

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 6 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT E. BENNETT; JUDITH D.
BENNETT,

Plaintiffs-Appellants,

v.

CITY OF KINGMAN,

Defendant-Appellee.

No. 21-16105

D.C. No. 3:19-cv-08001-MTL

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Michael T. Liburdi, District Judge, Presiding

Submitted January 4, 2023**

Before: HAWKINS, S.R. THOMAS, and McKEOWN, Circuit Judges.

Robert E. and Judith D. Bennett appeal pro se the district court's orders denying mandamus relief and entering summary judgment, dismissing their action under 42 U.S.C. § 1983 alleging that the City of Kingman violated the Takings Clause, their due process rights, and state law by re-zoning their property and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

denying a third extension on their 2013 conditional use permit (“CUP”) and their 2018 application for a new CUP. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court’s conclusions of law, including the application of the statute of limitations and whether summary judgment and mandamus relief are appropriate. *Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936, 939 (9th Cir. 2017); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1057 (9th Cir. 2012); *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th Cir. 2003). We review for abuse of discretion the district court’s decisions whether to consider a new issue at summary judgment and to extend supplemental jurisdiction over state law claims. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994), *overruled on other grounds by City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cir. 2017); *Arroyo v. Rosas*, 19 F.4th 1202, 1210 (9th Cir. 2021). We affirm.

The district court properly found that claims premised on the 2005 enactment of City Ordinance 1471, which re-zoned the Bennetts’ property, are barred by Arizona’s two-year statute of limitations. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). The Bennetts did not file suit until seven years after they first knew “kn[ew] of the injury which is the basis of the action.” *Id.*

To the extent the Bennetts’ Takings Clause claim is premised on the denial of their 2018 CUP application, the district court properly granted summary

judgment because they failed to raise a triable dispute as to whether they had a protected property interest at stake. “Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]” *Bowers v. Whitman*, 671 F.3d 905, 912 (9th Cir. 2012) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Arizona courts have declined to find a property interest where the applicant “was subject to the inherently unpredictable and often politicized process of seeking permission from a local legislative body to conduct certain activity on a piece of property.” *Aegis of Ariz., L.L.C. v. Town of Marana*, 81 P.3d 1016, 1028 (Ariz. Ct. App. 2003).

To the extent that the Bennetts’ Taking Clause claim is premised on the denial of a third extension on their 2013 CUP, the district court properly granted summary judgment because they failed to raise a triable dispute as to whether the denial constitutes a taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The Bennetts failed to provide evidence of the direct economic impact of the denial or of sufficiently concrete “investment-backed expectations” with which the denial interfered. *Bridge Aina Le’a, LLC v. Land Use Comm’n*, 950 F.3d 610, 630 (9th Cir. 2020) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124). Moreover, the denial did not resemble a physical invasion or unfairly require the Bennetts to bear a burden more appropriately borne by the

broader public. *See Penn Cent. Transp. Co.*, 438 U.S. at 124.

The district court properly granted summary judgment on the Bennetts' procedural due process claim because they failed to raise a triable dispute as to whether the City denied them any constitutionally required process. The Bennetts failed to establish a genuine dispute of material fact as to whether they were denied "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The district court properly granted summary judgment on the Bennetts' substantive due process claim because they failed to raise a triable dispute as to whether denial of the CUP was "substantial[ly] relat[ed] to the public health, safety, morals or general welfare." *Samson*, 683 F.3d at 1058 (citation omitted).

The district court properly denied the Bennetts' request for federal mandamus relief because they did not seek to compel any federal officer or agency to perform any duty. *See* 28 U.S.C. § 1361.

The district court did not abuse its discretion in declining to consider the Bennetts' equal protection claim, raised for the first time on summary judgment. The district court did not abuse its discretion in finding prejudice to defendants counseled against adding a new issue. *See Kaplan*, 49 F.3d at 1370.

Finally, the district court did not abuse its discretion in declining to exercise

supplemental jurisdiction over the state-law claims. When all federal claims are dismissed before trial, “judicial economy, convenience, fairness, and comity [all] point toward declining to exercise jurisdiction over the remaining state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

AFFIRMED.¹

¹ We deny the Bennetts’ motion for default judgment (Dkt. No. 15).