UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BUILDERS ASSOCIATION OF METROPOLITAN PITTSBURGH, *Plaintiff,* v. CITY OF PITTSBURGH; *et al*., *Defendants.*	Civil Action No. 2:22-cv-706-RJC Judge Robert J. Colville

MEMORANDUM IN SUPPORT OF
DEFENDANT INTERVENORS' [PROPOSED] MOTION TO DISMISS

Lawrenceville United, The Bloomfield Development Corporation, The Polish Hill Civic Association, The Hill District Consensus Group, and The Fair Housing Partnership of Greater Pittsburgh (together, "Intervenors") submit this memorandum in support of their Motion to Dismiss pursuant to Rule 12(b)(6).

I. INTRODUCTION AND FACTUAL BACKGROUND

The City of Pittsburgh is experiencing an affordable housing shortage that pushes low- and moderate-income residents out of the City and away from better schools and transportation options or, in the alternative, forces them to pay steep rent while forgoing other necessities like retirement savings and health care.[1] The shortage disproportionately affects Pittsburgh's Black residents and re-entrenches barriers to racial and economic integration for all Pittsburgh residents.[2] The affordable housing shortage is not caused by lack of development. Between 2010 and 2019, developers built roughly the same number of multifamily units as in the previous three decades.[3]

[1] *Why Housing Matters*, HABITAT FOR HUMAN. OF GREATER PITTSBURGH, bit.ly/3C7vVbl (citing *How Housing Matter: The Housing Crisis Continues to Loom Large in the Experiences and Attitudes of the American Public*, MACARTHUR FOUNDATION (2014), https://bit.ly/3piC7Wv.
[2] *First Look at the 2020 Decennial Census: Pittsburgh Region*, U. OF PITTSBURGH CENTER FOR SOCIAL & URBAN RES. (Aug. 12, 2021), https://bit.ly/3plOqkW.
[3] ROBERT DAMEWOOD, REGIONAL HOUSING LEGAL SERVICES, BUILDING INCLUSIVE COMMUNITIES: A REVIEW OF LOCAL CONDITIONS, LEGAL AUTHORITY AND BEST PRACTICES FOR PITTSBURGH 3 (Jan. 2022).

Unsurprisingly, residential housing prices in the Pittsburgh metropolitan area are rapidly increasing.[4] In 2021, rents increased by 18.5% and home sale prices increased by 14%.[5]

The problems created by a lack of affordable housing—market instability, displacement, racial and economic segregation, loss of cultural diversity—affect individuals across all income levels.[6] Pittsburgh's Inclusionary Zoning Ordinance ("IZO"), like many IZ policies that courts have upheld across the country, ensures that certain Pittsburgh neighborhoods can offer new housing at a variety of price points. By integrating affordable units into market-rate projects, Pittsburgh's IZO also creates opportunities for socioeconomic diversity and equal access to amenities and services in developing communities. By enacting the IZO, the City will interrupt the growing shortage in affordable housing so that all Pittsburghers have the opportunity to live in their City.

II. STANDARD OF REVIEW

To establish a basis for dismissal under Fed. R. Civ. P. 12(b)(6), the movant must show that the plaintiff fails to allege "sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). To be facially plausible, the plaintiff must allege facts that are more than conclusory or speculative and "allo[w] the court to draw the reasonable inference that the defendant is liable" for the challenged conduct. *Id*. In reviewing the sufficiency of the complaint, the court should disregard "labels and conclusions," "a formulaic recitation of the elements," and "bare" assertions absent "further factual enhancement." *Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 555–56 (2007).

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[4] *Pittsburgh real estate values rising their fastest since the 1970s*, U. OF PITTSBURGH CENTER FOR SOCIAL & URBAN RES. (Jan. 7, 2022), https://bit.ly/3w4E3Wm (last visited Aug. 15, 2022).
[5] Jiayi Xu & Danielle Hale, *December Rental Data: Rents Surged by 10.1% in 2021*, REALTOR.COM (Jan. 26, 2022),https://bit.ly/3AqbIMZ.
[6] LINCOLN INSTITUTE OF LAND POLICY, INCLUSIONARY HOUSING: CREATING AND MAINTAINING EQUITABLE COMMUNITIES 55 (2015).

Courts use a three-step approach to evaluate the sufficiency of the complaint. *Iqbal*, 556 U.S. at 675. First, the court notes the elements the plaintiff must allege to state a valid claim. *Id.* Second, the court identifies conclusory allegations unworthy of the court's consideration. *Id*. at 679. Third, the court, accepting the remaining allegations as true, decides whether they plausibly state a valid claim for relief. *Id.*; *Connelly v. Lane Construction Corp.*, 809 F.3d 780, 787 (3d Cir. 2016). Under these clear standards, Plaintiff Building Association of Metropolitan Pittsburgh's ("BAMP") complaint should be dismissed due to its reliance on legal conclusions, barefaced allegations, and speculative assertions that cannot support a plausible claim for relief. *Twombly*, 550 U.S. at 555–56.

III. ARGUMENT

A. THE TAKINGS CLAIM SHOULD BE DISMISSED BECAUSE BAMP FAILS TO STATE A CLAIM UNDER ANY OF THE REGULATORY TAKINGS STANDARDS.

The Supreme Court's takings jurisprudence recognizes three forms of regulatory actions that constitute a taking. Two of these are considered *per se* or "categorical" takings and involve the "relatively narrow" circumstances in which a regulation either results in a "permanent physical occupation" under *Loretto v. Teleprompter Manhattan CATV Corp.*, 4¶ U.S. 419, 426 (1982), or denies a landowner "all economically beneficial use" of their property under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) ("Our precedents stake out two categories of regulatory action that generally will be deemed a *per se* taking."). Neither of these "relatively narrow" circumstances apply here. As such, the Court must decide whether the IZO constitutes a taking using the "principle guidelines" set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 538.

1. Pittsburgh's IZO Cannot Be Construed as a *Per Se* Regulatory Taking.

The Supreme Court recognizes "the longstanding distinction between government acquisitions of property and regulations," a critical distinction that makes clear why the IZO is not a taking under *Loretto* or *Lucas*. *Horne v. Dep't of Agri.*, 576 U.S. 350, 361 (2015). To establish a taking under *Loretto*, the plaintiff must suffer a "permanent physical occupation" of its land that is "qualitatively more severe than a regulation of the use of property." 458 U.S. at 434–36; *see, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (holding *Loretto* does not apply to a rent control ordinance because a physical taking occurs "*only* where it requires the landowner to submit to the physical occupation of his land.") (emphasis added); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (concluding it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking, and vice versa.") (internal citations omitted); *2910 Georgia Ave. L.L.C. v. D.C.*, 234 F.Supp.3d 281, 304 (D.D.C. 2017) (explaining "categorical takings" analysis under *Loretto* is "plainly not applicable" to inclusionary zoning ordinance because ordinance regulates the terms of use).

The IZO is a time-limited regulation of land use rather than a permanent physical occupation. No case law supports BAMP's contention that a use regulation like the IZO compels the physical or permanent occupation of its members' land, and BAMP's "formulaic recitation" of the required elements under *Loretto* fail to advance a claim. *Twombly*, 550 U.S. at 556; *See* Compl. ¶ 68, ECF No. 1 (reciting elements of the claim).

Similarly, the IZO is not a *per se* taking under the standard set forth in *Lucas*. Under *Lucas*, economic regulations result in a taking, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his

property economically idle." *Lucas*, 505 U.S. at 1019 (emphasis in original). BAMP must therefore allege facts illustrating the deprivation of *all* uses. *See Lingle*, 544 U.S. at 539 ("The complete elimination of a property's value is the determinative factor" for establishing a taking in *Lucas*).

Instead, BAMP misstates the standard under *Lucas*, omitting its central qualification that the regulation must deny the landowner "all" economically viable uses of the land. *Id.*; *see* Compl. ¶ 64. While the IZO imposes some limits on how a developer may use the land, it does not deny developers "*all* economically beneficial" land uses. *Lucas*, 505 U.S at 1019. (emphasis in original). In fact, property owners are still permitted to engage in the same exact use as previously intended. *See* PITTSBURGH, PA, ZONING CODE, Tit. IX, art. III, § 907.04.A.6(e) (2021).[7] Thus, the IZO does not aim to render the land "economically idle." *Id*. at § 907.02.H.2(a); *Lucas*, 505 U.S. at 1019.

2. The Complaint Should Be Dismissed Because BAMP Offers Only Threadbare Allegations That Do Not Establish a Taking Under the *Penn Central* Test.

Rather than *Lucas* and *Loretto*, here *Penn Central* supplies the applicable standard for determining whether the IZO constitutes a regulatory taking. *Penn Central* requires consideration of: (1) "the regulation's economic effect on the landowner;" (2) "the extent to which the regulation interferes with reasonable investment-backed expectations;" and (3) "the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (*citing Penn Central*, 438 U.S. at 124–25). BAMP's takings claim should be dismissed because the complaint does not allege factual content to establish a regulatory taking under these factors but rather relies on impermissible conclusory allegations. *See, e.g.*, *Twombly*, 550 U.S. at 555.

[7] The IZO's Inclusionary Standards apply to "[n]ew construction or Substantial Improvement of one or more buildings that collectively contain . . . 20 or more dwelling units" and set aside ten percent of all units to be rented or sold at below-market prices, for low and moderate-income households. PITTSBURGH, PA, ZONING CODE, Tit. IX, art. III, § 907.04.A.6(e). The Affordability Term—the time period for which the requirements of the IZO Ordinance apply—is 35 years. *Id*. at § 907.04.A.4. Developers, therefore, are still permitted to use property exactly as originally intended and without limitation for 90%, the vast majority, of units built.

a. BAMP Mischaracterizes the IZO.

In considering the "character of the government action" the court must decide whether it is akin to a "physical invasion" or to "a public program adjusting the benefits and burdens of economic life to promote the public good," with the presumption that the latter is true. *Penn Central.*, 438 U.S. at 124; *see Pace Res. Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1030 (3d Cir. 1987) (instructing that in assessing character, the government is "entitled to a presumption that it does advance the public interest"). The Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions" without running afoul of the Takings Clause even when the regulation produces economic injuries to a land owner. *Yee*, 503 U.S. at 528–29. Moreover, numerous courts have determined that a city's adoption of an inclusionary zoning ordinance is not a taking but a valid exercise of a municipality's police power. *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1178 (2011) (rejecting takings claim to ordinance requiring developers to sell a percentage of land as affordable housing and record associated deeds); *see also 2910 Georgia Ave. L.L.C. v. D.C.*, 234 F. Supp. 3d at 304 (agreeing inclusionary zoning ordinance was permissible exercise of police power); *Home Builders Ass'n of Greater Chi.* v. *City of Chi.*, 213 F. Supp. 3d 1019, 1027 (N.D. Ill. 2016) (dismissing takings claim based on challenge to ordinance's imposition of rent ceilings on new housing developments); *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 462 (2015) (determining developer's obligation to set aside 15 percent of new units for affordable housing and record deed restrictions was not a taking).

Pittsburgh's IZO squarely falls within this line of cases, and its public purpose is self-evident. On its face, the City determined the IZO was "necessary" to "promote the public health and welfare by increasing the supply of affordable housing." PITTSBURGH, PA, ZONING CODE, Tit.

IX, art. III, §§ 907.04.A.2-A.3. Like similar ordinances in other jurisdictions, the IZO promotes the public interest by requiring developers to set aside 10% of units so that lower income households also benefit from new development. BAMP even concedes that Pittsburgh enacted the IZO to advance the public interest and states that the goal of the IZO is "laudable." Compl. ¶¶ 3, 52. Nevertheless, BAMP attempts to sidestep its concession by merely concluding that, "[t]he ordinance does not substantially advance any legitimate government interest." Compl. ¶ 66. Not only is the "substantially advance[s]" language the improper standard to establish a takings claim (or for that matter a substantive Due Process claim, see *infra* Part III), BAMP's allegation contains nothing more than unsupported legal conclusions unable to overcome the presumption in favor of the City. *Lingle*, 544 U.S. at 542 (*citing Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

Furthermore, BAMP fails to allege the facts necessary to prove that the IZO accomplishes "a physical invasion." *Penn Central*, 438 U.S. at 124. It simply states that its members "suffer the permanent physical occupation." Compl. ¶ 68. But "threadbare recitals of the elements" untethered to any facts do not suffice to state a plausible claim. *Iqbal*, 556 U.S. at 678. Because BAMP is unable to overcome the presumption in favor of the City based on its conclusory allegations, the Court should dismiss BAMP's takings claim.

b. BAMP's Reliance on Speculative Facts and Conclusory Allegations Impede the Court's Ability to Evaluate the Alleged Degree of Economic Harm.

Under *Penn Central*, a plaintiff must also provide sufficient facts to illustrate that the regulation severely interferes with its ability to benefit economically from its property. 438 U.S. at 124. To that end, the "magnitude" of the regulation's economic impact on the owner's property interests must rise to where the regulation drastically interferes with the uses or significantly diminishes the value of the property. *Lingle*, 544 U.S. 540; *see also Pace Res. Inc.*, 808 F.2d at

1031. Then, the plaintiff must provide sufficient facts to illustrate that the degree of interference the regulation has on the plaintiff's "reasonable, distinct, investment-backed expectations" is severe. *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 713 (3d Cir. 1985), *aff'd*, 480 U.S. 470 (1987) (hereafter cited to as "*KBCA*").

In the Third Circuit, courts routinely dismiss takings claims that allege that zoning ordinances deprive parties of economically viable uses where the property retains commercially exploitable uses. *See, e.g.*, *Pace Res. Inc.*, 808 F.2d at 1031 (determining that although industrial use was no longer available under new zoning ordinance, ordinance was not a taking because the land still retained other exploitable uses); *Rogin v. Bensalem*, 616 F.2d 680, 692 (3d Cir. 1980) (dismissing claim that downzoning of developer's property constituted taking because the reduction in housing density would add other value to owner's existing parcel).

Here, the limits the IZO imposes on BAMP's members have smaller economic consequences than those alleged in the cases cited above. The IZO still permits the developer to engage in the same commercial use as before, *i.e.*, developing multifamily properties for rental or sale. Further, because the IZO impacts only a small portion of the entire property (10% of the total units), the impact on the use of the *entire property* is well below drastic. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944 (2017) (explaining that regulation's impact must be assessed in relation to entire property); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (explaining that property must be viewed in the "aggregate" when assessing impact of ordinance); *2910 Georgia Ave. LLC*, 234 F. Supp. 3d at 294–98 (analyzing whether an inclusionary zoning ordinance effectuated a regulatory takings based on its effect on an entire building rather than on individual units). The restriction on 10% of units, or "one strand" in the developer/owner's bundle of rights, plainly does not destroy the "full" bundle of property rights and cannot be construed as a taking. *Andrus*, 444 U.S. at 65–66.

BAMP also fails to allege any facts related to the diminution in the property's present value. To be construed as a taking, the diminution in the value of the property must be shown to "destroy or severely" reduce the value of the existing property. *Rogin*, 616 F.2d at 690. Unlike in cases where plaintiffs provided courts with comparative cost estimates of the impact of challenged regulations on property values, *see KBCA*, 480 U.S. at 497, here BAMP fails to allege any purported losses in property value beyond bare allegations. *See* Pl.'s Compl., Ex., A, Decl. of James M. Eichenlaub ("Eichenlaub Decl.") ¶ 9, ECF No. 1. Because bare allegations of loss prevent the Court from assessing the "magnitude" of the IZO's impact, the Court cannot infer that the allegations state a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Home Builders Ass'n of Greater Chi.*, 213 F. Supp. 3d at 1029 (dismissing regulatory takings challenge to IZO because plaintiff failed to proffer estimated loss in value beyond "some" loss).

Nor has BAMP alleged facts that the IZO interferes with its "reasonable distinct investment-backed expectations" as required under the third *Penn Central* factor. *KBCA*, 771 F.2d at 713, *aff'd*, 480 U.S. 470 (1987). These expectations are subject to two limiting principles: 1) requiring a plaintiff to show the regulation has "nearly the same effect as the complete destruction of the property right of the owner," with 2) the implicit understanding that to be reasonable the expectations must account for the state's authority to regulate private property to further the public interest. *Pace Res. Inc.*, 808 F.2d at 1033. The interference alleged here fails on both counts.

A municipality's passage of an ordinance to regulate the residential housing market to promote housing affordability is a paradigmatic example of allowable government action that typically does not violate the Takings Clause. *See, e.g.*, *Yee*, 503 U.S. at 528–29. There should be no surprise to BAMP that its members' expected return on investments may be tempered by the government's right to regulate, particularly in a field as extensively regulated housing. *Home*

Builders Ass'n of Greater Chi., 213 F.Supp.3d at 1030; *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 645 (1993) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."). "Zoning laws often affect some property owners more severely than others" but this does not by itself establish a taking. *Penn Central*, 438 U.S. at 133–34.

BAMP argues that the IZO will force its members to either "suffer losses and harms" by complying with the measure or "suffer other losses and harms" to property value, economic opportunities, and profits due to abandonment of projects. Eichenlaub Decl. ¶ 10. But BAMP's speculative assertions fail to offer facts to show that the degree of alleged interference caused by the IZO "ha[s] nearly the same effect as the complete destruction" of the property owner's rights. *Penn Central*, 438 U.S. at 127. Rather BAMP's claimed investment losses chiefly rest on its unreasonable expectation to exploit property through its most profitable use. But government action that prohibits the "most profitable use" of property does not constitute a taking. *Andrus*, 444 U.S. at 66; *see also Penn Central*, 438 U.S. at 130 (holding "untenable" plaintiff's claimed taking based on its prior assumption that an exploitable interest was available). Without more, BAMP cannot sustain its takings claim.

3. BAMP's Facial Challenge to the IZO Cannot Establish a Taking Through an Alleged Exaction as a Matter of Law.

BAMP also alleges that the IZO is a taking because it is an unconstitutional exaction. Compl. ¶¶ 58, 61–65. But the Supreme Court has identified three forms of unconstitutional exactions, none of which apply to the IZO at issue. *Cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 842 (1987) (recognizing conditioning issuance of a permit on owner's conveyance of public easement as an exaction); *Dolan v. City of Tigard*, 512 U.S. 374, 390 (1994) (deciding conditioning permit on conveyance of real property to create public greenway was exaction); *Koontz v. St. Johns*

River Water Mgmt. District, 570 U.S. 595, 612 (2013) (expanding the exactions analysis to include monetary fees demanded a condition for a permit). BAMP's attempt to shoehorn the IZO into an exaction under these cases fails. Contrary to BAMP's assertions, the IZO is not a land use exaction because it does not require the developer to convey property, nor require the developer to convey an easement to the government for public use, nor demand the developer pay a fee to receive a permit. *Cal. Bldg. Indus. Ass'n*, 61 Cal.4th at 444 (distinguishing inclusionary zoning ordinance from exaction because it did not require developer to "pay monetary fee but rather place a limit on the way a developer may use its property."); *see* Compl. ¶¶ 56–58.

Moreover, the exaction analysis should not be countenanced as a matter of law under *Nollan/Dolan*. BAMP is most certainly raising a facial takings claim in that it "asserts that the mere enactment of a statute effects a taking of property without just compensation, irrespective of its particular applications." *Khodara Env. Inc. ex rel. Eagle Env. L.P. v. Burch*, 245 F. Supp. 2d 695, 728 (W.D. Pa. 2002). But the *Nollan/Dolan* standard simply does not apply to a facial takings challenge because the factors considered under *Nollan/Dolan* only become relevant once a specific exaction has actually been imposed. *See Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (concluding "that *Dolan* applies only to as-applied takings challenges, not to facial takings challenges"). Here, BAMP admits, while it has members whose properties may be subject to the IZO, no member has applied for nor been denied a permit as of this filing and therefore no property is subject to an exaction. Eichenlaub Decl. ¶¶ 8-9. Therefore, BAMP cannot present the IZO as an unconstitutional exaction nor rely on *Nollan* and its progeny to support its facial takings challenge. *See Khodara Env. Inc.*, 245 F. Supp. 2d at 728 (citing to *Garneau* for this exact proposition) (*overruled on other grounds*). Such reliance is misplaced and compels dismissal.

B. THE COURT SHOULD DISMISS BAMP'S UNCONSTITUTIONAL CONDITIONS CLAIM BECAUSE BAMP FAILED TO DEMONSTRATE THE PREDICATE CONDITION FOR SUCH A CLAIM.

BAMP cannot assert an unconstitutional conditions claim because BAMP must first establish a "predicate" constitutional violation, such as a taking. *Koontz*, 570 U.S. at 612. In this case, BAMP has failed to plead facts demonstrating a taking or any other premise for its unconstitutional conditions claim. Thus BAMP's unconstitutional conditions claim also must be dismissed. *See Ballinger v. Oakland*, 24 F.4th 1287, 1297-98 (9th Cir. 2022) (dismissing unconstitutional conditions based on lack of predicate taking shown).

C. THE IZO DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

BAMP alleges that the IZO deprives its members of their liberty and property without due process of law in violation of the Fourteenth Amendment. This claim fails for two reasons. First, under long-established precedent, due process claims challenging legislation are reviewed under the deferential rational basis standard. *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012) ("In a case challenging a legislative act . . . the act must withstand rational basis review."); *Rogin*, 616 F.2d at 689. BAMP does not and cannot argue that there is no rational basis for the IZO. Second, BAMP's claim that the IZO requires its members "to furnish their time, talents, labor, and financial resources to construct housing for the benefit of the City and/or for the benefit of third parties favored by the City" does not provide a cognizable basis for a due process claim. Compl. ¶73; *see Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 258–60 (1964). If it did, broad swaths of federal, state, and local law, including taxation, would be called into doubt.

1. Substantive Due Process Challenges to Land Use Regulations Are Subject to Rational Basis Review; BAMP Has Not Alleged the IZO is Irrational.

Lingle, a challenge to a state rent control statute for gas stations, is the leading case on the application of the Due Process Clause to land use regulations. *See Lingle*, 544 U.S. at 528. Under this line of precedent, the Court expressed apprehension about the use of the "substantially advances" test to demonstrate a substantive Due Process claim. Resolving this question in the negative, the Court found that a more appropriate standard of review for substantive due process claims is the rational basis standard due to the "imprecise" nature of the "substantially advances" test. *Id.* at 542 (*citing Lewis*, 523 U.S. at 846).

But BAMP does not allege that the IZO is irrational, nor can it. *See* Compl. at ¶ 66. Under the correct standard, *i.e.* rational basis review, the IZO itself supplies the rational basis: it is "necessary to increase the production of affordable housing to meet existing and anticipated housing and employment needs and to provide a diverse range of housing choices within the District boundaries." PITTSBURGH, PA, ZONING CODE, Tit. IX, art. III, § 907.04.A.2. Furthermore, as the City explained "because remaining land appropriate for residential development within the IZO is limited, it is essential that a reasonable proportion of such land be developed into housing units affordable to low and moderate-income people." *Id*. at § 907.04.A.3(c). In sum, because the rational basis standard governs whether the IZO violates the Due Process Clause and BAMP has conceded that the IZO serves a legitimate interest, BAMP has failed to plausibly plead that the IZO's requirements are arbitrary and have no rational relationship to the conceded interest.

2. Government Regulations Routinely Require Businesses to Perform Services that Benefit Others.

BAMP also advances a novel claim that the IZO compels its "members to furnish their time, talents, labor, and financial resources to construct housing for the benefit of the City and or for the benefit of third parties favored by the City" and that, by doing so, the IZO deprives BAMP of liberty and property in violation of the Due Process Clause. Compl. at ¶ 73. However,

government regulations routinely require businesses to "furnish their time, talents, labor, and financial resources" to the public and for the benefit of would-be customers. *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 258–60 (1964) (holding that the Due Process Clause does not confer a "'[r]ight' to select its guests as it sees fit, free from governmental regulation"). The consequences of entertaining BAMP's outlandish distortion of the Due Process Clause would be far-reaching, implicating even the government's ability to tax and spend for the public good. This Court should reject the invitation.

D. BAMP'S STATE LAW CLAIMS ARE MERITLESS AND SHOULD BE DISMISSED.

In addition to its federal claims, BAMP asserts two state law claims: (1) that Pittsburgh's IZO is prohibited under Pennsylvania law governing Home Rule municipalities; and (2) that Pittsburgh's IZO operates as a *de facto* tax in violation of the Pennsylvania Constitution's Uniformity Clause. Neither have merit. Contrary to BAMP's assertions, Pittsburgh was expressly authorized by Pennsylvania law to enact and implement its IZO, and the IZO does not operate as a *de facto* tax. This Court should dismiss these claims pursuant to Rule 12(b)(6).

1. The City of Pittsburgh Has Municipal Power to Enact Its IZO.

The Pennsylvania Constitution vests every municipality with the right and power to frame, adopt and conduct its affairs pursuant to a home rule charter. PA. CONST. art. IX, § 2. This delegation of the Commonwealth's powers is very broad. A municipality that adopts a home rule charter is empowered to exercise *any and all* powers or functions of government that are not denied by the Constitution, by an Act of the General Assembly or by the municipality's home rule charter, itself. *Id*. As the Pennsylvania Supreme Court has made clear, "a home-rule municipality's exercise of legislative power is presumed valid, absent a specific constitutional or statutory limitation[; and] …'[a]ll grants of municipal power to municipalities…shall be liberally construed

in favor of the municipality.'" *Penn. Rest. and Lodging Ass'n v. City of Pitt.*, 211 A.3d 810, 817–24 (Pa. 2019) (quoting 53 PA. CONS. STAT. § 2961) (hereinafter "*PRLA*").

At issue in this case is the specific limitation on home rule authority, codified at Section 2962(f) of the Pennsylvania Consolidated Statutes, commonly known as the Business Exclusion, which states:

> "A municipality which adopts a home rule charter shall not determine duties, responsibilities or requirements placed upon businesses…*except as expressly provided by statutes which are applicable in every part of this Commonwealth or which are applicable to all municipalities or to a class or classes of municipalities.* (emphasis added)."

53 PA. CONS. STAT. § 2962(f) (2021). This constraint on home rule authority is, by its own terms, quite limited. *See PRLA*, 211 A.3d at 824 (holding "the Business Exclusion provides that a home-rule municipality seeking to invoke this exception is entitled to the benefit of affirmative grants of authority applicable to *any* class of municipality as a whole, or reflected in codes that apply to all municipalities together."). In other words, the exception to the Business Exclusion permits home rule municipalities to regulate business if there is *any* source of municipal power in state law that authorizes such regulation.

In evaluating whether a home rule municipality's regulation of business is "expressly" authorized by statute, the Pennsylvania Supreme Court has held that an authorizing statute is "express" when it is "clear and unmistakable" in its *general* grant of authority. *See PRLA*, 211 A.3d 810, at 839.The statute need not be textually explicit about every aspect of the authority delegated, as the General Assembly cannot be expected to anticipate every eventuality to which the municipality might apply the authority. *Id.* at 830, n.19; *accord Apartment Ass'n of Metro. Pitt. Inc. v. City of Pitt.*, 261 A.3d 1036, 1043 (Pa. 2021) ("To require the legislature to specify each permissible action and concomitant burden in detail would hamstring home-rule municipalities

from exercising their home-rule authority in any way that burdens businesses . . . undercutting the general presumption in favor of home rule.") (internal quotation and citation omitted). Rather than textual specificity, the statute must clearly and unmistakably grant ordinance-making authority, and there must be a "nexus" between the over-arching intent of the enabling statute and the objectives and requirements of the local ordinance. *Id.*

a. The Pennsylvania Municipalities Planning Code expressly empowered the City to enact its IZO.

The Pennsylvania Municipalities Planning Code ("MPC") clearly and unmistakably authorizes municipalities to enact zoning ordinances that ensure housing is available for people of all income levels in a balanced and inclusionary manner. The MPC delegates zoning power to nearly all classes of municipalities in Pennsylvania. 53 PA. STAT. ANN. §10103 (West). The MPC expressly authorizes municipalities to "enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of [the MPC]" and specifically states that such zoning ordinances "may permit, prohibit, regulate, restrict and determine," among other things, the "use of structures." 53 PA. STAT. ANN. §§ 10601 and 10603(b)(2). This express grant of ordinance-making authority is precisely the kind of statutory delegation enumerated in Section 2962(f) and recognized by the Pennsylvania Supreme Court. *See* 53 PA. CONS. STAT. § 2962(f).

Equally clear is the "nexus" between the "overarching intention" of the MPC and the objectives and requirements of Pittsburgh's IZO. *Apartment Ass'n of Metro. Pitt.*, 261 A.3d at 1045. Among other provisions that illustrate that nexus, the MPC states that a municipality's comprehensive plan shall include a "plan to meet the housing needs of present residents and of those individuals and families anticipated to reside in the municipality, which may include…*the accommodation of expected new housing in different dwelling types and at appropriate densities for households of all income levels*." 53 PA. STAT. ANN. § 10301(a)(2.1) (emphasis added); *see*

also 53 PA. STAT. ANN. §§ 10105 and 10604 (setting forth the intent and purposes of the MPC's delegation of authority to municipalities, including to "guid[e the] . . . development and growth [and] uses of land and structures," "provide for the use of land . . . for residential housing of various dwelling types," and to "permit municipalities to minimize such problems as may presently exist or which may be foreseen" in their communities).

The nexus between these purposes of the MPC and the objectives and requirements of Pittsburgh's IZO could hardly be clearer. The IZO reflects the City's determination that IZ is:

> "[N]ecessary to increase the production of affordable housing to meet existing and anticipated housing and employment needs and to provide a diverse range of housing choices within the District boundaries. The updated zoning will provide adequate balances by ensuring that the neighborhoods can continue to offer new housing units at a variety of price points."

PITTSBURGH, PA, ZONING CODE, Tit. IX, art. III, § 907.04.A.2 (articulating need for Zoning Overlay); *see also id.* at §§ 907.02.A & 907.04.A.3 (outlining the full purpose and intent of the IZO). The General Assembly contemplated precisely the type of purpose and objectives underlying the IZO when it delegated zoning authority to municipalities under the MPC. *See, e.g.*, 53 PA. STAT. ANN. §§ 10105, 10301(a) (2.1) & 10604. And in its Complaint, BAMP does not challenge the validity of the purpose or intent of Pittsburgh's IZO requirements. Compl. ¶ 58. To the contrary, BAMP characterizes them as "laudable." *Id.*

Furthermore, a zoning ordinance is presumed valid and the challenging party must show that it is arbitrary, unreasonable, and unrelated to public health, safety, and general welfare. *Main St. Development Group, Inc. v. Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21, 27–28 (Pa. Commw. Ct. 2010). BAMP fails to satisfy that burden. To the contrary, the IZO creates "Inclusionary Zoning Districts" in certain neighborhoods where the City deemed it necessary to increase the production of affordable housing to meet existing and anticipated housing and employment needs and to

provide a diverse range of housing choices. In short, the IZO is directly related to the City's legitimate objectives.

In this case, BAMP's challenge to Pittsburgh's authority to enact its IZO boils down to a complaint about perceived future diminution of profits and property value, without sufficient factual allegations from which the Court could reasonably infer such injuries. Assuming, *arguendo,* that such injuries were pled, however, BAMP fails to recognize that Pittsburgh's IZO is expressly authorized by the MPC and, therefore, not prohibited by the Business Exclusion. *See, e.g., Apartment Ass'n of Metro. Pitt. Inc.*, 261 A.3d 1036 at 49 ("…[E]ven a substantial burden may be incidental for purposes of the Business Exclusion if the statutory warrant for it is clear.") BAMP's "home rule" challenge to the IZO is without merit.

2. BAMP Has Failed to State a Claim Under the Uniformity Clause of the Pennsylvania Constitution.

BAMP's assertion that Pittsburgh's IZO is equivalent to a *de facto* tax, and that this tax violates the Uniformity Clause of the Pennsylvania Constitution, is fundamentally flawed and without support under Pennsylvania Law. First, the IZO simply does not raise revenue. Pennsylvania case law unequivocally states that a "tax" is a legislative exaction "imposed for the purpose of raising revenue." *Adams Outdoor Advert., Ltd. v. Borough of Stroudsburg*, 667 A.2d 21, 24 (Pa. Commw. Ct. 1995). "Even though the imposition of or exemption from a tax may advance other governmental concerns…the primary purpose of taxes is always to raise money for the taxing authority." *Id.*; *see also Nat'l Biscuit Co. v. City of Phila.*, 98 A.2d 182, 187 (Pa. 1953) (distinguishing taxes from fees by defining property taxes as levied "solely for the purpose of raising revenue"); *Pitt. Milk Co. v. City of Pitt.*, 62 A.2d 49, 52 (Pa. 1948) ("a tax…is imposed…solely for the raising of revenue."). It is not surprising, then, that when evaluating whether a statute imposes a *de facto* tax, the courts must determine whether the statute's purpose

is to generate revenue. *See, e.g.*, *White v. Com. Medical Professional Liability Catastrophe Loss Fund*, 517 A.2d 911 (Pa. Commw. Ct. 1990) (finding that a surcharge in a statute is not a tax because it was not enacted to generate revenue or defray the costs of government); *accord Holmdel Builders Ass'n v. Twp. of Holmdel*, 583 A.2d 277, 298 (N.J. 1990) (holding that the mandatory set-aside provision of an inclusionary zoning law is not a tax).

In this case, it cannot be argued, nor has BAMP alleged, that the purpose of Pittsburgh's IZO is to raise revenue for the City. Rather, BAMP recognizes that the "[p]urpose and [i]ntent [of] the [IZO] is to promote the public health and welfare by increasing the supply of affordable housing for a range of family sizes and promoting economic integration within the District boundaries." Compl. ¶ 3. The IZO imposes no assessment, charge, fee, or other payment obligation for the purpose of raising revenue for the City. As such, there is no possible Uniformity Clause violation.

BAMP further asserts that the IZO "triggers Pennsylvania and local realty transfer taxes applicable to leases for a term of 30 years or greater, for which Pittsburgh itself would be a direct beneficiary." Comp. ¶ 94. Specifically, BAMP suggests that the IZO "compels" developers to enter into 35-year leases, thereby triggering the complained of realty transfer tax. *Id.* But this implication is belied by the plain text of the IZO, which provides developers with a clear *choice* of methods for complying with the on-site inclusionary standard. PITTSBURGH, PA, ZONING CODE, Tit. IX, art. III, §§907.04.A.6(b)(1) & (2). Further, in the event a developer were to choose the master-lease option over the deed restriction option, thereby triggering the 1% realty transfer tax under the City's Fiscal Code, PITTSBURGH MUNI. CODE §§ 255.01 *et seq.*, to raise a Uniformity Clause challenge, the developer would still have to show the following: 1) that the statute at issue results in a classification of a group of taxpayers; and 2) that the classification is "unreasonable

and not rationally related to any legitimate state purpose." *Clifton v. Allegheny County*, 969 A.2d 1197, 1210 (Pa. 2009). BAMP has alleged no facts upon which such a showing plausibly could be made. Neither the IZO nor the City's Fiscal Code create any such classification. The realty transfer tax in the City's Fiscal Code applies uniformly to every taxpayer whose circumstance triggers the tax, not just to developers who might choose the master-lease option for complying with the IZO's onsite inclusionary standard.

E. IN THE ALTERNATIVE, THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER BAMP'S STATE LAW CLAIMS.

In the alternative, the Court should decline to exercise supplemental jurisdiction over these claims, as BAMP has failed to allege any valid federal claims in this case, and there are no countervailing considerations that would justify the exercise of supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(3). The Third Circuit has counselled that district courts *must* decline to exercise jurisdiction over pendent state claims in such cases unless considerations of judicial economy and fairness to the parties provide an affirmative justification for retaining jurisdiction. *See Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995). As set forth in Sections I-III of this brief, because BAMP has fails to state a federal claim, the Court should decline to exercise jurisdiction over BAMP's state law claims.

CONCLUSION

For the foregoing reasons, this Court should dismiss BAMP's claims pursuant to FRCP Rule 12(b)(6). In the alternative, the Court should decline to exercise supplemental jurisdiction over BAMP's state law claims.

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Respectfully submitted,

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