

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

TMS ENTERPRISES LTD., ET AL., :  
Relators-Appellees, :  
v. : No. 115774  
THE CITY OF CLEVELAND, OHIO, :  
Respondent-Appellant. :

## JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: August 20, 2026**

Civil Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CV-23-986870

***Appearances:***

Mark D. Griffin, Cleveland Director of Law, Jerome A. Payne, Jr., Assistant Law Director, and James R. Russell, Jr., Chief Assistant Director of Law, *for appellant*.

The Lindner Law Firm LLC and Daniel F. Lindner, *for appellees.*

MARY J. BOYLE, P.J.:

{¶ 1} Respondent-appellant the City of Cleveland (“the City”) appeals the decision of the Cuyahoga County Court of Common Pleas granting summary judgment and injunctive relief in favor of relators-appellees TMS Enterprises Ltd.,

et al. (“TMS”). The City also appeals the trial court’s decision denying its motion for summary judgment. The City raises the following assignments of error for review:

**Assignment of Error I:** The trial court erred as a matter of law by granting summary judgment to [TMS] and issuing a writ of mandamus to compel appropriation proceedings.

**Assignment of Error II:** The trial court erred by granting [TMS] an overbroad and unnecessary injunction that is moot.

**Assignment of Error III:** The trial court erred as a matter of law by denying the City’s motion for summary judgment because [TMS] had an adequate remedy at law and the case is moot after the results of the administrative proceedings.

**{¶ 2}** For the reasons set forth below, we affirm.

## **I. Facts and Procedural History**

**{¶ 3}** This case is the second of three cases filed by TMS against the City, which stems from the rezoning of Harvard Avenue from East 55th Street to Broadway Avenue, in Cleveland, Ohio, in an area commonly known as Slavic Village. The rezoning affected the property located at 6806 Harvard Avenue (the “Property”) that was purchased by TMS prior to the rezoning.

**{¶ 4}** The following is a summary of the facts documented in the first two cases.

**{¶ 5}** TMS is an Ohio limited liability company that sells used cars and develops real estate. TMS purchased the Property, which contained two parcels, from the Cuyahoga County Sheriff’s Office for \$12,100 in February 2020. The parcels were consolidated on September 24, 2020.

**{¶ 6}** At the time of purchase, the Property was zoned as General Retail-C2. Although a two-story home existed on the Property, the zoning classification for General Retail permitted many business uses, including the sale of motor vehicles. TMS planned to operate a used car lot on the Property.

**{¶ 7}** On September 22, 2020, TMS filed a change-of-use application with the City's Department of Building and Housing ("Building and Housing"), seeking to change the use from residential to a used car sales facility. Additionally, TMS applied for permits to begin the process of transforming the property into a used car sales lot. After applying for the permits, TMS demolished the two-story house on the property.

**{¶ 8}** On October 7, 2020, the City enacted zoning ordinance No. 760-2020, which changed the zoning classification of the Property from General Retail C-2 to Multi-Family District-D2. The zoning change took effect in November 2020 and did not permit used car sales.

**{¶ 9}** TMS then filed an application for compliance with Building and Housing. Building and Housing responded with a notice of nonconforming use acknowledging that a used car lot was permitted under the prior zoning classification but was not permitted under the new classification.

**{¶ 10}** In April 2021, TMS submitted a variance application to the Cleveland Board of Zoning Appeals ("BZA") requesting a change use. The BZA held a public hearing on the requested variance in July 2021. After the hearing, the BZA unanimously denied TMS's variance request.

## **The First Case — The Administrative Appeal**

**{¶ 11}** In August 2021, TMS appealed the BZA’s decision to deny the variance to the Cuyahoga County Court of Common Pleas, in accordance with R.C. Ch. 2506. *See TMS Ents. Ltd. v. City of Cleveland Bd. of Zoning Appeals*, Cuyahoga C.P. No. CV-21-952073. The trial court affirmed the BZA’s decision, finding that there was no evidence that TMS engaged in a permissible, nonconforming use prior to the rezoning that would have conferred a vested right in the Property for the nonconforming use. The trial court also found TMS’s property was not subject to illegal spot zoning because the evidence in the administrative record showed that although the Property was near a business district, it was surrounded by residences. (Journal Entry, Sept. 29, 2023.)

**{¶ 12}** TMS appealed the trial court’s order to this court. *See TMS Ents. v. Cleveland Bd. of Zoning Appeals*, 2024-Ohio-1888 (8th Dist.) (“*TMS I*”).

**{¶ 13}** On appeal, TMS raised two assignments of error for review. In its first assignment of error, TMS argued that the rezoning did not apply to the Property because TMS had a vested right in a preexisting nonconforming use because TMS applied for permits prior to the rezoning ordinance taking effect. In its second assignment of error, TMS argued that the decision of the BZA should be reversed because the rezoning of the Property constituted unconstitutional spot zoning.

**{¶ 14}** This court agreed that “TMS had a vested right in the prior general retail zoning classification that allowed the sale of used cars,” because TMS filed a change-of-use application and permits to demolish the two-story residence while

the property was still zoned general retail. We held that “the trial court erred as a matter of law in finding that TMS did not have a vested right in that preexisting, nonconforming use.” *TMS I* at ¶ 22.

{¶ 15} Because the first assignment of error was dispositive, the second assignment of error was rendered moot. The trial court’s decision was reversed, and the case was remanded to the BZA to “consider TMS’s change-of-use application in light of its vested right to use the property under the property’s general retail zoning classification.” *Id.* at ¶ 25.

{¶ 16} Upon remand the BZA granted the change-of-use variance.

### **The Second Case — Current Appeal**

{¶ 17} Also in August 2021, TMS filed a second case against the City requesting declaratory judgment, a writ of mandamus, and injunctive relief arguing that the zoning ordinance was unconstitutional and constituted a taking of the Property without just compensation. *See TMS Ents. Ltd. v. Cleveland*, Cuyahoga C.P. No. CV-21-952329. That case was dismissed without prejudice in May 2023 and refiled in October 2023 as *TMS Ents. Ltd. v. Cleveland*, Cuyahoga C.P. No. CV-23-986870.

{¶ 18} The complaint set forth four causes of action. In Count 1, TMS requested declaratory judgment stating that the Multi-Family District designation was unconstitutional on its face and as applied to TMS. (Comp. at ¶ 21-22.) In Count 2, TMS requested declaratory judgment stating that the Multi-Family District designation as applied to the Property is a taking under Article I, Section 19 of the

Ohio Constitution for which TMS is entitled to just compensation from the City. (Comp. at ¶ 29-30.) In Count 3, TMS sought a mandamus action ordering the City to commence appropriation proceedings to compensate TMS for the unconstitutional taking of the Property. (Comp. at ¶ 36.) And in Count 4, TMS requested a permanent injunction enjoining the City from enforcing the Multi-Family District designation against TMS and from retaliating against TMS for bringing this litigation. (Comp. at ¶ 20-41.)

**{¶ 19}** It was not until May 16, 2024, that the decision in *TMS I* was issued. TMS then filed a motion for summary judgment as to Counts 2-4 of its complaint acknowledging that Count 1 was rendered moot by *TMS I*. In its motion, TMS argued that the decision in *TMS I* conclusively established a taking for which TMS is entitled to just compensation. TMS also argued for an injunction, the basis for which included the demolition of a structure on the Property by the City following the ruling in *TMS I*.<sup>1</sup>

**{¶ 20}** The City filed its own motion for summary judgment and a brief in opposition to the TMS's motion for summary judgment, arguing that the zoning ordinance was not unconstitutional facially or as applied. The City also argued that the zoning ordinance did not constitute an unconstitutional taking; therefore, a mandamus action is improper. The City did not address the request for injunction.

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<sup>1</sup> We note that in March 2026, TMS filed a third case against the City requesting declaratory judgment and a mandamus action alleging that the City wrongfully demolished a structure on the Property on June 5, 2023. *See TMS Ents. Ltd. v. Cleveland*, Cuyahoga C.P. No. CV-26-134592.

{¶ 21} TMS filed a combined opposition to the City’s motion for summary judgment and reply in support of its own motion for summary judgment.

{¶ 22} On September 3, 2024, TMS submitted a notice of additional exhibit in support of its reply, which included a document demonstrating the administrative appeal decided in its favor was a final order. The City filed a reply in support of its motion for summary judgment.

{¶ 23} On October 6, 2025, the trial court granted summary judgment in favor of TMS as to Counts 2-4 and denied the City’s motion for summary judgment. The trial court stated, in pertinent part, that

the Ohio Supreme Court has held that “[a]ny direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property, for which he is guaranteed a right of compensation by Section 19 of the Bill of Rights.” *Norwood v. Sheen* (1933), 126 Ohio St. 482, 186 N.E. 102, paragraph one of the syllabus. The Court finds that a governmental taking has occurred under Article I Section 19 of the Ohio Constitution for which [TMS] is entitled to just compensation from [the City].

...

The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution. Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged. *State ex rel. Shemo v City of Mayfield Heights*, 95 Ohio St. 3d 59, citing *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 92 Ohio St. 3d at 533, 751 N.E.2d 1032. Relators have the burden of proving their entitlement to the requested extraordinary relief in mandamus. *Elass* at 533. In *Shemo* the Court outlined the test for mandamus stating, “This test is disjunctive, i.e., a compensable taking can occur either if the application of the zoning ordinance to the particular property is constitutionally invalid, i.e., it does not substantially advance

legitimate state interests, or denies the landowner all economically viable use of the land.” *State ex rel. Shemo v City of Mayfield Heights*, 95 Ohio St. 3d 59 citing *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106. Satisfaction of either prong of the *Agins* test establishes a taking. . . . “where a regulation places limitation on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred”. *Id.*

The Court finds that [TMS] has satisfied both prongs of the test for mandamus. The rezoning depleted The Property of its fair market value and the application of the zoning ordinance is constitutionally invalid as to the property. As such, [the City] has a legal duty to institute appropriation proceedings under the Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution. The Court further finds that other than a writ of mandamus there is no adequate remedy for [TMS] in the ordinary course of law.

...

The Court finds that a permanent injunction is proper and permanently enjoins [the City] from enforcing The Property’s Multi-Family Residential District-D2 zoning classification. Further, [the City] and or its agents, officers or departments are permanently enjoined from retaliating against [TMS] or the Property for bringing this litigation.

...

Judgment is hereby granted in favor of TMS Enterprise, LTD. The Court declares that [the City] violated [TMS]’s procedural and/or substantive due process rights and [TMS] is entitled to compensation therefore in an amount to be determined at trial. The Court declares that [the City]’s unconstitutional rezoning of The Property significantly and materially diminished the value of the property without due process of law and without just and reasonable compensation. [TMS] is entitled to just compensation from [the City] for the taking. The Court issues a Writ of Mandamus directing [the City] to institute eminent-domain proceedings pertinent to past, present and continued taking of The Property, so that [the City] will pay [TMS] just compensation at the trial of these matters. The Court permanently enjoins [the City] from enforcing its unconstitutional rezoning Multi-Family Residential District-D2 zoning classification and prevents [the City] and or its agents, officers or departments from retaliating against [TMS] or the Property for bringing this litigation.

(Opinion and Judgment Entry, Oct. 8, 2025.)

{¶ 24} It is from this judgment that the City now appeals.

## II. Law and Analysis

{¶ 25} In the first and third assignments of error, the City asserts that summary judgment was improperly granted in favor of TMS and against the City. Specifically, the City argues that the trial court used the incorrect legal standard to determine whether there was a compensable taking and that when the correct legal standard is applied, TMS cannot prevail. In addition, the City argues that TMS had an adequate remedy at law via the administrative appeal process. According to the City, summary judgment should have been granted in its favor.

### Standard of Review

{¶ 26} We review an appeal from summary judgment under a de novo standard. *Cleveland Elec. Illum. Co. v. Cleveland*, 2020-Ohio-4469, ¶ 13-15 (8th Dist.), citing *Baiko v. Mays*, 140 Ohio App.3d 1, 10 (8th Dist. 2000). Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Id.*, citing *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 192 (8th Dist. 1997).<sup>2</sup>

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<sup>2</sup> TMS argues that the applicable standard of review in a takings case requires that we review the legal conclusions de novo and the factual findings under a clearly erroneous standard citing *State ex rel. OC Lorain Fulton, L.P. v. Cleveland*, 2019-Ohio-1531, ¶ 13 (8th Dist.). In *Lorain Fulton*, this court reviewed the trial court's denial of a writ of mandamus after a hearing, not after a ruling on summary judgment. Because the trial court in this case ruled on the parties' motions for summary judgment, we review de novo.

## Summary Judgment

**{¶ 27}** The trial court granted summary judgment in favor of TMS as to Counts 2-4 of the complaint, which included claims for declaratory judgment, mandamus action, and injunctive relief. In addition, the trial court denied the City's motion for summary judgment, as to Counts 1-4.

**{¶ 28}** Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that

(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.

**{¶ 29}** Civ.R. 56(C) also provides an exclusive list of materials that parties may use to support a motion for summary judgment:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

**{¶ 30}** The moving party carries the initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). If the movant meets this burden, the burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact exists. *Id.* at 293. The nonmoving party cannot simply rest on its pleadings. *Id.*

**{¶ 31}** “When assessing cross-motions for summary judgment, each motion must be considered individually and separately, construing the evidence most strongly in favor of the party against whom the motion under consideration was filed. If neither movant is so entitled, both motions must be denied.” *State ex rel. Montgomery v. Ruckman*, 2026-Ohio-2671, ¶ 17 (7th Dist.), citing *Tatum v. Dawson*, 2023-Ohio-1746, ¶ 5 (7th Dist.).

### **Declaratory Judgment**

**{¶ 32}** In this case, the trial court found that because TMS “had a vested right in the prior zoning classification, the Multi-Family Residential District-D2 zoning classification is unconstitutional as applied to the Property.” (Opinion and Judgment Entry, Oct. 8, 2025.) The trial court further declared that the zoning classification as applied to the Property constituted a taking and that TMS is entitled to just compensation from the City.

**{¶ 33}** For purposes of a declaratory-judgment action, a “controversy exists when there is a genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Wagner v. Cleveland*, 62 Ohio App.3d 8, 13 (8th Dist. 1988), citing *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St.2d 93 (1973).

### **Writ of Mandamus**

**{¶ 34}** The trial court further found that TMS satisfied both prongs of the test to establish a taking as outlined in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), citing *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59 (2002). The trial court

concluded that the “rezoning depleted the Property of its fair market value and the application of the zoning ordinance is invalid as to the Property,” the City “has a legal duty to institute appropriation proceedings,” and that a mandamus action is appropriate because there is no adequate remedy in the ordinary course of law. (Opinion and Judgment Entry, Oct. 8, 2025.)

**{¶ 35}** When the government is alleged to have taken property without providing just compensation, a property owner may institute a mandamus action for inverse condemnation. *State ex rel. Boggs v. Cleveland*, 2025-Ohio-5094, ¶ 29, citing *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 2001-Ohio-1276, ¶ 21; *State ex rel. Doner v. Zody*, 2011-Ohio-6117, ¶ 53. To be entitled to a writ of mandamus for inverse condemnation, a property owner must establish (1) a clear legal right to compel the City to commence appropriation, (2) a corresponding legal duty on the part of the City to institute that action, and (3) the lack of an adequate remedy in the ordinary course of law. *State ex rel. Lora Elias, DDS, Inc. v. Northeast Ohio Regional Sewer Dist.*, 2023-Ohio-2182, ¶ 22 (8th Dist.). The appropriate standard of proof in mandamus cases is that a relator must prove all of the elements necessary by clear and convincing evidence. *State ex rel. Cleveland Right to Life v. State Controlling Bd.*, 2013-Ohio-5632, ¶ 2. “Clear and convincing evidence” is a measure or degree of proof that is more than a preponderance of the evidence but less than the beyond-a-reasonable-doubt standard required in a criminal case; clear and convincing evidence produces in the trier of fact’s mind a firm belief of the fact

sought to be established. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 2013-Ohio-3720, ¶ 14.

### **Regulatory Taking**

{¶ 36} The City maintains that the trial court used the incorrect legal standard to determine whether there was a compensable taking. The City argues that the test that was set forth in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), is the applicable test and when applied, TMS cannot prevail.

{¶ 37} TMS argues that the trial court applied the correct test. And that this court held in *TMS I* that “(1) the rezoning never applied to [the Property], and therefore (2) no variance application or administrative process was ever required.” (TMS’s brief, p. 17.)<sup>3</sup> Therefore, TMS contends that “the City’s wrongful imposition of an inapplicable re-zoning/regulation” equates to a governmental taking. (TMS’s brief, p. 17.)

{¶ 38} The Takings Clause of the Fifth Amendment to the United States Constitution, which is applicable to the States under the Fourteenth Amendment, provides that private property shall not “be taken for public use, without just compensation.” Likewise, Article 1, Section 19 of the Ohio Constitution provides

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<sup>3</sup> We disagree with TMS’s characterization of our decision in *TMS I*. Although this court held that TMS had a vested right in the preexisting nonconforming use because TMS applied for permits prior to the rezoning ordinance taking effect, this court did not conclude that the rezoning did not apply to TMS, nor did this court find that the variance application or administrative process was not required. Furthermore, *TMS I* does not stand for the proposition that a vested right in a preexisting nonconforming use automatically equates to a governmental taking. TMS conflates these concepts in the trial court, as well as on appeal. Therefore, we will address the takings issue.

that private property shall not be taken for public use without just compensation. *State ex rel. Shelly Materials v. Clark Cty. Bd. of Commrs.*, 2007-Ohio-5022, ¶ 16.

**{¶ 39}** A typical example of a taking clause violation that requires just compensation is direct government appropriation or physical invasion of private property. *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 2026-Ohio-1487, ¶ 28, citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Similarly, the takings clause may be applied to overly burdensome government regulation of property “if [the] regulation goes too far.” *Id.* quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

**{¶ 40}** In this case, TMS alleged a regulatory taking. The United States Supreme Court has identified two categories of regulatory action that will be deemed per se takings for Fifth Amendment purposes. *Id.* at ¶ 29, citing *Lingle* at 538. One such category is when a government regulation causes an owner to suffer “a permanent physical invasion” of the owner’s property, no matter how minor, the government must provide just compensation. *Id.*, citing *Lingle*. A second category that requires payment of just compensation is when the regulation affects a total or categorical taking. *Id.* In other words, when a regulation “deprives land of all economically beneficial use’ unless ‘background principles of the State’s law of property and nuisance’ independently restrict the owner’s usage.” *Id.*, citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027, 1029 (1992).

**{¶ 41}** Here, there was no physical invasion of property, nor was the property deprived of all economically beneficial use. Although TMS asserted that

the Property would be “worth basically nothing” if it could not construct and operate a used car lot, the City set forth evidence that there were numerous other options available to TMS, including constructing “larger residential units than previously allowed under the General Retail, Bed and Breakfasts, rooming houses, townhouses, residential facility, boarding home, dormitories, orphanages, etc.” (City’s Summary Judgment Motion, Shannan Leonard, Affidavit). Therefore, there is no per se taking in this case.

{¶ 42} “Outside these per se categories, regulatory takings are evaluated based on the factors described in *Penn Cent.*, 438 U.S. 104.” *AWMS* at ¶ 30, citing *Shelly Materials*, 2007-Ohio-5022, at ¶ 18. Notably, the Ohio Supreme Court has acknowledged that “whether a governmental regulatory action substantially advances a legitimate state interest” as set forth in *Agins*, “is no longer an appropriate test to evaluate constitutional takings claims.” *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 2008-Ohio-3181, ¶ 20. Rather, the Court stated that the *Penn Central* test is the appropriate test to determine whether there is a compensable taking. *Id.* Therefore, we agree with the City that the trial court used the incorrect test when deciding whether there was a compensable taking.

{¶ 43} Nevertheless, because our review is de novo, we will review the trial court’s decision to determine whether a genuine issue of material fact remains when the *Penn Cent.* test is applied.

{¶ 44} “*Penn Central* recognizes an ad hoc, factual inquiry that requires the examination of the following three factors to determine whether a regulatory taking

occurred in cases in which there is no physical invasion and the regulation deprives the property of less than 100 percent of its economically viable use: (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. [*Penn Cent.*] at 124, 98 S.Ct. 2646, 57 L.Ed.2d 631.” *Id.*, quoting *Shelly Materials* at ¶ 19. Indeed, “[c]ourts have applied the *Penn Central* test to claimed partial regulatory-takings cases involving rezoning.” *Id.* at ¶ 21, citing e.g., *Byrd v. Hartsville*, 365 S.C. 650, 657-659 (2005); *Reagan v. St. Louis Cty.*, 211 S.W.3d 104, 107-111 (Mo.App. 2006); *Dorman v. Clinton Twp.*, 269 Mich.App. 638, 646-650 (2006).

**{¶ 45}** We begin with the economic impact of the rezoning as applied to the Property, and “we note that a loss of market value, without more, does not constitute a taking.” *Lorain Fulton*, 2019-Ohio-1531, ¶ 15 (8th Dist.), citing *State ex rel. Anderson v. Obetz*, 2008-Ohio-4064, ¶ 68 (10th Dist.), citing *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 344 (1998).

**{¶ 46}** In TMS’s motion for summary judgment, Tommy Sullivan, the sole owner of TMS, attested that, in addition to the purchase price of the Property, he invested \$40,000 into the Property to convert the Property to a used car lot and if the use variance was denied, the Property would be “virtually useless.” (TMS’s Summary Judgment Motion, Affidavit of Tommy Sullivan.) TMS also hired a real estate appraiser who issued an opinion that the market value of the Property was \$94,000 under the general retail classification; however, under the rezoning, the

Property's market value was \$11,000. (TMS's Summary Judgment Motion, Affidavit and Appraisal.) TMS asserted that the rezoning depleted the Property of 88.3 percent of its fair market value.

**{¶ 47}** The City, on the other hand, set forth evidence that the rezoning only reduced the Property's value from \$22,000 to \$14,000, which is a 36 percent depletion of its fair market value. (City's Summary Judgment Motion, Appraisal Report.) Additionally, Chris Alvarado, the executive director of Slavic Village Development, testified at the BZA hearing that "residential development [in the area] is on the uptake," and that home prices and appraisals increased 50 percent from 2014 to 2020. (City's Summary Judgment Motion, BZA tr. 17.)

**{¶ 48}** Here, both parties agree that there was a negative economic impact triggered by the rezoning that caused the market value of the Property to decrease in value from 36 percent up to as much as 83 percent. Additionally, TMS provided uncontested evidence that it spent \$40,000 to develop the Property into a used car lot. Considering the foregoing evidence, we find that the economic impact factor weighs in favor of TMS.

**{¶ 49}** The second factor a court must consider under *Penn Cent.* is "the extent to which the regulation has interfered with distinct investment-backed expectations." *State ex rel. AWMS Water Solutions v. Mertz*, 2020-Ohio-5482, ¶ 57, quoting *Shelly Materials*, 2007-Ohio-5022, at ¶ 19. "The analysis of this factor 'is designed to account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more

restrictive legislation or regulations will not be adopted.” *AWMS*, 2026-Ohio-1487, at ¶ 42, quoting *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed.Cir. 2018). In other words, TMS had to show that it made its investment “in reliance on a state of affairs that did not include the challenged regulatory regime,” *Id.*, quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed.Cir. 1994). “These expectations must be reasonable.” *Id.* “The purchase price and the regulatory regime in place at the time of purchase can reflect the reasonableness of the property owner’s expectations.” *Lorain Fulton*, 2019-Ohio-1531, ¶ 17, citing *Murr v. Wisconsin*, 582 U.S. 383 (2017).

**{¶ 50}** In this case, the uncontroverted evidence is that TMS, a used car dealership, purchased the Property at a sheriff’s sale in February 2020. At that time, the Property was zoned as General Retail, which allowed for a used car lot. Although a two-story home was on the Property at the time of purchase, the home was condemned and required demolition. It was not until May 2020 that the rezoning process began, which was not completed until October 2020, and not effective until November 2020. (City’s Summary Judgment Motion, Leonard Affidavit.) Further, this court determined in *TMS I*, that TMS had a vested right in the prior general retail zoning classification that allowed the sale of used cars. Based on the uncontested evidence, TMS had a reasonable investment-backed expectation that it would be able to operate a used car lot on the Property. Therefore, this factor weighs in favor of TMS.

**{¶ 51}** Finally, the third factor addresses the character of the government action at issue. “This factor considers the interference that arises from public regulation adjusting the benefits and burdens of economic life to promote the common good.” *Lorain Fulton* at ¶ 19, citing *Penn Cent.*, 438 U.S. at 124.

**{¶ 52}** Here, the City explained that the purpose of the rezoning was to remove legacy industrial zoning and general retail designations to align the parcels in the subject area with the Citywide 2020 Plan and other Small Neighborhood Plans, which consolidated an assortment of zoning districts to ensure that future development in the neighborhood is consistent and compatible with adjacent and nearby residential uses. (City’s Summary Judgment Motion, Leonard Affidavit.) The rezoning consisted of three phases and was in line with the 2007 Adopted Citywide Comprehensive Plan. (City’s Summary Judgment Motion, Leonard Affidavit.) Because this evidence is uncontroverted, we find this factor weighs in favor of the City.

**{¶ 53}** Nevertheless, both economic factors weigh in favor of TMS and “[u]ltimately, the *Penn Central* balancing test is designed to ‘ascertain whether . . . it is unfair to force the property owner to bear the cost of the regulatory action.’” *AWMS*, 2026-Ohio-1487, at ¶ 55, quoting *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed.Cir. 2009). Accordingly, we find that there is no genuine issue of material fact as to whether a taking has occurred; therefore, the trial court did not err by declaring that a taking occurred.

**{¶ 54}** As discussed previously, when a taking has occurred the property owner has a clear legal right to compel the City to commence appropriation proceedings by way of a writ of mandamus. Furthermore, the City has a corresponding legal duty to institute inverse condemnation proceedings.

**{¶ 55}** Having found that TMS had a clear legal right and the City had a corresponding legal duty, we address whether there is an adequate remedy at law.

**{¶ 56}** The City cites *State ex rel. Gorgievski v. Massillon*, 2009-Ohio-4533 (5th Dist.), for its position that TMS had an adequate remedy at law when it appealed and won its administrative appeal in *TMS I*. The City argues that the mere existence of procedural delays in the administrative process does not amount to a taking. We find *Gorgievski* distinguishable.

**{¶ 57}** In *Gorgievski*, appellants were denied a conditional use permit twice. Appellants were eventually granted the conditional-use permit but only after two separate administrative appeals. Appellants then filed a writ of mandamus to institute appropriation proceedings. The trial court granted the City's motion for judgment on the pleadings finding that appellants had an adequate remedy at law via the administrative appeal process. On appeal, the Fifth District affirmed and noted that "the denial of a conditional use permit was not a compensable 'taking' under the Fifth or Fourteenth Amendments to the United States Constitution. [Because], a conditional use is not the same as a permitted use. A conditional use is a lesser use and is not a matter of right." *Id.* at ¶ 18, citing *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 66 Ohio St.3d 452 (1993). The *Gorgievski*

Court also noted that “the landowner must prove that the taking deprived all economically viable uses of the land.” *Id.*

**{¶ 58}** Unlike the situation in *Gorgievski*, here “TMS had a vested right in the prior general retail zoning classification that allowed the sale of used cars.” *TMS I*, 2024-Ohio-1888, at ¶ 22. Additionally, when applying the *Penn Cent.* factors, TMS established a compensable taking. This was not merely a delay caused by the administrative process. Both parties agreed that there was a negative economic impact triggered by the rezoning that caused the market value of the Property to decrease in value and TMS provided uncontested evidence that TMS spent \$40,000 to develop the Property into a used car lot. Furthermore, TMS had a reasonable investment-backed expectation that it would be able to operate a used car lot on the Property.

**{¶ 59}** Based on the record in this case, we find that the administrative appeal for the denial of the change-of-use variance is not an adequate remedy at law because it does not provide just compensation when, as here, there is a compensable taking. Therefore, we find that there is no genuine issue of material facts and TMS was entitled to summary judgment as a matter of law.

**{¶ 60}** Accordingly, the City’s first and third assignments of error are overruled.

### **Injunction**

**{¶ 61}** In the second assignment of error, the City asserts that the trial court improperly granted an overly broad and unnecessary injunction that is moot

because TMS was granted the change-of-use variance. TMS argues that the City waived this assignment of error because the City did not contest the injunction in the trial court. After careful review of the record, we agree with TMS; the City did not contest the injunction in the trial court.

**{¶ 62}** Indeed, it is well settled that a party cannot raise new arguments and legal issues for the first time on appeal and that the failure to raise an issue before the trial court waives that issue for appellate purposes. *Cleveland Town Ctr., L.L.C. v. Fin. Exchange Co. of Ohio, Inc.*, 2017-Ohio-384, ¶ 28 (8th Dist.); *Kalish v. Trans World Airlines, Inc.*, 50 Ohio St.2d 73, 79 (1977) (Appellate courts “will not consider a question not presented, considered, or decided by a lower court.”). In this case, the City did not address TMS’s request for injunction in its brief in opposition to TMS’ s summary-judgment motion nor did it address TMS’s injunction in the City’s summary-judgment motion.

**{¶ 63}** Furthermore, App.R. 16(A)(7) requires that an appellant’s brief include “[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.” Moreover, App.R. 12(A)(2) provides that “[t]he court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).” The burden is on the appellant, not the appellate court, to construct the legal arguments

necessary to support an appellant's assignment of error. *Doe v. Cuyahoga Cty. Community College*, 2022-Ohio-527, ¶ 25 (8th Dist.), citing *Taylor-Stephens v. Rite Aid of Ohio*, 2018-Ohio-4714, ¶ 121 (8th Dist.). Appellate courts are not advocates. *Id.* Thus, we will not consider the City's arguments regarding the injunction.

{¶ 64} Accordingly, the City's second assignment of error is overruled.

{¶ 65} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY J. BOYLE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and  
DEENA R. CALABRESE, J., CONCUR