor of the Village "might lead" him to be partial to the Village's claims that were prosecuted before him. The U.S. Supreme Court held "that Petitioner is entitled to a neutral and detached judge in the first instance" and struck down the arrangement as unconstitutional. *Id.* at 61-62.

The same "possible temptations" that caused the U.S. Supreme Court to hold the "Mayor's Court" in *Ward* unconstitutional are in play in this case. For a significant period of time, Ogden City used its administrative authority to order Mr. Bruce to keep his units unoccupied, while at the same time, ordering him to maintain and upkeep the property. Ogden City then held a hearing at which its own mayor, Mayor Caldwell, presided and heard evidence presented by a municipal employee to that employee's boss (the mayor). In the process used by Ogden City, in other words, the prosecutor and the judge were on the "same team." It is no surprise then that Ogden City's mayor gave in to these "possible temptations" and ordered the building demolished. Indeed, it was the desired outcome by Ogden City, the entity overseen and managed by the mayor who is the driving force for all actions taken by the city, from the beginning of the proceedings.

As such, the Tenth Circuit's decision is contrary to binding precedent, and this Court should grant this Petition.

CONCLUSION

For the foregoing reasons, Mr. Bruce respectfully requests that this Court issue a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

DATED this 29th day of March, 2024.

Respectfully submitted,

/s/ Aaron C. Garrett
Aaron C. Garrett, Bar No. 318386
Counsel of Record for Petitioner Douglas Bruce
NONPROFIT LEGAL SERVICES OF UTAH
623 East 2100 South, Suite B1
Salt Lake City, Utah 84106
Tel: (385) 419-4111
aaron@nonprofitlegalservices.com

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOUGLAS BRUCE, an individual

Plaintiff—Appellant

v.

OGDEN CITY CORPORATION, an incorporated city in the State of Utah; **MICHAEL P. CALDWELL**, in his official capacity as the Mayor of Ogden City Corporation,

Defendants—Appellees

Appeal from the United States District Court
For the District of Utah
No. 22-4114

Before **BACHARACH**, **BRISCOE**, and **McHUGH**, Circuit Judges

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BRISCOE, Circuit Judge.

ORDER AND JUDGMENT

Plaintiff Douglas Bruce is a Colorado resident who owns a tract of land within the city limits of Ogden, Utah (the City), that contains two duplexes and one cottage. In early 2020, the City's building official directed Bruce to rehabilitate or demolish one of the buildings on the property that had been damaged by a fire in 2018. Bruce failed to respond to that directive. The building official then petitioned the City's mayor to issue a demolition order. Following a hearing, the mayor ordered the building to be demolished at Bruce's expense.

Bruce responded to the demolition order by filing this action against the City and its mayor. Bruce's complaint included a Fifth Amendment

takings claim, a procedural due process claim, and a substantive due process claim, all asserted pursuant to 42 U.S.C. § 1983, as well as a state law tort claim. The district court granted summary judgment in favor of defendants on all of the claims. Bruce now appeals the district court's grant of summary judgment in favor of the City. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the judgment of the district court.

I

Factual Background

a) Bruce's Property in Ogden

Bruce, a Colorado resident, has owned a tract of land (the Property) in the City since 1983. The Property contains three residential buildings—two duplexes and one cottage—which together contain a total of five residential living spaces. The Property also has two street addresses: 3166 Grant Avenue and 3172 Grant Avenue. The building assigned the address of 3166 Grant Avenue is a side-by-side duplex with two residential living spaces. The buildings assigned the address of 3172 Grant Avenue include a side-by-side duplex with two residential living spaces, and a two-bedroom cottage that is located in the rear of the property. The five residential spaces on the Property have a combined total of five kitchens, five bathrooms, five gas meters, five electric meters, and three water meters.

The Property is treated as one tax parcel.

b) Zoning history of the Property

The three buildings on the Property were built in approximately 1907, prior to any zoning by the City.

The City first implemented zoning regulations in 1951. At that time, the Property was zoned as "R-5," which permitted the number and types of

structures that exist on the Property. Aplt. App., Vol. 2 at 14–15.

In 1984, the area in which the Property is located was rezoned as "R-2A." Id. at 15. R-2A zones generally "allow[ed] single family and duplex-type development," as well as "subdivisions for senior housing and . . . other typical accessory residential uses such as churches, schools, [and] public facilities." Id. at 96. City officials deemed Bruce's property nonconforming because the number of structures on the property exceeded the density limits of the new zone. Id. at 105. The City, however, undertook no enforcement measures against the Property during the time that the Property was zoned as R-2A. Id.

According to City records, R-2 zoning areas "[t]raditionally . . . had more single family homes than duplexes." Id., Vol. 1 at 65. "This allowed [for] the creation of neighborhoods with a good mixture of housing styles and market ranges." Id. Over time, however, new development in R-2 zoning areas came to be dominated by "duplex only style neighborhoods." Id. Further, owners of new duplexes typically occupied only a small percentage of those duplexes. Id. at 75. City officials considered "[t]his type of land use [a]s eliminating" the City's "ability to provide different market levels of housing" and instead "create[ed] a starter home only type of community." Id. at 65. City officials also considered "[t]his [to be] detrimental to neighborhood stability because" such neighborhoods were "always in transition," which in turn impacted local schools. Id. at 155. In addition, city officials expressed concern that "[t]his . . . threaten[ed] to create areas of future slum and blight." Id. at 88.

These trends in the R-2 zoning areas led the City, on July 18, 2000, to adopt Ordinance No. 2000-

44. That ordinance prohibited the development of two-family dwellings, i.e., duplexes, within all existing two-family zones, including zone R-2A, from July 18, 2000, to January 18, 2001, so that the City could review and consider the downzoning of all or a portion of the R-2 zones to single-family zone classification.

On January 16, 2001, after lengthy consideration, public notice,[1] and public input, the City adopted Ordinance No. 2000-73 (the Ordinance). The Ordinance amended the City's zoning map and, in relevant part, reclassified the R-2A two- family residential zones as "R-1-5," meaning single-family residential. Id. at 49. The Ordinance stated, however, that "legally established duplexes, currently located in the areas subject to rezoning, should not be treated as non-conforming uses and that such uses, if allowed to continue as legal confirming uses, will not have a significant impact on the goals for rezoning." Id. Consistent with this statement, the Ordinance resulted in the following provision being added to the City's code: "Any two-family dwelling or duplex that

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[1] The public notice took two forms. First, the city "mail[ed] a letter or postcard to each individual property owner, to each tenant of property within [the] area being considered for a zone change, notifying them of the meeting[s], notifying them of staff to contact if they have questions about it, and also notifying them that they c[ould] either attend the meeting[s] or send . . . letter[s] regarding their concerns." Aplt. App., Vol. 2 at 92, 171. Second, the City placed a notice in the local newspaper informing the public of any upcoming meetings at which the issue would be discussed. Id. at 92.

was in legal existence prior to January 16, 2001, shall be considered legal conforming."[2] Id., Vol. 2 at 5, 28.

It is undisputed that Bruce did not judicially challenge the Ordinance at the time of its adoption. It is also undisputed that the City complied with all applicable state laws and local regulations in adopting the Ordinance.

c) The Property's history of noncompliance with City codes

On or about March 7, 2005, Greg Montgomery, the City's Manager of Current Planning, issued a certificate of noncompliance regarding the Property. The certificate stated that the Property was inspected on February 15, 2005, and that "[t]he following conditions and/or use of the building and/or premises render[ed] the property in violation of Ogden City Ordinances": "Having a group dwelling (three buildings with dwelling units) on a lot that allows only one dwelling unit. Approval must be obtained to continue a use as a group dwelling." Id., Vol. 1 at 238.

Beginning in late January of 2009, the City increased its efforts to enforce ordinance violations at the Property. On January 27, 2009, a City code enforcement officer visited the Property and notified Bruce that the Property was in violation of Ordinance 12-4-2 due to the presence of waste materials or junk on the Property. On February 10, 2009, a City code enforcement officer again visited the Property and advised Bruce that the Property was in violation of Ordinance 12-4-2 due to the presence of waste

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2 This provision did not operate to render Bruce's Property as a whole legal conforming because the number of structures on the Property exceeded the density limits that existed both before and after passage of the 2001 Ordinance.

materials or junk on the Property. The City also advised Bruce on that date that "[d]ocuments still ha[d] not been provided" by him "for a legal Nonconforming use" of the Property "with the down zone from R-2 to R-1-5." Id. at 242. On March 4, 2009, a City code enforcement officer visited the Property and again advised Bruce of the waste and nonconforming use issues. The City noted that because notice of nonconformance "was given in 2004," some of "the rights were lost," but that it was aware "that the south duplex has been occupied and may have some rights." Id. at 243. The City advised Bruce that it was up to him "to go through the approval process" for a nonconforming use, and it advised him of who to contact in the City's planning department. Id.

According to Bruce, at some point in 2009, the city mailed him a notice notifying him that the Property had been downzoned to single-family residential (the 2009 Notice). Bruce alleges that, after receiving this 2009 Notice, he attempted to file an administrative appeal. Bruce alleges that the City ignored his appeal and ordered that the two units in the duplex at 3166 Grant Avenue and the unit in the rear of 3172 Grant Avenue (the cottage) remain unoccupied indefinitely. Bruce also alleges that the City instructed him to board up those units.

City code enforcement officers conducted seventeen additional inspections of the Property between April 13, 2009, and May 7, 2010. Following each of those visits, the City sent notices to Bruce advising him of the Property's nonconformance with zone R-1-5, encouraging him to utilize the City's approval process for nonconforming uses, and asking him to advise the City of his plans for the Property.

The City also issued six citations to Bruce in 2009 due to ordinance violations at the Property.

Bruce met with Greg Montgomery, the City's Planning Manager, in early May 2010. Following the meeting, Montgomery sent a letter to Bruce noting, in relevant part, (a) that the City mailed notices to property owners prior to the enactment of the Ordinance, (b) how the process of applying for a nonconforming use certificate works, and (c) emphasizing that a nonconforming certificate can be lost or revoked.

On eleven occasions between July 1, 2015, and November 14, 2019, the City's Code Services Department "sent abatement crews to secure the [P]roperty, remove discarded junk and debris from the yard, and/or cut the weeds." Id. at 268.

Beginning on June 2, 2015, the City sent sixteen Notices of Violation, fourteen Citations, and eleven Abatement Citations to Bruce regarding the Property.

d) Bruce's failure to establish the legal existence of a noncomplying structure and/or a nonconforming use

Utah law provides that "a nonconforming use or noncomplying structure may be continued by the present or future property owner." Utah Code Ann. § 10-9a-511(1)(a). Utah law also, however, affords municipalities with substantial regulatory authority over nonconforming uses. More specifically, Utah law provides that municipalities "may provide for":

(a) the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance;

(b) the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any; and

(c) the termination of a nonconforming use due to its abandonment.

Id. § 10-9a-511(2). In addition, Utah law provides that "[u]nless [a] municipality establishes, by ordinance, a uniform presumption of legal existence for nonconforming uses, the property owner shall have the burden of establishing the legal existence of a noncomplying structure or nonconforming use through substantial evidence." Id. § 10-9a-511(4)(a).

Consistent with Utah law, the City's Municipal Code "allows for the preservation of nonconforming uses of land, provided that the use legally existed before its current land use designation and has been continuously maintained since the time of the adoption of the land use ordinance changing the permitted use." Aplt. App., Vol. 1 at 27 (citing City Municipal Code § 15-6-3). The City issues nonconforming certificates and in turn records those in the county records.

It is undisputed that the Property was noncompliant with City ordinances because multiple dwelling units were located on the Property, which was zoned for only one dwelling unit. Id. at 26, 238. As noted, the City repeatedly urged Bruce to seek a

certificate for a nonconforming use for the Property.[3] Bruce, however, neither sought nor received a certificate for any nonconforming use for the Property

e) The demolition order

On June 25, 2018, there was a fire in the building on the north side of the Property, i.e., the side-by-side duplex located at 3166 Grant Avenue. This building "ha[d] been vacant for an extended period of time," "lack[ed] sanitation facilities," and had been the subject of "38 calls" to the police. Id. at 267. "The fire damaged the exterior south wall window header and framing, and the fascia on the south side." Id. at 266. "The interior structure was [also] damaged from the fire, including damage to the door framing and headers as well as wall framing . . . and coverings," which "compromised the structural integrity of the building." Id. "The interior ceiling . . . partially collapsed from fire damage and firefighting efforts." Id. at 266–267.

On January 8, 2020, Steve Patrick, the City's Building Official, "declared the structure on the north side of the [Property] . . . to be a dangerous building and a public nuisance" under the City's ordinances. Id. at 265–266. On or about January 9, 2020, Patrick sent

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[3] According to the record, "a nonconformance certificate is to help people understand what their rights are, that the nonconformity exists, and that it can be lost through certain neglect items." Aplt. App., Vol. 2 at 129. In addition, "the certificate allows them to make sure that if they're selling the property, the new buyer can know that it does have those rights," i.e., "that the city actually recognizes those rights and it specifies what those rights are." Id.

a letter to Bruce that was titled "NOTICE OF DANGEROUS BUILDING AND ORDER TO ABATE." Id. at 222. The letter listed the "Property Address" as "3166 Grant Avenue." Id. The letter stated, under the title "DESCRIPTION":

> That certain parcel with three separate structures. The structures are non-complying group dwellings, and have not been permitted by the city. The structure subject to this notice and order, henceforth referred to as "the structure" is located on the north side of the parcel with address number 3166. The structure being a wood framed two story structure facing west to the street, with wood siding, and two entrances on the west side, and an attached wood framed covered porch, and an entrance on the east and north side of the house, with a cement foundation, and cement cellar. The second structure, which is not subject to this notice and order, being a wood framed two story structure with address number 3172 located on the south side of the lot, with wood siding, and two entrances on the west side, and an attached wood framed covered porch, and an entrance on the east and north side of the house, with a cement foundation, and cement cellar. The third structure, which is not subject to this notice and order, located on the east side of the lot, being one level, with no visible house number, with an entrance on the south side of the building, with an attached lean to shed on the east side of the property, the parcel is located at 3166 Grant Ave., Ogden City, Weber County, Utah[.]
>
> ***
>
> You, and each of you, are hereby notified that pursuant to the provisions of Section 16-8A-7[] of

the Code for the Abatement of Dangerous Buildings, the undersigned, as the officer charged with the administration and enforcement of said Ordinance, has caused to be inspected the buildings herein above described and has determined that said buildings are a Dangerous Buildings within terms of Ordinance 16-8A-6 A & B and particularly by reason of the following, to wit:

16-8A-6: B4. Whenever any portion thereof has been damaged by fire, earthquake, wind, flood, or by any other cause, to such an extent that the natural strength or stability thereof is materially less than it was before such catastrophe and is less than the minimum requirements of the Building Code for new buildings or similar structure, purpose or location.

On June 25, 2018, there was a fire in the structure. The fire damaged the exterior south wall window header and framing, and the fascia on the south side "Figure 1". The interior structure was damaged from the fire. The fire damage to the door framing and headers as well as wall framing and coverings have compromised the structural integrity of the building "Figure 2". The interior ceiling has collapsed from fire damage and firefighting efforts "Figure 3".

16-8A-6: B12. Whenever the building or structure has been so damaged by fire, wind, earthquake or flood, or has become so dilapidated or deteriorated it has become: a) an attractive nuisance to children; b) a harbor for vagrants, criminals or immoral persons; or as to c) enable persons to resort thereto for the purpose of committing unlawful or immoral acts.

The structure has been vacant for some time and lacks sanitation facilities. The water service has been off since May 21, 2003. Individuals have entered and illegally resided in the structure on numerous occasions. Since March, 2017, Ogden City Police Department has responded to 38 calls to the property "Figure 4".

16-8A-6: B19. Whenever any building or structure, or portion thereof, is vacant or open and:

a. One or more of the doors, windows, or other openings are missing or broken;

b. One or more of the doors, windows, or other openings are boarded up or secured by any means other than conventional methods used in the design of the building or permitted for new type, unless boarded in accordance with an approved vacant building plan pursuant to article B of this chapter; or

c. In such condition that it constitutes an attractive nuisance or hazard to the public.

The doors and windows of the structure have been broken down numerous times. The owner does not respond to requests from Ogden City Code Enforcement to close and secure the structure, remove junk from the yard, and remove people living in the structure. These actions constitute an attractive nuisance and hazard to the public.

On the following dates Ogden City Code Services sent abatement crews to secure the property, remove discarded junk and debris from the yard, and/or cut the weeds:

1. July 1, 2015

2. September 14, 2015

3. August 19, 2016
4. June 16, 2017
5. July 28, 2017
6. October 20, 2017
7. October 31, 2017
8. November 22, 2017
9. January 25, 2018
10. June 12, 2018
11. November 14, 2019

YOU ARE HEREBY ORDERED to immediately vacate the premises, if the premises are not already vacant. YOU ARE FURTHER ORDERED to obtain the proper permits as required and secure the building and to cause the building to be secured immediately. YOU ARE FURTHER ORDERED not to lease or rent any of the buildings, and to maintain the buildings at the above address VACANT and SECURE against entry until it has been determined that said buildings are no longer dangerous by the Ogden City Building Department. YOU ARE HEREBY ORDERED to obtain the proper demolition permits and commence to completion with reasonable diligence, demolition of said building not later than FIFTEEN (15) DAYS FROM THE DATE OF SERVICE OF THIS NOTICE, and to have said work of abatement completed within the limits of required permits. If you fail to do so, your non-compliance will result in the buildings being abated at the direction of Ogden City, and the total cost of said abatement shall be levied as a special assessment against said property.
YOU ARE HEREBY ADVISED that all other persons having an interest in said building or land

are hereby notified that they may, at their own risk and expense, so abate said buildings not later than the date herein above provided, so as to prevent the levy by Ogden City of the aforesaid special assessment on said property.

YOU ARE HEREBY FURTHER ADVISED that failure to abate (correct) the nuisance within the time specified is a misdemeanor.

YOU ARE HEREBY FURTHER ADVISED that the building or structure identified in this Notice and Order has deteriorated to a condition that has rendered it uninhabitable. Any nonconforming use pertaining to the building or structure will be lost if the building or structure is not repaired or restored within six (6) months after the date this notice is mailed to you.

YOU ARE HEREBY FURTHER ADVISED that any person having any record title or legal interest in the building may appeal the Notice and Order to the Ogden City Board of Building and Fire Code Appeals, provided the appeal is made in writing, within 10 days from the DATE OF SERVICE of such notice and order. Failure to do so constitutes a waiver of all rights to an administrative hearing and determination of the matter. SERVICE by mail in the manner herein provided shall be effective five (5) days after the date of mailing of this notice and order.

YOU ARE HEREBY FURTHER ADVISED that non-compliance of this notice and order of the appeal process, within the time specified, will result in the recordation of this order with the County Recorders Office for permanent record on the property abstract

Id. at 222-226 (emphasis in original).

A notice of the declaration was sent to Bruce on January 9, 2020, ordering him to "commence with the demolition/rehabilitation of the building not later than fifteen (15) days from the date of the Notice." Id. at 266. Bruce failed to respond to the notice. More specifically, Bruce failed to commence demolition or rehabilitation work on the Property, did not seek to "obtain permits for either the repair or demolition of the building within the required period," and did not appeal the declaration and notice. Id. at 266.

On February 4, 2020, Patrick petitioned Michael Caldwell, the Mayor of the City, "to hold a hearing and order" Bruce "to show cause why [the City] should not abate the dangerous building." Id. at 265. A hearing was scheduled for March 6, 2020, and Bruce was notified of the hearing. "Bruce appeared at the hearing via telephone and was also represented in person through his attorney, Aaron C. Garrett." Id. On April 8, 2020, Caldwell determined that "the building [wa]s in fact dangerous as defined in the Ogden Municipal Code and [was] a public nuisance." Id. at 268. Caldwell also found that Bruce "ha[d] not shown valid reasons why the city should not proceed with the demolition of the building." Id. Caldwell therefore ordered the building to be demolished and "the cost of such demolition" to "be recovered by a tax lien on the property." Id. at 269.

II

Procedural history

On March 16, 2020, Bruce initiated these proceedings by filing a complaint in federal district court against the City and Caldwell in his official capacity as Mayor of the City. Bruce alleged in his

complaint that he first received notice from the City in 2009 "that it had changed the zoning of the Property to a single family residential zone." Id. at 11. Bruce further alleged that "[b]efore 2009 [he] had spent tens of thousands of dollars on renovations and upgrades to the residential units located on the Property." Id. Bruce alleged that he "received no hearing or other proper due process before the Property was down-zoned." Id. Bruce alleged that "[h]e attempted an administrative appeal" of the down-zoning, but the "City ignored his appeal," "ordered that the two units at 3166 Grant Avenue and the unit in the rear of 3172 Grant Avenue must remain unoccupied and empty forever," and "instructed [him] to board up the units and otherwise close them from residential use." Id. at 11–12. Bruce alleged that, "[a]gainst his will, [he] complied with this order even though it meant he had lost the substantial income he could generate from these three units." Id. at 12. Bruce also alleged that he "had two tenants in the side-by-side duplex located at 3172 Grant Avenue, who [the] City agreed could remain in the homes until they moved." Id. "After that, however, [the] City [allegedly] mandated that [Bruce] could only lease one of the two units at 3172, and only one of his five units on the Property, at any given time." Id.

The first three causes of action alleged in the complaint sought relief under 42 U.S.C. § 1983 for various constitutional violations allegedly committed by the City and/or Caldwell. The first of those three causes of action, titled "DEPRIVATION OF PROPERTY UNDER FIFTH AMENDMENT RIGHTS," alleged that "Defendants maintain[ed] a policy, practice, custom, or procedure through which

[they] downzone[d] multi-unit parcels to single-family dwellings without providing owners proper notice, reasonable ability to contest the zoning change before a neutral party, and the right to appeal." Id. at 15. It further alleged that "[a]s a result of this policy, practice, custom, or procedure, Defendants ha[d] unlawfully deprived [Bruce] of his private property." Id.

The second cause of action, titled "VIOLATION OF PROCEDURAL DUE PROCESS—FOURTEENTH AMENDMENT," alleged that Bruce's "legitimate property interest . . . in the Property was abridged, under color of state law, without appropriate due process." Id. at 16. More specifically, the cause of action alleged that Defendants "ha[d] unlawfully deprived [Bruce] of his private property" "[a]s a result of [their] policy, practice, custom, or procedure" by which they "downzone[d] multi-unit parcels to single-family dwellings without providing owners proper notice, reasonable ability to contest the zoning change before a neutral party, and the right to appeal." Id.

The third cause of action, titled "VIOLATION OF SUBSTANTIVE DUE PROCESS," alleged that due to defendants' "policy, practice, custom, or procedure which prefer[red] single family units to the multi-family unit property maintained by [Bruce]," defendants "ha[d] unlawfully deprived [Bruce] of his private property" and "violated [his] substantive due process rights under the United States Constitution." Id. at 16–17.

The fourth cause of action alleged in the complaint was titled "INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS UNDER UTAH STATE LAW." Id. at 18. This cause of

action alleged that "Defendants intentionally interfered with [Bruce's] existing or potential economic relations with respect to the Property" and "did so with the improper and predominant purpose of injuring [him] and his financial interest in the Property." Id.

On February 15, 2022, defendants filed a motion for summary judgment with respect to all of the claims asserted in Bruce's complaint. Defendants argued that Bruce's Fifth Amendment takings claim failed as a matter of law because the subject ordinance did not deprive Bruce of all economically viable uses of the Property, there was no evidence of diminution in value, and any alleged diminution in value did not amount to a taking. Defendants in turn argued that Bruce's "claim of a procedural due process violation should be dismissed as a matter of law because the challenged Ordinance was the result of legislative action." Id., Vol. 2 at 160. As for Bruce's substantive due process claims, defendants argued those should be dismissed because the challenged government action was not arbitrary and capricious, or capable of shocking the judicial conscience. Finally, defendants argued that Bruce's tortious interference claim was fatally flawed because he "failed and refused to provide any evidence concerning the damages sustained by him as a result of [the] City's actions." Id., Vol. 1 at 46.

Bruce opposed the motion, in part. Specifically, Bruce argued that genuine issues of material fact precluded summary judgment on his constitutional claims against the City, but he "d[id] not dispute dismissal of . . . Caldwell in his official capacity [as Mayor] or the dismissal of the interference with business relations claim." Id., Vol. 2 at 23 n.4.

Defendants filed a reply brief in support of their motion for summary judgment. In it, defendants argued, in relevant part, that some of the statements and admissions contained in Bruce's response to the motion for summary judgment established that his claims arose long before his complaint was filed and that, as a result, his constitutional claims were untimely. Bruce filed a surreply arguing, in relevant part, that his claims were not time-barred.

On November 8, 2022, the district court issued a written order granting defendants' motion for summary judgment. The district court concluded, as an initial matter, that to the extent Bruce was alleging the existence of any constitutional violations stemming from the enactment of the Ordinance and the issuance of the 2009 Notice, those claims were time-barred. The district court next considered "whether a reasonable jury could find that the 2020 Demolition Order and its related proceedings were a Fifth Amendment taking without just compensation, a denial of procedural due process, or a violation of substantive due process." Id., Vol. 4 at 25. The district court concluded that "[b]ecause [Bruce] d[id] not allege a permanent physical invasion of the Property," it only needed to consider "whether [he] ha[d] sufficient evidence to show that either . . . the City completely deprived [him] of 'all economically beneficial use' of his property under Lucas[v. South Carolina Coastal Council, 505 U.S. 1003 (1992)] or" that "the evidence [wa]s sufficient to satisfy the Penn Central[Transp. Co. v. New York City, 438 U.S. 104 (1978)] analysis." Id. at 26. The district court concluded that Bruce's evidence was insufficient to show a taking under Lucas because it did not show that defendants denied him all economically

beneficial use of the Property. Id. at 27–29. The district court also concluded that Bruce's evidence was insufficient to show a taking under Penn Central because he provided no evidence of economic impact or a distinct, investment-backed expectation to maintain a nuisance; lastly, the district court concluded that regulating a nuisance is quintessential government action.

As for Bruce's procedural due process claim, the district court concluded that "[i]t [wa]s undisputed that [Bruce] ha[d] a property interest in the Property." Id. at 32. The district court in turn concluded that the record evidence established that Bruce received notice from the City that it was considering demolishing one of the buildings on the Property, that Bruce was afforded a hearing, that Bruce appeared remotely at the hearing and was represented in-person through his attorney, and that the mayor rendered a decision after hearing the evidence and the arguments from both sides. Id. at 33. Although the district court noted that Bruce's position was that "the mayor's role as arbiter violated procedural due process," it rejected that view, noting that Bruce "fail[ed] to offer any evidence that the City's mayor faced any circumstances that would lead him not to be impartial and fair." Id. at 33, 34.

Finally, as for Bruce's substantive due process claim, the district court noted that the "City Code authorizes the City to abate dangerous buildings that 'endanger the life, limb, health, morals, property, safety or welfare of the general public or their occupants,'" and the "[r]ecord evidence show[ed] that the . . . City Building Official reviewed the condition and history of the structure at 3166 Grant Avenue," "observ[ed] that the structure had been vacant for

years, had experienced a fire in 2018, and was the location of 38 calls to the police over the last three years," and "concluded that the property was dangerous." Id. at 36. The district court further noted that "[a]fter hearing from the building official and from [Bruce], the mayor also concluded that the building was dangerous and should be demolished." Id. The district court concluded that "[n]o reasonable jury could find that this constitutes 'outrageous' conduct." Id.

Final judgment was entered in the case on November 8, 2022. Bruce filed a timely notice of appeal on November 22, 2022.

III

In his appeal, Bruce challenges the entirety of the district court's decision granting summary judgment in favor of the City. Specifically, Bruce argues that the district court erred in concluding that (1) many of his claims were time-barred, (2) he could not establish a Fifth Amendment takings claim, (3) the mayor was a neutral decision-maker, and (4) the City's actions did not shock the conscience so as to give rise to a substantive due process claim.

"We review the district court's rulings on summary judgment de novo." Deer Creek Water Corp. v. City of Okla. City, 82 F.4th 972, 979 (10th Cir. 2023) (quoting Hamric v. Wilderness Expeditions, Inc., 6 F.4th 1108, 1121 (10th Cir. 2021) (internal quotation marks omitted)). "Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Id. (quoting Fed. R. Civ. P. 56(a) (internal quotation marks omitted)).

1) Statute of limitations

In his first issue on appeal, Bruce argues that the district court erred in concluding that the statute of limitations had run on his § 1983 claims to the extent they related to downzoning. "We review whether a district court properly applied a statute of limitations de novo." Allen v. Envtl. Restoration, LLC, 32 F.4th 1239, 1243 (10th Cir. 2022).

Because § 1983 itself contains no statute of limitations, § 1983 claims are governed by the statute of limitations generally applicable to personal injury actions in the state where the claims arose. Thus, in this case, Utah's four-year residual statute of limitations governs Bruce's § 1983 claims. See Fratus v. DeLand, 49 F.3d 673, 675 (10th Cir. 1995).

The district court concluded, in addressing the timeliness of Bruce's § 1983 claims, that to the extent Bruce was alleging the existence of any constitutional violations stemming from the enactment of the Ordinance or the issuance of the 2009 Notice, those claims were time-barred, but to the extent Bruce's alleged constitutional violations stemmed from the 2020 Demolition Order and the related proceedings, those claims were not time-barred. More specifically, the district court noted that "by 2009, [Bruce] had notice of the . . . Ordinance . . . and was injured by it." Aplt. App., Vol. 4 at 24. Because he "did not file this complaint until 2020, the four-year statute of limitations had long since run." Id. As for the 2009 Notice, the district court noted that Bruce "knew about the [notice]," "attempted to appeal it," "and then complied with it" all in 2009, "which [allegedly] caused him injury in the form of lost rental income." Id. "By 2013," the district court concluded, "the applicable four-year statute of limitations had expired." Id. Finally, the district court concluded that, to the extent

Bruce's alleged constitutional violations stemmed from the 2020 Demolition Order and the related proceedings, those claims were not time-barred because Bruce "filed his complaint in March 2020, well within the four-year statute of limitations." Id. at 25.

Bruce argues in his appeal that "the touchstone for [his] takings and due process claims was the demolition order issued by" the Mayor "on March 6, 2020." Aplt. Br. at 11. He argues that "[i]t was through this order that [the] City ordered his building demolished, which constitutes a taking under the 5th Amendment." Id. More specifically, Bruce argues that "[t]he regulations" he now "challenge[s] . . . with his lawsuit did not rise to the level of a total taking *until Appellees ordered the demolition of the building* at 3166 Grant Avenue on the Property." Id. at 8 (emphasis in original). "Prior to that point," Bruce asserts, "there was some theoretical residual value for use of the Building." Id. Consequently, he argues, "no statute of limitations began to run on any of [his] claims until that order for demolition was issued, in January 2020." Id. at 8–9.

We begin with Bruce's assertion that the demolition order resulted in a "total taking" of the Property. For the reasons we shall discuss below in our analysis of Bruce's Fifth Amendment takings claim, Bruce has failed to demonstrate that the demolition order resulted in a "total taking" of the Property. We therefore reject his statute-of-limitations arguments to the extent that they rest on this "total takings" theory.

Notably, Bruce does not otherwise challenge any of the conclusions that underpin the district court's statute of limitations rulings. Specifically, he

has not challenged the district court's determinations that he "received notice of the [Challenged Ordinance] no later than 2009, when Defendants mailed him [the 2009 Notice]," or that "Defendants began enforcing the ordinance on the Property" in 2009. Aplt. App., Vol. 4 at 24. Nor does Bruce challenge, at least directly, the district court's conclusion that because he "did not file this complaint until 2020, the four-year statute of limitations had long since run," meaning that "[a]ny constitutional violations resulting from the . . . Ordinance are time-barred." Id. Lastly, Bruce does not challenge the district court's conclusion that "[b]y 2013, . . . the applicable four-year statute of limitations had expired" on any claim arising out of the 2009 Notice. Id.

We therefore affirm the district court's statute-of-limitations rulings.

2) The Fifth Amendment Takings claim

Bruce argues that the district court erred in granting summary judgment in favor of the City on his Fifth Amendment takings claim. Bruce argues in support that "all economically beneficial use of" the Property "has been eliminated by the municipal demolition order." Aplt. Br. at 13. According to Bruce, "[n]o additional or replacement building will be permitted to be built" on the Property at 3166 Grant Avenue, "as it is considered [by the City to be] one in the same with the buildings located at 3172 Grant Avenue," "and the revised local ordinances do not allow multiple units on one parcel." Id. at 14. "As such," Bruce argues, "by ordering the demolition of the Building at 3166 Grant Avenue, [defendants] have forced [him] to hold the ground fallow and unused, and have erased any economic use of that property." Id.

"The Fifth Amendment's Takings Clause provides that 'private property [shall not] be taken for public use, without just compensation.'" N. Mill St., LLC v. City of Aspen, 6 F.4th 1216, 1224 (10th Cir. 2021) (quoting U.S. Const. amend. V). "The Supreme Court has recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such regulatory takings may be compensable under the Fifth Amendment." Id. (quoting Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (internal quotation marks omitted)). "The Court has identified two categories of regulatory action that are per se takings: (1) where government requires an owner to suffer a permanent physical invasion of her property—however minor, and (2) regulations that completely deprive an owner of all economically beneficial use of her property." Id. (quoting Lingle, 544 U.S. at 538) (internal quotation marks omitted).

In addition to these two categories of per se takings, "a taking still may be found" "when a regulation impedes the use of property without depriving the owner of all economically beneficial use." Murr v. Wisconsin, 582 U.S. 383, 393 (2017). In such situations, "a taking . . . may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Id. (internal quotation marks omitted).

"A central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility," by which courts "reconcile two competing objectives central to

regulatory takings doctrine." Id. at 394. "One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership." Id. Second "is the government's well-established power to 'adjus[t] rights for the public good.'" Id. (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979)). In balancing these two competing objectives, "the analysis must be driven by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Id. (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001)) (internal quotation marks omitted).

In determining whether a regulatory taking has occurred, a reviewing court must determine "the proper unit of property against which to assess the effect of the challenged governmental action." Id. at 395. That is "[b]ecause [the] test for regulatory taking requires" a reviewing court "to compare the value that has been taken from the property with the value that remains in the property." Id. (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987)) (internal quotation marks omitted). "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." Id. (quoting Concrete Pipe & Products of Cal., Inc v. Constr. Laborers Pension Trust for Southern Cal., 508 U.S. 602, 644 (1993)).

In this case, Bruce effectively argues that the proper unit of property against which to assess the effect of the challenged governmental action is the "building and property located at 3166 Grant

Avenue," i.e., the specific building that is the subject of the demolition order. Aplt. Br. at 12 (capitalization omitted). The City argues, in contrast, that the proper unit of property for purposes of analysis is "the entire subject parcel," i.e., the Property. Aple. Br. at 17.

We conclude that the City has the better of the argument. In Murr, the Supreme Court noted that it "has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation." 582 U.S. at 396. The Court also held that "courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law." Id. at 397. In this case, it is undisputed that, although the Property encompasses two street addresses, it is a single parcel of real estate that the state and the City have long treated as one tax parcel, and that the City has treated as a single unit for purposes of zoning. Thus, in assessing whether the demolition order resulted in a taking for purposes of the Fifth Amendment, we conclude we must treat the Property as a whole as the "proper unit of property against which to assess the effect of the challenged governmental action," rather than simply the building that is the subject of the demolition order. Id. at 395.

As the Supreme Court has noted, defining the proper unit of property is often "outcome determinative." Id. That is because "the relevant question . . . is whether the property taken is all, or only a portion of, the parcel in question." Id. (quoting Concrete Pipe, 508 U.S. at 644). And that is true here, at least in part. Even assuming that the demolition order resulted in a taking by the City of the portion of the Property associated with 3166 Grant Avenue, that portion represents only part of the Property. More

specifically, there is no evidence that the demolition order required Bruce "to suffer a permanent physical invasion" of the Property or "completely deprive[d]" him "of all economically beneficial use of" the Property. N. Mill St., 6 F.4th at 1224 (quoting Lingle, 544 U.S. at 537). Indeed, as the district court correctly noted, Bruce may still rent, occupy, or sell the Property after the offending duplex is demolished. Thus, the Property in its entirety was not taken by the demolition order. Consequently, that eliminates the possibility that the demolition order resulted in a per se taking of the Property.

That leaves only the possibility of a taking "based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Murr, 582 U.S. at 393. With respect to the first of these factors, the district court concluded that Bruce "provided no evidence of the value that remains in the Property or of the value that has been taken by the demolition order." Aplt. App., Vol. 4 at 30. With respect to the second factor, the district court concluded that when Bruce purchased the Property in 1983, he had no distinct, investment-backed expectation in maintaining a nuisance. Id. (capitalization omitted). Consequently, the district court concluded that "the 2020 Demolition Order did not interfere with [Bruce]'s distinct investment-backed expectations." Id. at 31. Lastly, with respect to the third factor, the district court concluded that "[r]egulating a nuisance is quintessential government action." Id. The district court further noted that Bruce "offer[ed] no evidence that the duplex at 3166 Grant Avenue is not a

nuisance," and that, "[i]nstead, the unrebutted evidence show[ed] that the building is dangerous because it is structurally deficient and left unsecured." Id. Notably, Bruce does not discuss these three factors at all in his opening appellate brief, let alone make any attempt to rebut the district court's conclusions regarding these factors.

We therefore conclude that the district court correctly granted summary judgment in favor of the City on Bruce's Fifth Amendment Takings claim.

3) The procedural due process claim

Bruce next argues that the district court erred in granting summary judgment in favor of the City on his procedural due process claim. Bruce asserts that he "was not provided notice of the zoning changes as they were being considered and enacted in the 2000–2001 time period, and in the summary judgment briefing, Appellees presented no admissible evidence to contradict his sworn statement." Aplt. Br. at 16. Bruce also challenges the hearing that preceded the demolition order, arguing that "[d]ue process requires a neutral and detached decision maker; and in these circumstances using the executive officer of the municipal body bringing the claim against [him] as the presiding judge does not meet this basic due process requirement." Id. at 17.

Bruce's argument that he failed to receive notice of the zoning changes to the Property fails for at least three reasons. First, the district court found that Bruce "admit[ted] that he received notice of the [2001] ordinance by no later than 2009, when Defendants mailed him a notice." Aplt. App., Vol. 4 at 24. Bruce does not dispute this finding in his opening appellate brief. Second, and relatedly, the district court concluded that "by 2009, [Bruce] had notice of

the . . . Ordinance . . . and was injured by it," but "did not file this complaint until 2020." Id. As a result, the district court concluded that "the four-year statute of limitations had long since run" when Bruce filed his complaint in 2020, and "[a]ny constitutional violations resulting from the 2001 Ordinance [we]re time-barred." Id. Again, Bruce does not dispute this conclusion in his opening appellate brief, and therefore, to the extent his procedural due process claim is based upon failure to receive notice of the Ordinance, it is time-barred. Third, even if the claim was not time-barred, it clearly lacks merit. That is because the Supreme Court long ago "held that constitutional procedural due process does not govern the enactment of legislation," and we in turn have held that "the adoption of a general zoning law is a legislative action."[4] Onyx Props. LLC v. Bd. of Cnty. Comm'rs of Elbert Cnty., 838 F.3d 1039, 1045–46 (10th Cir. 2016).

As for Bruce's arguments regarding the propriety of the Mayor presiding over the demolition hearing, it is well established that due process requires an "impartial and disinterested" adjudicator, Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980), and prohibits procedures that "might lead" "the average

4 In Onyx, this court "recognize[d] that not all actions by municipal boards are legislative," and that "[w]hen the action has a limited focus (only a few people or properties are affected) and is based on grounds that are individually assessed, it may be more adjudicative than legislative and therefore subject to traditional procedural requirements of notice and hearing." 838 F.3d at 1046. That exception clearly does not apply to the 2001 Ordinance in this case, because it applied generally to all R-2 zoning areas in the City.

[person] as a judge . . . not to hold the balance nice, clear, and true between" the opposing parties, Tumey v. State of Ohio, 273 U.S. 510, 532 (1927). That said, we have held that "a substantial showing of personal bias is required to disqualify a hearing officer or tribunal." Corstvet v. Boger, 757 F.2d 223, 229 (10th Cir. 1985). Further, a person claiming bias on the part of a hearing officer or tribunal "must overcome a presumption of honesty and integrity in those serving as adjudicators." Withrow v. Larkin, 421 U.S. 35, 47 (1975). In applying this presumption, we have held that "[d]ue process is violated only when 'the risk of unfairness is intolerably high' under the circumstances of a particular case." Mangels v. Pena, 789 F.2d 836, 838 (10th Cir. 1986) (quoting Withrow, 421 U.S. at 58). We have also held that "[b]ecause honesty and integrity are presumed on the part of a tribunal, there must be some substantial countervailing reason to conclude that a decisionmaker is actually biased with respect to factual issues being adjudicated." Id. (citations omitted).

The Supreme Court has, over the past century, applied these same procedural due process principles to three cases, two of which Bruce cites in his opening brief, involving mayor's courts, i.e., where the mayor of a town served both in an executive capacity and a judicial capacity overseeing certain crimes and alleged ordinance violations. In Tumey, the mayor was authorized to try certain crimes and fine those persons whom he found guilty. 273 U.S. at 516–17. Notably, any fines that were paid partly supplemented the mayor's salary, and the remainder was deposited into the village's general fund, which the mayor had substantial control over. Id. at 517–19.

The Supreme Court held in Tumey that the mayor was not an impartial adjudicator because of his personal and official interests in securing convictions and in turn imposing fines. Id. at 523.

A year later, in Dugan v. Ohio, the Court heard an appeal from a conviction "before the mayor's court of the city of Xenia, Greene county, Ohio." 277 U.S. 61, 62 (1928). The defendant was convicted by the mayor of possessing intoxicating liquor and fined $1,000. Id. at 63. "The defendant . . . raised the question of the constitutional impartiality of the mayor to try the case." Id. at 62. In addressing this question, the Supreme Court noted that "[t]he mayor ha[d] no executive, and exercise[d] only judicial, functions," and his "salary [wa]s fixed by the votes of the members of the [city] commission other than the mayor, he having no vote therein." Id. at 63. The Court also noted that the mayor "receive[d] no fees" from fines imposed on criminal defendants. Id. In addition, the Court distinguished the case from Tumey because "[t]he mayor of Xenia receive[d] a salary which [wa]s not dependent on whether he convict[ed] in any case or not," and even though "his salary [wa]s paid out of a fund to which fines accumulated from his court," that was "a general fund, and he receive[d] a salary in any event, whether he convict[ed] or acquit[ted]." Id. at 65. The Court therefore rejected the defendant's procedural due process argument.

The third and most recent case involving a mayor's court was Ward v. Village of Monroeville, 409 U.S. 57 (1972). Although the mayor's salary in that case did not depend on fines from convictions, the mayor did perform executive functions in addition to his judicial functions, and the revenue from fines constituted a "substantial portion of [the]

municipality's funds." Id. at 59. The Supreme Court held that, because the mayor exercised "executive responsibilit[i]es for village finances," this created an impermissible incentive for him "to maintain the high level of contribution from [his] court" to the village's general fund. Id. at 60. The Court therefore reversed the defendant's conviction on procedural due process grounds.

The case at hand differs substantially from all three of these Supreme Court cases involving mayor's courts. To begin with, the case at hand does not involve the Mayor acting in a judicial capacity in criminal proceedings, but rather involves the Mayor acting in an adjudicatory capacity in a demolition proceeding. Further, unlike all three of the Supreme Court cases, the Mayor in this case did not impose any fines on Bruce. Thus, there was no possibility in the instant case that ruling against Bruce in the demolition proceeding would have financially benefited the City's Mayor, either personally or professionally. To be sure, the Mayor in this case did order that the city's cost to conduct the demolition be recovered by a tax lien on the Property. But, again, there is no evidence that such a tax lien would benefit the Mayor either personally or professionally.

Although Bruce cites to Tumey and Ward in his opening appellate brief, he makes no attempt to explain how they support his procedural due process claim. Nor does he offer any explanation as to why the Mayor in this case was biased, other than to generally state that the Mayor was "the executive officer of the municipal body bringing the claim against" Bruce. Aplt. Br. at 17. That general assertion, standing alone, is insufficient to allow a reasonable jury to find that the Mayor was biased against Bruce or to otherwise

find that there was a substantial risk of unfairness in the demolition proceedings due to the Mayor's role as adjudicator.

For these reasons, we affirm the district court's grant of summary judgment in favor of the City on Bruce's procedural due process claim.

4) The substantive due process claim

Finally, Bruce argues that the district court erred in granting summary judgment in favor of the City on his substantive due process claim. To understand this claim and Bruce's appellate arguments regarding it, it is useful to turn first to the allegations in Bruce's complaint. Bruce alleged in his complaint, in support of his substantive due process claim, that "Defendants . . . acted in an arbitrary and capricious manner with respect to [his] rights in the Property, including but not limited to their improper downzoning of the Property inconsistent with the historical use of the Property and factual reality on the ground, as well as . . . its inconsistent treatment of nearby properties that should have been similarly downzoned, but were not." Aplt. App., Vol. 1 at 17. Bruce further alleged that "Defendants maintain[ed] a policy, practice, custom, or procedure which prefer[red] single family units to the multi-family property maintained by [him], particularly where the owners are not local residents." Id. Bruce alleged that he had been "unlawfully deprived . . . of his private property" as a result of these actions, and that "[t]hese actions [we]re outrageous and of such a magnitude . . . that it truly shock[ed] the conscience." Id.

In his brief in opposition to defendants' motion for summary judgment, Bruce argued, in discussing his substantive due process claim, that he "was stripped of the right to rent three of the five units on

his Property immediately, and it w[ould] ultimately become four of the five units once one of the tenants vacate[d].” Id., Vol. 2 at 20. Bruce further argued that “[h]e was not provided notice of the zoning changes as they were being considered and enacted in the 2000–2001 time period, and Defendants . . . presented no admissible evidence to contradict his sworn statement.” Id. Bruce also argued that “Defendants . . . used their administrative authority to order him to keep the units unoccupied while at the same time requiring him to maintain and upkeep the Property.” Id. Lastly, Bruce alleged that “Defendants appointed themselves judge, jury, and executioner in the form of an administrative hearing in which [the] City’s mayor decided whether or not [the] City had presented sufficient evidence to permit [the] City to order the demolition of [his] buildings, thereby furthering the city’s policy and custom against multifamily housing and entitling it to a tax lien.” Id. at 20–21.

The district court did not address most of the arguments on the merits because it concluded that any claims arising out of the enactment of the 2001 Ordinance and the 2009 Notice were time-barred. Thus, it only ruled on the merits of Bruce’s arguments pertaining to the Mayor’s demolition order. As to those arguments, the district court noted that (a) the City Code authorizes the City to abate dangerous buildings, (b) the City’s Building Official concluded that the structure at 3166 Grant Avenue was dangerous (based on its long-term vacancy, a fire, and numerous police calls to the building over a multi-year period), and (c) after hearing from the Building Official, the Mayor “also concluded that the building was dangerous and should be demolished.” Aplt. App., Vol. 4 at 36. The district court concluded that “[n]o

reasonable jury could find that this constitutes 'outrageous' conduct" sufficient to give rise to a substantive due process violation. Id.

In his opening appellate brief, Bruce repeats the same arguments he made in his brief in opposition to defendants' motion for summary judgment. Aplt. Br. at 16. In other words, he does not discuss, let alone challenge, the district court's rationale for rejecting his substantive due process challenge to the demolition order. Thus, for that reason alone, we could summarily reject Bruce's appellate arguments and affirm the district court's decision regarding his substantive due process claim. See Nixon v. City and Cnty. of Denver, 784 F.3d 1364, 1369 (10th Cir. 2015) (affirming district court's dismissal of due process claim because appellant's "opening brief contains nary a word to challenge the basis of the dismissal").

Out of an abundance of caution, however, we will proceed to address Bruce's challenge to the demolition order on the merits. To state a valid Fourteenth Amendment substantive due process claim challenging executive action such as the Mayor's demolition order, a plaintiff must plausibly allege that "the government action deprive[d] [the plaintiff] of life, liberty, or property in a manner so arbitrary it shocks the judicial conscience." Halley v. Huckaby, 902 F.3d 1136, 1153 (10th Cir. 2018). To be conscience shocking, a defendant's behavior must lack "any reasonable justification in the service of a legitimate governmental objective." Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). Further, "[f]or executive action to shock the conscience requires much more than mere negligence." Halley, 902 F.3d at 1155. "Conduct that shocks the judicial conscience is deliberate government action that is

arbitrary and unrestrained by the established principles of private right and distributive justice." Id. (quoting Hernandez v. Ridley, 734 F.3d 1254, 1261 (10th Cir. 2013) (internal quotation marks omitted). "To show a defendant's conduct is conscience shocking, a plaintiff must prove a government actor arbitrarily abused his authority or employed it as an instrument of oppression." Id. (quoting Hernandez, 734 F.3d at 1261) (internal quotation marks omitted). "The behavior complained of must be egregious and outrageous." Id. (quoting Hernandez, 734 F.3d at 1261) (internal quotation marks omitted).

Nothing in the record in this case comes close to establishing that the City or Mayor acted egregiously or outrageously in seeking or issuing the demolition order. As the district court noted, municipalities have an important interest in controlling blight by demolishing buildings that are deemed a nuisance or threat to public health or safety. See Harris v. City of Akron, 20 F.3d 1396, 1405 (6th Cir. 1994) ("So far as we know, or have been informed, no court has held that it shocks the conscience for municipal authorities, acting pursuant to an unchallenged ordinance, to order the destruction of a building found by responsible officers to be a nuisance or threat to public health or safety."). In this case, the City's code recognizes as much because it contains an entire chapter dedicated to the abatement of dangerous buildings and structures, i.e., "buildings or structures which from any cause endanger the life, limb, health, morals, property, safety or welfare of the general public or their occupants." Ogden City Code § 16-8A-2. That chapter provides, in relevant part, that "[a]ll buildings or portions thereof which are determined after inspection by the building official to

be 'dangerous', as defined in Subsection B of this section, are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedures specified herein." Id. § 16-8A-6(A).

It is undisputed that City officials acted pursuant to the City code when, on February 21, 2020, the City's Building Official, Steve Patrick, sent a letter to Bruce notifying him that Patrick had, for a number of stated reasons, deemed the structure located on the north side of the parcel with street address 3166 Grant a dangerous building under the City's code. In that same letter, Patrick ordered Bruce to rehabilitate or demolish the building within fifteen days. Bruce failed to do so, prompting Patrick on February 4, 2020, to petition the Mayor of the City to hold a hearing and order Bruce to show cause why the City should not abate the building. Bruce received notice of, appeared, and was represented by counsel, at the hearing before the Mayor. After the hearing, the Mayor determined that the building was in fact dangerous, as defined by the City's code, and was a public nuisance. Consequently, the Mayor ordered the building to be demolished and that a tax lien for the cost of the demolition be imposed on the Property.

Notably, Bruce does not dispute that the City code authorized these activities, and he does not dispute any of those code provisions. Nor does Bruce seriously challenge the determinations of both the City's Building Official and the Mayor that the structure at 3166 Grant was dangerous, as defined under the City's code.

In sum, Bruce offers nothing, either evidence or argument, that remotely establishes that the City's actions could be deemed to shock the conscience. We

therefore affirm the district court's grant of summary judgment in favor of defendants on Bruce's substantive due process claim.

IV

The judgment of the district court is AFFIRMED.

Entered for the Court
Mary Beck Briscoe Circuit Judge

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOUGLAS BRUCE, an individual

Plaintiff—Appellant

v.

OGDEN CITY CORPORATION, an incorporated city in the State of Utah, et al.

Defendants—Appellees

Appeal from the United States District Court
For the District of Utah
No. 22-4114

Before **BACHARACH, BRISCOE,** and **McHUGH**, Circuit Judges

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ORDER

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

FILED, United States Court of Appeals, Tenth Circuit, January 2, 2024.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

DOUGLAS BRUCE, an individual,

Plaintiff,

v.

OGDEN CITY CORPORATION, an incorporated city in the State of Utah, and **MICHAEL P. CALDWELL**, in his Official Capacity as the Mayor of Ogden City Corporation,

Defendants.

Case No. 1:20-cv-00034-DBB-DBP
District Judge David Barlow
Chief Magistrate Judge Dustin B. Pead

ORDER GRANTING [24] DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Douglas Bruce filed a complaint in this court asserting three § 1983 claims and a state tort claim against Defendants Ogden City Corporation (the "City") and its mayor, Michael Caldwell in his official capacity (together, "Defendants").[1] The claims arise out of Defendants' downzoning, use restrictions, and demolition order relating to a residential parcel of land owned by Plaintiff.

This matter is now before the court on Defendants' motion for summary judgment.[2] For the reasons that follow, Defendants' motion for summary judgment is granted.

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[1] Verified Compl., ECF No. 2, filed March 16, 2020.
[2] Def.'s Mot. Sum. J., ECF No. 24, filed Feb. 15, 2022.

BACKGROUND[3]

Plaintiff owns a piece of real estate with multiple residential structures in Ogden City, Utah (the "Property").[4] The Property is one tax parcel and is not subdivided into individual dwellings.[5] It has two street addresses: 3166 Grant Avenue and 3172 Grant Avenue.[6]

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3 The court addresses the record evidence in the light most favorable to the non-moving party. Scott v. Harris, 550 U.S. 372, 378 (2007) (quoting United States v. Diebold, Inc., 369 U.S. 654 (1962)).

4 Compl. ¶ 8. Plaintiff's complaint is verified. "[A] verified complaint may be treated as an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out in [Rule 56(c)(4)]." Conaway v. Smith, 853 F.2d 789, 792 (10th Cir. 1988). Rule 56(c)(4) "requires that the affidavit be based on personal knowledge, contain facts which would be admissible at trial, and show that the affiant is competent to testify on the matters stated therein." Id. Plaintiff's verified complaint, as to the factual allegations in support of his claims, meets these requirements. And "[e]ven standing alone, self-serving testimony can suffice to prevent summary judgment." Janny v. Gamez, 8 F.4th 883, 901 (10th Cir. 2021) (quoting Greer v. City of Wichita, Kansas, 943 F.3d 1320, 1325 (10th Cir. 2019)).

5 Compl. ¶ 15.

6 Id. at ¶ 10. The City occasionally refers to the Property as 3166 Grant Avenue, but for purposes of this decision, 3166 Grant Avenue is used to designate the duplex on the north portion of the property, and 3172 Grant Avenue the duplex and cottage on the south side.

3166 Grant Avenue consists of a side-by-side duplex on the north portion of the Property.7 3172 Grant Avenue consists of a side-by-side duplex in the front of the lot and a two-bedroom cottage in the rear.8 In total, the Property has three separate residential buildings with five residential living spaces.9 Additionally, it has five gas meters, five electric meters, and three water meters.10 The buildings on the Property were built in approximately 1907.11 At the time, Ogden City did not have any zoning ordinances.12

Plaintiff became the owner of the Property around August 1983.13 He subsequently rented out its residential units.14 At least since 2000, Plaintiff has lived in Colorado and has not resided on the Property.15

In 1984, the City adopted a community plan that encompassed the Property.16 It downzoned the area to R-2A.17 R-2A allows single-family and duplex-type development.18

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7 Id. at ¶ 11.
8 Id. at ¶ 12.
9 Id. at ¶ 8.
10 Id. at ¶ 13.
11 Id. at ¶ 14.
12 Id.
13 Id. at ¶ 16.
14 Dep. Douglas Bruce 48:1–48:6.
15 Compl. ¶ 1; 2010 Letter from Planning Manager to Pl. Ex. J, at 1–3.
16 Dep. Greg Montgomery 13:9–13:22.
17 Id. at 28:22–29:4.
18 Id. at 14:22–14:23.

Under this rezone, the Property became nonconforming because it did not have the lot area required for the number of buildings on the Property.19 However, it was grandfathered in.20

On January 16, 2001, the City adopted a new zoning ordinance ("2001 Ordinance").21 The ordinance rezoned properties that had been classified as two-family residential to single-family residential.22 Prior to its passage, the City placed notices in the local newspaper and issued press releases to inform the general public about opportunities to comment on the proposed ordinance.23 It also mailed a notice about the proposed ordinance's public hearing to property owners, including Plaintiff at his Colorado Springs post office box address.24

The 2001 Ordinance did not apply to legally established duplexes "currently located in the areas subject to rezoning," stating that they should "not be treated as non-conforming uses."25 The intent was that duplexes—meaning one duplex on one property—would not be required to seek the City's recognition of their nonconforming use.26 However, the Property is not a duplex; it is a group dwelling, meaning it has "two or more buildings on the lot."27

19 Id. at 22:23–23:21.
20 Id. at 31:2–31:11.
21 Ordinance No. 2000-73 Ex. A, at 3.
22 Id. at 1.
23 2010 Letter from Planning Manager to Pl. Ex. J, at 1.
24 Id. at 2–3.
25 Ordinance No. 2000-73 Ex. A, at 1.
26 Dep. Greg Montgomery 26:22–27:3.
27 Id. at 27:17–27:25.

On May 21, 2003, the water service was turned off to one of the Property's three buildings, the duplex at 3166 Grant Avenue.28

On October 7, 2004, the City informed Plaintiff that he had an illegal use on the premises due to having multiple duplexes ("2004 Notice").29 The City required that Plaintiff "fill out an application to establish his . . . rights and the use with the zoning changes that happened."30 The City intended this process to record the grandfathered-in nonconforming uses.31 It was not a legal requirement, but the City highly encouraged property owners to participate.32 Plaintiff did not complete the application.33

On March 7, 2005, the Manager of Ogden City's Planning Division issued a Certificate of Noncompliance for the Property ("2005 Certificate").34 The stated condition rendering the property in violation was the "group dwelling (three buildings with dwelling units) on a lot that allows only one dwelling unit."35 The certificate instructed Plaintiff that "[a]pproval must be obtained to continue a use as a group dwelling."36

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28 Notice of Dangerous Building & Order to Abate Ex. C, at 3.
29 Dep. Jared Johnson 25:7–25:13.
30 Id. at 27:8–28:11.
31 Id. at 29:9–29:25.
32 Id. at 30:7–30:11; Dep. Greg Montgomery 48:4–48:8.
33 Dep. Jared Johnson 27:17–27:19.
34 2005 Certificate of Noncompliance Ex. D, at 1.
35 Id.
36 Id.

In 2009, the City mailed Plaintiff a notice that the Property had been downzoned to single-family residential ("2009 Notice").37 After receiving the 2009 Notice, Plaintiff attempted an administrative appeal.38 Ignoring his appeal, the City ordered that the two units in the building at 3166 Grant Avenue and the unit in the rear of 3172 Grant Avenue (the cottage) remain unoccupied and empty forever ("2009 Order").39 The City instructed Plaintiff to board up those units.40 Plaintiff complied with the order against his will, causing him to lose the rental income from those three units.41 The City further ordered Plaintiff to only lease one of the two units in the 3172 Grant Avenue duplex at any given time as soon as either tenant then occupying the building moved.42

After its 2009 Order, the City periodically mailed notices to Plaintiff ordering Plaintiff to maintain the Property in certain ways and issued Plaintiff fines.43 The City received 38 calls for service at 3166 Grant Avenue from 2017 to 201944 and sent

37 Compl. ¶ 17.
38 Id. at ¶ 22.
39 Id. at ¶ 23, Answer ¶ 25 ("Defendants admit that Ogden informed Plaintiff that he could lease only one unit on the parcel at 3166 Grant Avenue at any given time."); see Dep. Jared Johnson 9:11–9:17 (clarifying that "3166 Grant Avenue" means the entire Property).
40 Compl. ¶ 23.
41 Id. at ¶ 24.
42 Id. at ¶ 25.
43 Id. at ¶ 30.
44 Notice of Dangerous Building & Order to Abate Ex. C, at 3.

abatement crews to "secure the property, remove discarded junk and debris from the yard, and/or cut the weeds" on eleven occasions between July 2015 and November 2019.45 The City ordered Plaintiff to renovate the duplex at 3166 Grant Avenue after "vandals" started a fire in one of its units46 in 2018.47 The fire compromised the building's structural integrity and led to its ceiling collapsing.48

In January 2020, Ogden City issued a Notice of Dangerous Building and Order to Abate to Plaintiff ("2020 Demolition Notice").49 It informed Plaintiff that the City would imminently demolish the 3166 Grant Avenue duplex unless Plaintiff abated the problem or demolished the duplex himself within 15 days.50 Plaintiff did not abate the problem or demolish the duplex.51

On February 5, 2020, the City's Building Official petitioned the mayor to hold a hearing and order Plaintiff to show cause why the City should not abate the dangerous building.52 Notice was sent to Plaintiff.53 On March 6, 2020, Mayor Caldwell

45 Id. at 3–4.
46 Compl. ¶ 31; Ex. C 4.
47 Notice of Dangerous Building & Order to Abate Ex. C, at 3.
48 Id. at 3, 8–14 (photos of damage).
49 Compl. ¶ 33.
50 Id.
51 Administrative Proceedings of the Mayor of Ogden City Findings and Conclusions in Support of Demolition Order Ex. F ("2020 Hearing"), at 2.
52 Id. at 1.
53 Id. at 1.

presided over the hearing ("2020 Demolition Hearing").54 The Building Official, Plaintiff, and Plaintiff's attorney presented evidence and argument.55 At the conclusion of the hearing, Mayor Caldwell ordered the 3166 Grant Avenue duplex to be demolished.56 On April 8, 2020, the mayor signed an order to complete the demolition work on the 3166 Grant Avenue duplex ("2020 Demolition Order").57

Shortly thereafter, Plaintiff filed this lawsuit. The Complaint alleges that Plaintiff has been unable to rent three of the five units on the Property since 2009 causing a loss of rental income in the amount of $2,100 per month for a total of $327,600.58 This loss of income allegedly caused Plaintiff to be unable to maintain the 3166 Grant Avenue duplex, resulting in its current deteriorated condition.59 Plaintiff has been unable to sell the Property for "anything close" to what he deems to be fair market value due to the City's prohibition on renting three (four, once one of the tenants in 3172 Grant Avenue duplex vacates) of its five units.60 Further, he avers that he would net "very little if any payment for the Property" because he would have to cover the cost of demolishing two structures on the Property in order to bring it into

54 Compl. ¶ 34.
55 2020 Hearing, at 1.
56 Compl. ¶ 34.
57 Order of the Mayor of Ogden City, Utah to Complete Demolition Work at 3166 Grant Avenue, Ogden, Utah Ex.
G ("2020 Demolition Order"), at 1–2.
58 Compl. ¶ 38.
59 Id. at ¶ 37.
60 Id. at ¶ 39.

compliance with the single-family zoning restriction.61

In his verified complaint, Plaintiff asserts four causes of action: a deprivation of property without just compensation in violation of the Fifth Amendment's takings clause, a violation of procedural due process under the Fourteenth Amendment, a violation of substantive due process under the Fourteenth Amendment, and a state tort claim for intentional interference with business relations.62 Defendants filed a motion for summary judgment on February 15, 2022.63 The motion is now fully briefed and ready for decision.

STANDARD

"A court 'shall grant summary judgment 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.'"64 "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."65 "Where no such

61 Id.

62 See generally Compl. The fifth "Cause of Action" identifies the various kinds of relief Plaintiff seeks and is not a standalone cause of action.

63 ECF No. 15.

64 CEW Properties, Inc. v. U.S. Dep't of Just., Bureau of Alcohol, Tobacco, Firearms, & Explosives, 979 F.3d 1271, 1276 (10th Cir. 2020) (quoting Fed. R. Civ. P. 56(a)).

65 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 884 (1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

showing is made, '[t]he moving party is 'entitled to a judgment as a matter of law.'"66

Defendants, "the moving parties, have the initial burden to show 'that there is an absence of evidence to support the nonmoving party's case.'"67 "Once the moving parties meet this burden, the burden shifts to the Plaintiff[] to identify specific facts that show the existence of a genuine issue of material fact."68 "'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,' summary judgment in favor of the moving party is proper."69

"In applying this standard, [the court] view[s] the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party."70 "[A] verified complaint may be treated as an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out in" Federal Rule of Civil Procedure 56(c)(4).71 Rule 56(c)(4) "requires that the affidavit be based on personal knowledge, contain facts which would be admissible at trial, and show that the affiant is

66 Id.

67 Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1356 (10th Cir. 1994) (quoting Celotex, 477 U.S. at 325).

68 Id. (citing Bacchus Indus., Inc. v. Arvin Industries, Inc., 939 F.2d 887, 891 (10th Cir. 1991)).

69 Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

70 CEW Properties, 979 F.3d at 1276 (quoting Parker Excavating, Inc. v. Lafarge W., Inc., 863 F.3d 1213, 1220 (10th Cir. 2017)) (alterations in original).

71 Conaway v. Smith, 853 F.2d 789, 792 (10th Cir. 1988).

competent to testify on the matters stated therein."72 "There is nothing in [Rule 56] to suggest that nonmovants' affidavits alone cannot—as a matter of law—suffice to defend against a motion for summary judgment."73

DISCUSSION

The first issue is whether Plaintiff's claims are time-barred. For those claims that are not time-barred, the next issue is whether Defendants' actions constituted a Fifth Amendment taking, a violation of procedural due process, or a violation of substantive due process.74

Further, because Plaintiff does not dispute dismissal of Defendant Caldwell in his official capacity or the dismissal of the intentional interference with business relations claim,75 the court dismisses Plaintiff's fourth cause of action and Defendant Caldwell without further discussion.

I. Plaintiff's Causes of Action Stemming from the 2001 Ordinance and the 2009 Order Are Barred by the Four-Year Statute of Limitations.

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72 Id.

73 Janny v. Gamez, 8 F.4th 883, 901 (10th Cir. 2021) (quoting Danzer v. Norden Sys., Inc., 151 F.3d 50, 57 (2d Cir. 1998)) (alteration in original).

74 Because no reasonable jury could find for Plaintiff on his underlying causes of action, the decision does not address the issue of municipal liability.

75 Opp'n 23, n.4. The complaint only identifies Defendant Caldwell in his official capacity; there are no claims against Michael P. Caldwell as an individual.

Because § 1983 "is silent concerning the applicable statute of limitations," federal courts "borrow the analogous state statute for personal injury."76 "[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims . . . borrow the general or residual statute for personal injury actions."77 In Utah, the statute of limitations for general personal injury actions is four years.78

"[A] cause of action accrues and the relevant statute of limitations begins to run upon the happening of the last event necessary to complete the cause of action."79 As is relevant here, "[a] civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the

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75 Opp'n 23, n.4. The complaint only identifies Defendant Caldwell in his official capacity; there are no claims against Michael P. Caldwell as an individual.

76 Laurino v. Tate, 220 F.3d 1213, 1217 (10th Cir. 2000); see Womble v. Salt Lake City Corp., 84 F. App'x 18, 20 (10th Cir. 2003).

77 Owens v. Okure, 488 U.S. 235, 249–50 (1989).

78 Buck v. Utah Lab. Comm'n., 73 F. App'x 345, 348 (10th Cir. 2003) (unpublished); UTAH CODE ANN. § 78B-2-307(3); see Arnold v. Duchesne Cnty., 26 F.3d 982, 987 (10th Cir. 1994) (holding that Utah's two-year statute of limitations for federal civil rights actions under § 1983 is invalid).

79 Buck, 73 F. App'x at 348 (quoting O'Neal v. Div. of Family Servs., 821 P.2d 1139, 1143 (Utah 1991)).

action."80 "Since the injury in a § 1983 case is the violation of a constitutional right, such claims accrue 'when the plaintiff knows or should know that his or her constitutional rights have been violated.'"81 "This requires the court 'to identify the constitutional violation and locate it in time.'"82

Plaintiff's complaint describes events occurring over the twenty-year span between 2000 and 2020. He does not allege any one event as the constitutional violation; instead, he contends that Defendants' policy of downzoning resulted in a deprivation of his constitutional rights.83

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80 Smith v. City of Enid, 149 F.3d 1151, 1154 (10th Cir. 1998) (quoting Baker v. Board of Regents, 991 F.2d 628, 632 (10th Cir. 1993)).

81 Id. (quoting Lawshe v. Simpson, 16 F.3d 1475, 1478 (7th Cir.1994)).

82 Id.

83 Compl. ¶¶ 41–42 ("Upon information and belief, Defendants maintain a policy, practice, custom, or procedure through which it downzones multi-unit parcels to single-family dwellings without providing owners proper notice, reasonable ability to contest the zoning change before a neutral party, and the right to appeal. As a result of this policy, practice, custom, or procedure, Defendants have unlawfully deprived Plaintiff of his private property as alleged herein and will be proven at trial."); id. at ¶ 51 ("Upon information and belief, Defendants maintain a policy, practice, custom, or procedure through which it downzones multi-unit parcels to single-family dwellings without providing owners proper notice, reasonable ability to contest the zoning change before

a neutral party, and the right to appeal. As a result of this policy, practice, custom, or procedure, Defendants This "policy," he alleges, is evidenced by the 2001 Ordinance, the 2009 Order, and the 2020 Demolition Order and related proceedings. Because of this ambiguity in the complaint, the court evaluates the three events Plaintiff describes—the passage of the 2001 Ordinance, the 2009 Order, and the 2020 Demolition Order and related proceedings—in order "to identify the constitutional violation and locate it in time."84

Defendants adopted the 2001 Ordinance in 2001. Plaintiff admits that he received notice of the ordinance by no later than 2009, when Defendants

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have unlawfully deprived Plaintiff of his private property as alleged herein and will be proven at trial."); id. at ¶¶ 56–58 ("As alleged above and as will be proven at trial, Defendants have acted in an arbitrary and capricious manner with respect to Plaintiff's rights in the Property, including but not limited to their improper downzoning of the Property inconsistent with the historical use of the Property and factual reality on the ground, as well as (upon information and belief) its inconsistent treatment of nearby properties that should have been similarly downzoned, but were not. Upon information and belief, Defendants maintain a policy, practice, custom, or procedure which prefers single family units to the multi-family property maintained by Plaintiff, particularly where the owners are not local residents. As a result of this policy, practice, custom, or procedure, Defendants have unlawfully deprived Plaintiff of his private property as alleged herein and will be proven at trial.").

84 Smith, 149 F.3d at 1154.

mailed him a notice.85 This was the around the same time that Plaintiff alleges Defendants began enforcing the ordinance on the Property. Therefore, by 2009, Plaintiff had notice of the 2001 Ordinance—the alleged constitutional violation—and was injured by it. As Plaintiff did not file this complaint until 2020, the four-year statute of limitations had long since run. Any constitutional violations resulting from the 2001 Ordinance are time-barred.

Turning to the 2009 Order, Defendants issued it in 2009. Plaintiff knew about the order—he attempted to appeal it and then complied with it—that same year, which caused him injury in the form of lost rental income. By 2013, then, the applicable four-year statute of limitations had expired. Plaintiff did not commence this action until 2020, seven years later. The statute of limitations bars these claims.

Finally, Defendants mailed the 2020 Notice, held the 2020 Demolition Hearing, and issued the 2020 Demolition Order in the first four months of 2020. It is plausible to read Plaintiff's complaint as asserting these actions as constitutional violations—though the constitutional violation causes of action rest on downzoning, they also purport to incorporate earlier parts of the Complaint addressing the fire and subsequent Demolition Hearing and Order. Plaintiff's claims for relief stemming from the 2020 Demolition Order and its related proceedings are not time-barred, because Plaintiff filed his complaint in March 2020,

85 Compl. ¶ 17.

well within the four-year statute of limitations.86

Accordingly, the court next considers whether a reasonable jury could find that the 2020 Demolition Order and its related proceedings were a Fifth Amendment taking without just compensation, a denial of procedural due process, or a violation of substantive due process.

II. Defendants Are Entitled to Summary Judgment on Plaintiff's Fifth Amendment Takings Claim Because Plaintiff Failed to Make a Showing Sufficient to Establish the Existence of the Essential Elements Under Either Lucas or Penn Central.

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86 While Plaintiff refers to the 2020 Demolition Order and related proceedings as the "touchstone" of his claims, the 2020 Demolition Order does not somehow revive the time-barred 2009 Order claims. Plaintiff attempts to tie them together as part of the same policy of downzoning, but that fails. The 2020 Notice is the only document in the 2020 Demolition proceedings that even mentions that the Property does not comply with the 2001 Ordinance. Even so—unlike the 2004 Notice, the 2005 Certificate of Noncompliance, or the 2009 Order—the 2020 Notice does not cite the Property's noncompliance with the 2001 Ordinance as the reason for the structure's classification as a "dangerous building;" it instead mentions a 2018 fire in the structure and 38 calls to law enforcement concerning the structure in the past three years. Notice of Dangerous Building & Order to Abate Ex. C, at 3. In any event, a 2020 Hearing and Order regarding an uncontested nuisance simply cannot give new life to injuries of which Plaintiff undisputedly was aware in 2009 and which were extinguished as a matter of law in 2013.

"The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: '[N]or shall private property be taken for public use, without just compensation.'"87 "A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it."88 A person "whose property has been taken by a local government has a claim under § 1983 for a 'deprivation of [a] right[ ] ... secured by the Constitution' that he may bring upon the taking in federal court."89 "The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."90 But because "[g]overnment regulation often 'curtails some potential for the use or economic exploitation of private property,'"91 the "party challenging governmental action as an unconstitutional taking bears a substantial burden."92

The Supreme Court "has identified two categories of regulatory action that are 'per se' takings: (1) 'where government requires an owner to suffer a permanent physical invasion of her property—however minor,' and (2) 'regulations that

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87 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021) (quoting U.S. CONST. amend V).
88 Knick v. Twp. of Scott, Pennsylvania, 139 S. Ct. 2162, 2167 (2019).
89 Id. at 2172.
90 Id. at 2170.
91 E. Enterprises v. Apfel, 524 U.S. 498, 523 (1998) (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979)).
92 Id. at 523 (citing United States v. Sperry Corp., 493 U.S. 52, 60 (1989)).

completely deprive an owner of 'all economically beneficial use' of her property.'"[93] "Outside of these categories, when a regulation 'impedes the use of property without depriving the owner of all economically beneficial use, a taking may still be found based on a 'complex of factors,' including (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action."[94] "These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[95]

Because Plaintiff does not allege a permanent physical invasion of the Property, the court considers only whether Plaintiff has sufficient evidence to show that either (A) the City completely deprived Plaintiff of "all economically beneficial use" of his property under Lucas or (B) the evidence is sufficient to satisfy the Penn Central analysis.

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91 E. Enterprises v. Apfel, 524 U.S. 498, 523 (1998) (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979)).

92 Id. at 523 (citing United States v. Sperry Corp., 493 U.S. 52, 60 (1989)).

93 N. Mill St., LLC v. City of Aspen, 6 F.4th 1216, 1224 (10th Cir. 2021) (quoting Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005)).

94 Id. (quoting Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017)).

95 Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

A. Plaintiff's Evidence Is Insufficient to Show a Taking under Lucas Because It Does Not Show that Defendants Denied All Economically Beneficial Use of the Land—Plaintiff May Still Rent, Occupy, or Sell the Property after the Duplex Is Demolished.

"[W]ith certain qualifications, . . . a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause."96 "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."97 In order to prevail on that "logically antecedent inquiry," the defendant "must identify background principles of nuisance and property law that prohibit the uses [the plaintiff] now intends in the circumstances in which the property is presently found."98 "Only on this showing can the [defendant] fairly claim that [the government action] is taking nothing."99

In Lucas v. South Carolina Coastal Council, the Supreme Court found the claimant had suffered a per se taking when a new law permanently banned construction on his recently purchased, undeveloped

96 Palazzolo, 533 U.S. at 617 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)).
97 Lucas, 505 U.S. at 1027; id. at 1030 ("[T]he Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by [] 'existing rules or understandings.'").
98 Id. at 1031.
99 Id. at 1031–32.

properties.100 There, the claimant had purchased two lots, both zoned for single-family residential construction, for $975,000 in 1986.101 Two years later, but before he had built residences on the lots, the state passed a law banning construction on his properties.102 The trial court found that "this prohibition 'deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless.'"103 The case was remanded to determine whether "common-law principles would have prevented" the use the claimant desired.104

Defendants do not identify any background principles of nuisance and property law that prohibit the uses Plaintiff now seeks to continue maintaining. While this might have been dipositive in this case,105 without evidence or argument presented to it, the court continues to the second inquiry of Lucas: whether the Property has been rendered valueless.

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100 Id. at 1009.
101 Id. at 1008.
102 Id.
103 Id. at 1009 (citations omitted) (alterations in original).
104 Id. at 1031.
105 See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987) ("Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance."); but see Lucas, 505 U.S. 1023–24 ("'Harmful or noxious use' analysis was, in other words, simply the progenitor of our more contemporary statements that 'land-use regulation

The Tenth Circuit recognizes that a homeowner is qualified to testify regarding his property's value106 and does so as an expert,107 but Plaintiff refused to provide any valuation for the Property, either with the

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does not effect a taking if it 'substantially advance[s] legitimate state interests.'" (citations omitted)); and Lingle, 544 U.S. at 543 (overruling "substantially advances" inquiry as part of a takings analysis) ("Instead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property 'for public use.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of otherwise proper interference amounting to a taking.'" (citations omitted)).

106 United States v. Sowards, 370 F.2d 87, 92 (10th Cir. 1966) ("[A]n owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value."); Loughridge v. Chiles Power Supply Co., 431 F.3d 1268, 1281 (10th Cir. 2005).

107 United States v. 10,031.98 Acres of Land, More or Less, Situated in Las Animas Cnty., Colo., 850 F.2d 634, 636 (10th Cir. 1988) (An owner "may offer such testimony without further qualification. Furthermore, in testifying as to the value of his property the owner is entitled to the privileges of a testifying expert.").

duplex in its current condition or after the duplex's demolition.108 Instead, the verified complaint states that Plaintiff is unable to sell the Property without first demolishing the duplex and the cottage, netting him "very little if any payment for the Property."109 But Plaintiff's net gain from its sale is not the value of the Property110; even if it were, "very little" is not, standing alone, a sufficient basis for a reasonable jury to make a finding. Without any evidence of the Property's value, Plaintiff has failed to provide sufficient evidence from which a jury could find a taking under Lucas.111

Further, even if Plaintiff had provided evidence of the Property's value, Plaintiff failed to show that there is a genuine issue of material fact that Defendants' actions "denied all economically beneficial or productive use of land" as a Lucas categorical takings claim requires. The ordered demolition does not limit how Plaintiff may use the Property. After the demolition, the Property will still contain two residences: the cottage and the duplex at 3172 Grant Avenue. Plaintiff will still have the ability to rent, occupy, or sell the Property. Therefore, Plaintiff has failed to show that the Property will not

108 Dep. Douglas Bruce 69:2–73:14.

109 Compl. ¶ 39.

110 See Schmidt v. Utah State Tax Comm'n, 1999 UT 48, ¶ 9, 980 P.2d 690, 692 (discussing methods for calculating a property's value).

111 Additionally, the relevant paragraph in the Complaint is focused on downzoning. It is not clear to what degree it applies to loss from the 2020 Demolition Order as opposed to the loss occasioned by earlier orders and actions which are time barred. See Compl. ¶ 39.

be economically beneficial or productive once the 3166 Grant Avenue structure is demolished. For these reasons, Plaintiff has not carried his burden under Lucas.

B. Plaintiff's Evidence Is Insufficient to Show a Taking under Penn Central Because Plaintiff Provides No Evidence of Economic Impact or of an Investment-Back Expectation to Maintain a Nuisance, and Regulating a Nuisance is Quintessential Government Action.

Under Penn Central, "when a regulation 'impedes the use of property without depriving the owner of all economically beneficial use, a taking may still be found based on a 'complex of factors,' including (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action."112 The court discusses each factor in turn.

1. Plaintiff Failed to Offer Evidence of Any Economic Impact.

The "test for regulatory taking requires [the court] to compare the value that has been taken from the property with the value that remains in the property."113 "The value of property taken by a governmental body is to be ascertained as of the date of taking."114

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112 N. Mill St., LLC, 6 F.4th at 1224 (quoting Murr, 137 S. Ct. at 1942).

113 Keystone Bituminous Coal Ass'n, 480 U.S. at 497.

114 United States v. Clarke, 445 U.S. 253, 258 (1980) (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).

The verified complaint can be read to state that Defendants' 2020 Demolition Order prevents him from netting much income ("very little if any") from any sale of the Property because, in order to sell it, he would have to cover the cost of demolishing the 3166 Grant Avenue duplex.115 This conclusory statement is insufficient to survive summary judgment; Plaintiff has provided no evidence of the value that remains in the Property or of the value that has been taken by the demolition order.116

2. Plaintiff Had No Distinct, Investment-Backed Expectation in Maintaining a Nuisance.

"[T]he reasonable investment-backed expectations factor of the Penn Central test properly limits recovery to property owners who can demonstrate that their investment was made in reliance upon the non-existence of the challenged regulatory regime."117 This factor focuses on the regulatory regime at the time of the plaintiff's initial investment.118

Plaintiff purchased the Property in 1983.119 Even in the 1980s, maintaining a "building in such a manner and state of condition that the thing constituted an unlawful nuisance and menace to . . .

115 Compl. ¶ 39.

116 The $2,100 loss in monthly income was not caused by the 2020 Demolition Order. By 2020, it is undisputed that the units at 3166 Grant Avenue had been vacant for eleven years.

117 Good v. United States, 39 Fed. Cl. 81, 109 (1997), aff'd, 189 F.3d 1355 (Fed. Cir. 1999).

118 Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1345 (Fed. Cir. 2018).

119 Compl. ¶ 16.

health and safety" was prohibited.120 Therefore, the 2020 Demolition Order did not interfere with Plaintiff's distinct investment-backed expectations.

3. The Character of Government Action Is Quintessential.

Regulating a nuisance is quintessential government action.121 Indeed, taking challenges to government actions that affect existing uses of real property have frequently been denied when the government seeks to regulate a nuisance.122 For example, the Supreme Court has refused to require compensation when a state statute ordered property owners to cut down trees that produced a disease fatal to apple trees cultivated nearby,123 a law prohibited a property owner from continuing his operation of a brickyard due to health and comfort concerns of the

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120 See Cox v. Cedar City Corp., 664 P.2d 1174, 1175 (Utah 1983); Brough v. Ute Stampede Ass'n, 105 Utah 446, 142 P.2d 670, 672 (1943); Dahl v. Utah Oil Ref. Co., 71 Utah 1, 262 P. 269, 272 (1927) (defining a public nuisance to be "[d]oing any act, or omitting to perform any duty, which act or omission . . . [a]nnoys, injures, or endangers the comfort, repose, health, or safety of three or more persons" (citing to Comp. Laws Utah 1917)).

121 See Keystone Bituminous Coal Ass'n, 480 U.S. at 492.

122 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting) ("Thus, there is no 'taking' where a city prohibits the operation of a brickyard within a residential area, . . . or forbids excavation for sand and gravel below the water line.").

123 Miller v. Schoene, 276 U.S. 272 (1928).

neighbors,124 and a city ordinance prohibited a property owner from continuing a sand and gravel mining business.125

Here, Plaintiff offers no evidence that the duplex at 3166 Grant Avenue is not a nuisance. Instead, the unrebutted evidence shows that the building is dangerous because it is structurally deficient and left unsecured.126

Therefore, applying the Penn Central test, this is a straightforward analysis: there is no evidence of the economic impact on Plaintiff from compliance with the 2020 Demolition Order, Plaintiff never had a distinct investment-backed expectation in maintaining a dangerous building, and regulating a nuisance is a quintessential government action. The 2020 Demolition Order was not a taking under Penn Central.

In conclusion, no reasonable jury could find a Fifth Amendment taking. Therefore, Defendants are entitled to summary judgment on this claim.

III. Defendants Are Entitled to Summary Judgment on Plaintiff's Procedural Due Process Claim Because Plaintiff Failed to Make a Showing Sufficient to Establish that He Was Denied Notice or a Hearing.

"The Due Process Clause of the Fourteenth Amendment . . . prohibits a State from'depriv[ing] any person of life, liberty, or property, without due process

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124 Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915).
125 Goldblatt v. Town of Hempstead, N. Y., 369 U.S. 590, 590 (1962).
126 Notice of Dangerous Building & Order to Abate Ex. C.

of law.'"127 "Once a protected property or liberty interest is recognized, the Constitution may require certain procedures, such as a hearing, before depriving a person of that interest."128 Therefore, in considering a procedural due process claim, the court asks two questions: "(1) Did the plaintiff possess a protected property or liberty interest to which due process protections apply? And if so, (2) was the plaintiff afforded an appropriate level of process?"129

It is undisputed that Plaintiff has a property interest in the Property.130 The U.S. Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."131 "Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property."132 When a government "adjudicate[s] or

127 Al-Turki v. Tomsic, 926 F.3d 610, 614 (10th Cir. 2019) (quoting U.S. CONST. amend. XIV, § 1).
128 Id. (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).
129 Martin Marietta Materials, Inc. v. Kansas Dep't of Transp., 810 F.3d 1161, 1172 (10th Cir. 2016).
130 See United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993).
131 Mathews, 424 U.S. at 333.
132 United States v. James Daniel Good Real Prop., 510 U.S. 43, 62 (1993); Energy W. Mining Co v. Oliver, 555 F.3d 1211, 1219 (10th Cir. 2009) ("The government must provide a litigant with 'a fair opportunity to mount ameaningful defense to the proposed deprivation of its property.'" (quoting Consolidation Coal v. Borda, 171 F.3d
175, 183 (4th Cir. 1999))).

make[s] binding determinations which directly affect the legal rights of individuals, it is imperative that [it] use the procedures which have traditionally been associated with the judicial process."133 "An impartial tribunal is an essential element of a due process hearing,"134 as is "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken."135

The record evidence shows Defendant sent Plaintiff a Notice of Dangerous Building and Order to Abate in January 2020.136 When Plaintiff did not abate or demolish the structure, Defendants mailed Plaintiff an "Order to Show Cause to appear before the Ogden City Mayor . . . to explain why he had not complied."137 The Order to Show Cause notified Plaintiff of his hearing date.138 Plaintiff appeared at the hearing remotely and was represented in-person through his attorney.139 The mayor took evidence

133 Hannah v. Larche, 363 U.S. 420, 442 (1960).
134 Miller v. City of Mission, Kan., 705 F.2d 368, 372 (10th Cir. 1983) (citing Staton v. Mayes, 552 F.2d 908, 913 (10th Cir. 1977)).
135 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985); Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.").
136 Notice of Dangerous Building & Order to Abate Ex. C.
137 Compl. ¶ 34.
138 Id.
139 2020 Hearing Ex. F, at 1.

and heard from Plaintiff and his attorney.140 The mayor then rendered his decision that the duplex at 3166 Grant Avenue was a dangerous building and public nuisance.141 He concluded that the demolition process should proceed.142 There is neither allegation nor evidence that Plaintiff was denied notice or an opportunity to be heard, and the record shows Plaintiff had both. However, in his opposition, Plaintiff argues that the mayor's role as arbiter violated procedural due process.143

The Supreme Court has found that it is not unconstitutional for a mayor to perform certain judicial functions.144 A mayor serving in a judicial

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140 Id. at 1–4.
141 Id. at 5.
142 Id.
143 Opp'n 20–21.
144 Ward v. Vill. of Monroeville, Ohio, 409 U.S. 57, 60 (1972) (quoting Tumey v. Ohio, 273 U.S. 510, 534 (1927)); see also DePiero v. City of Macedonia, 180 F.3d 770, 777 (6th Cir. 1999) (upholding state statue authorizing a "mayor's court" because "the Supreme Court has found no fatal defect in the overarching system that permits a mayor simultaneously to exercise some combination of executive and judicial functions"); Bailey v. City of Broadview Heights, 674 F.3d 499, 505 (6th Cir. 2012) (Cases "have made it clear that a mayor may perform some judicial functions without violating due-process rights, as long as he does not perform them in a case that would offer a 'possible temptation ... to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.'").

capacity violates due process when the circumstances "offer a possible temptation . . . to forget the burden of proof required to convict the defendant, or [ ] might lead him not to hold the balance nice, clear, and true between the state and the accused."145 However, where a mayor "has a direct, personal, substantial pecuniary interest in reaching a conclusion against" the accused, the individual's due process right is violated.146

Here, Plaintiff fails to offer any evidence that the City's mayor faced any circumstances that would lead him not to be impartial and fair. There are no allegations, much less evidence, that the mayor individually had a "direct, personal, substantial pecuniary interest" at stake. Instead, it seems to be Plaintiff's contention that the mere fact that the mayor presided over the hearing violated due process.147 But that is insufficient as a matter of law.148 Without more, Plaintiff has failed to offer sufficient evidence of a violation of procedural due process to survive the summary judgment stage.149

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145 Ward, 409 U.S. at 60 (quoting Tumey, 273 U.S. at 532).

146 Tumey, 273 U.S. at 523; see Ward, 409 U.S. at 60 (finding "'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court").

147 Opp'n 20–21.

148 See Ward, 409 U.S. at 60 (quoting Tumey, 273 U.S. at 534).

149 See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 884 (1990) (quoting Celotex, 477 U.S. at 322).

IV. Defendants Are Entitled to Summary Judgment on Plaintiff's Substantive Due Process Claim Because a Reasonable Jury Could Not Find that Defendants' Behavior Was Conscience-Shocking.

The Fourteenth Amendment's provision that "'[n]o State shall ... deprive any person of life, liberty, or property, without due process of law,' 'guarantees more than fair process,' and covers a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.'"150 This substantive due process clause "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'"151 It "is violated by executive action only when [the executive action] 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'"152 "The plaintiff must

150 Cnty. of Sacramento v. Lewis, 523 U.S. 833, 840 (1998) (quoting U.S. CONST. amend. XIV § 1; Washington v. Glucksberg, 521 U.S. 702, 719 (1997); Daniels v. Williams, 474 U.S. 327, 331 (1986)) (cleaned up).

151 Collins v. City of Harker Heights, Tex., 503 U.S. 115, 126 (1992) (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989)) (alterations in original).

152 Lewis, 523 U.S. at 847 (quoting Collins, 503 U.S. at 128); see id. at 846 (The Court has "repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" quoting Collins, 503 U.S. at 129); Klen v. City of Loveland, Colo., 661 F.3d 498, 512–13 (10th Cir. 2011) ("An arbitrary deprivation of

demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking."153 "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."154

In Klen v. City of Loveland, the Tenth Circuit found that the behavior of the city in a heated permit dispute was not "outrageous."155 There, the plaintiffs attempted to obtain a building permit from the city.156 The permit was delayed, and the plaintiffs expressed increasing frustration with the delay to the city.157 The permit was then further delayed, and the city issued nearly sixty municipal citations to plaintiffs.158 The city then sent an inspector to the

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a property right may violate the substantive component of the Due Process Clause if the arbitrariness is extreme.").

153 Klen, 661 F.3d at 512–13 ("A high level of outrageousness is required."); see Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (This standard is difficult to meet: "to satisfy the 'shock the conscience' standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking."); Ward v. Anderson, 494 F.3d 929, 937 (10th Cir. 2007).

154 Lewis, 523 U.S. at 849 (emphasis added).

155 661 F.3d at 513.

156 Id. at 501.

157 Id.

158 Id.

site without a warrant, consent, or notice.159 The plaintiffs alleged the city's delay, citations, and inspection were retaliatory,160 and that this " continuous campaign of harassment, deceit, and delay" was a violation of substantive due process.161 However, the court disagreed, finding that the evidence showed a "kind of disagreement that is frequent in planning disputes" rather than conduct rising to the "level of conscience-shocking behavior."162

Ogden City Code authorizes the City to abate dangerous buildings that "endanger the life, limb, health, morals, property, safety or welfare of the general public or their occupants."163 Record evidence shows that the Ogden City Building Official reviewed the condition and history of the structure at 3166 Grant Avenue, observing that the structure had been vacant for years, had experienced a fire in 2018, and was the location of 38 calls to the police over the last three years.164 He concluded that the property was dangerous.165 After hearing from the building official and from Plaintiff, the mayor also concluded that the building was dangerous and should be demolished.166 No reasonable jury could find that this constitutes "outrageous" conduct.

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159 Id. at 507.
160 Id.
161 Id. at 511.
162 Id. at 513.
163 OGDEN CITY CODE § 16-8A-2.
164 Notice of Dangerous Building & Order to Abate Ex. C, at 3.
165 Id. at 2.
166 2020 Hearing Ex. F, at 5.

Finding that the Defendants are entitled to summary judgment on all three remaining causes of action, the court need not address Plaintiff's request for injunctive or declaratory relief.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Defendants Ogden City Corporation and Michael Caldwell's motion for summary judgment is GRANTED as to all claims against Defendants. It is further ORDERED that all claims being resolved, the clerk of court is directed to enter judgment in favor of Defendants on all claims and close this case.

Signed November 8, 2022.

BY THE COURT

/s/ David Barlow
David Barlow
United States District Judge