UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANITA YU, JOHN BOYER and
MARY RAAB,

Plaintiffs,

vs.

Case No. 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

CITY OF ANN ARBOR,

Defendant.
_____/

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DEFENDANT CITY OF ANN ARBOR'S OPPOSITION TO PLAINTIFFS' MOTION TO REMAND PURSUANT TO 28 U.S.C. §1447(c)

Defendant City of Ann Arbor ("City") responds in opposition to Plaintiffs' Motion to Remand Pursuant to 28 U.S.C. §1447(c) as follows and as set forth more fully in the City's accompanying brief.

1. The City's removal and Plaintiffs' motion to remand are based on and need to be decided based on Plaintiffs' complaint as it was filed and existed at the time of removal.

2. Plaintiffs' complaint, as written, does not include any federal takings claims, notwithstanding the labels attached to their claims.

3. Plaintiffs' complaint includes federal claims that are not and that Plaintiffs do not identify as takings claims.

4. Plaintiffs' federal claims that are not takings claims, regardless of the labels attached to them, are ripe for consideration by this Court.

5. Even if one or more of Plaintiffs' claims is considered to be a federal takings claim for purposes of their motion to remand, Plaintiffs included them in their complaint as being ripe for consideration; Plaintiffs cannot maneuver a remand of the case by amending their complaint to remove those claims as unripe.

6. Plaintiffs cannot maneuver a remand of the case by denying the existence of, or by amending their complaint to delete, the federal claims they included that are not takings claims and that they did not identify as takings claims.

7. Ripeness of a federal takings claim for consideration is a threshold or

prudential matter and is not subject matter jurisdiction per se; and the lack of ripeness does not strip a court of jurisdiction to decide issues that are not decisions on the merits.

8. The lack of ripeness does not preclude a court from deciding the merits of takings claims in certain circumstances.

9. The requirement of ripeness of a federal takings claim applies in both federal and state courts; a remand of a federal takings claim to state court does not make it ripe for consideration.

10. The City's removal of Plaintiffs complaint, as drafted, was objectively reasonable and supported by law.

11. Plaintiffs, as drafters of their own complaint, cannot fault the City for removing this case to federal court based on the claims they asserted in their complaint.

12. Because the City has already filed a Motion to Dismiss, the City requests that this Court consider both Plaintiffs' Motion to Remand and the City's Motion to Dismiss at the same time.

WHEREFORE, the City respectfully requests that this Court:

1. Deny Plaintiffs' Motion to Remand.

2. Dismiss from Plaintiffs' complaint with prejudice all federal claims that Plaintiffs now argue are not part of their complaint.

3. Deny Plaintiffs their request for costs and attorney fees.

4. Award the City its costs, including attorney fees, for having to respond to Plaintiffs' complaint as Plaintiffs drafted it, and for having to respond to Plaintiffs' Motion to Remand.

5. Grant such other relief as is in the interest of judicial economy, efficiency and justice.

Dated: April 17, 2014

Respectfully submitted,

By: /s/ Abigail Elias
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Attorneys for Defendant City
OFFICE OF THE CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiffs' Counsel, Salem F. Samaan (for himself and for M. Michael Koroi), and I hereby certify that I have mailed by US Mail, first class postage prepaid, the document to the following non-ECF participant: Irvin A. Mermelstein.

/s/ Alex L. Keszler
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DEFENDANT CITY OF ANN ARBOR'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND PURSUANT TO 28 U.S.C. §1447(c)

STATEMENT OF ISSUES PRESENTED

Was Plaintiffs' Complaint, as written and filed, properly removed?

Plaintiffs Answer: No

The City Answers: Yes

This Court Should Answer: Yes

Does Plaintiffs' position that their federal takings claims are not ripe make the removal of their complaint improper or require that it be remanded?

Plaintiffs Answer: Yes

The City Answers: No

This Court Should Answer: No

Must Plaintiffs' Complaint, as written and filed, be remanded?

Plaintiffs Answer: Yes

The City Answers: No

This Court Should Answer: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

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INTRODUCTION

Plaintiffs' complaint, which they filed on February 27, 2014,[1] stems from the footing drain disconnect (FDD) that they did or had done on each of their properties. Footing drains collect storm and groundwater from under and around a building. Properties constructed before the early 1980s discharged that stormwater into the City's sanitary sewer system. The sanitary sewer system is designed to carry sanitary sewage; it is not designed to carry storm flows. The large volume of stormwater flow during heavy rain events surcharges the sanitary system causing public health concerns due to both prohibited overflows (sewage flow in streets, on land and into the Huron River) and backups of sewage into basements.

The FDD program disconnects footing drains from the sanitary sewer system and redirects the discharge, usually into the City's storm sewer system, but sometimes to a back yard if approved. Sump pumps are required to lift the water from the footing drain to the pipe that carries it away.[2] Although not legally necessary to authorize the City's FDD program, MCL §117.5j (Home Rule City Act) explicitly authorizes the City's FDD ordinance, Sec. 2:51.1 of the Ann Arbor City Code (Doc 7-3, pp 19-20). Nevertheless, Plaintiffs now seek damages for the FDDs they did or had done in 2002 and 2003 pursuant to Sec. 2:51.1.

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[1] The complaint and its exhibits are filed with this Court as Doc 1 pp9-56; Plaintiffs attach the complaint and exhibits as Exhibit 3 to their Motion to Remand. (Doc 7-3) The City's references to the complaint in this brief are to Doc 7-3.

[2] Doc 1 pp31-32 (Ex 2 pp3-4).

Plaintiffs' complaint includes two causes of action they identify as federal claims. One they label as a claim for takings without compensation in violation of the 5th Amendment to the U.S. Constitution.[3] The other is written to include federal claims that are not takings claims.[4] Plaintiffs' requests for declaratory and injunctive relief,[5] based on constitutional grounds, are distinct from their takings claims and are not required to ripen like takings claims. Removal of the case to this Court based on federal question jurisdiction under 28 USC §1331 and based on the pleadings at the time of removal, was and remains proper.

Plaintiffs now concede that their federal "takings" claims, if they are takings claims, are not ripe for adjudication. However, their argument ignores - does not even mention - the other federal claims in their complaint, none of which has a ripeness requirement. Removal of Plaintiffs' complaint based on these other federal claims was and remains proper. Plaintiffs argue lack of ripeness as grounds for remand, but that argument does not apply to these claims.[6]

Plaintiffs' argument also ignores that their "takings" claims, as actually written in their complaint, are not takings claims despite being labeled as takings or inverse condemnation claims. Federal claims that are not actually takings claims

[3] Plaintiffs' Third Cause of Action (5th Amendment).
[4] Plaintiffs' Fourth Cause of Action (federal claims brought under 42 USC §1983).
[5] Plaintiffs' Fifth and Sixth "Causes of Action" (Doc 7-3 pp15-16 ¶¶68-74).
[6] Although these claims are subject to dismissal as time-barred by the applicable three year statute of limitations, that does not make removal improper and is not grounds for remand.

or are not intertwined with actual federal takings claims are not subject to the ripeness requirement for federal takings claims. Removal of those claims to this Court was and remains proper; they are not subject to remand for lack of ripeness.

Even if the claims they label as federal takings claims are assumed to be federal takings claims for purposes of this motion, Plaintiffs' argument that the non-judiciability of their federal takings claims means the Court lacks subject matter jurisdiction over the claims is not supported in a case like this.

Plaintiffs' argument also ignores that ripeness of a federal takings claim for consideration is not dependent on the forum; if those claims are not ripe for this Court to consider, they also are not ripe for the state court to consider and should not have been included in Plaintiffs' complaint in the first place.[7] Dismissal rather than remand is the appropriate consequence.

Plaintiffs' Motion to Remand should be denied. This Court should instead consider and grant the City's Motion to Dismiss.

ARGUMENT

I. STANDARD OF REVIEW

When a party brings a motion to remand, the removing party has the burden

[7] If Plaintiffs knew these claims were not ripe for consideration when they wrote their complaint, the inclusion of these claims in the complaint was frivolous, without legal support for ignoring the ripeness requirement. The City should be awarded its costs, including attorney fees, for its work to respond to these portions of the complaint that Plaintiffs now concede are barred as unripe for consideration.

of establishing that removal was proper. *Wilson v Republic Iron & Steel Co.*, 257 US 92, 97-98, 42 SCt 35, 66 Led 144 (1921); *Rogers v Wal-Mart Stores, Inc.*, 230 F3d 868, 871 (6th Cir 2000). In this case, that burden is easy.

As conceded by Plaintiffs,[8] when considering a motion for remand, the Court looks to the complaint at the time of removal. *Gentek Bldg. Products, Inc. v Sherwin-Williams Co.*, 491 F3d 320, 330 (6th Cir 2007); *Harper v AutoAlliance Int'l, Inc.*, 392 F3d 195, 210 (6th Cir 2004). A plaintiff's amendment to a complaint, including an amendment to dismiss a federal claim from the complaint, does not make the removal improper, even if the complaint, as amended, could not be removed. *Harper*, 392 F3d at 210; *Harless v CSX Hotels, Inc.*, 389 F3d 444, 448 (4th Cir 2004); *Ching v Mitre Corp.*, 921 F.2d 11, 13 (1st Cir 1990); *Henry v Independent American Sav. Ass'n*, 857 F2d 995, 998 (5th Cir 1988). Plaintiffs are stuck with the complaint they wrote and filed on February 27, 2014 (Doc 7-3 pp1-47), and it is that complaint upon which this Court must base its decision regarding the propriety of removal and Plaintiffs' motion for remand.

II. PLAINTIFFS' COMPLAINT INCLUDES FEDERAL CLAIMS THAT ARE NOT TAKINGS CLAIMS

A. Plaintiffs' Third and Fourth Causes of Action

Although Plaintiffs' fourth cause of action, brought under 42 USC §1983, reiterates the claims they label as 5th Amendment takings claims and their related

[8] Doc 7, p 12.

due process claims in their third cause of action,[9] the remainder of their fourth cause of action is stated as personal injury claims for violation of their alleged "right to be free from mandatory work and physical labor under the [City] Ordinance solely for the supposed benefit of others without pay or protection of law"[10] and for "the imposition of requirements for mandatory work and physical labor."[11] Although Plaintiffs do not identify the federal statute(s) or the provision(s) of the U.S. Constitution they claim have been violated,[12] they assert these claims as federal claims brought under 42 USC §1983 and request payment for "their work, their physical labor and their expenses."[13] Therefore, as drafted in Plaintiffs' complaint, these are properly recognized as federal claims. As a separate set of federal claims they provide independent grounds for removal and for this Court to deny remand. *Majeske v Bay City Bd. of Educ.*, 177 F Supp 2d 666, 671 (ED Mich 2001) (complaint that included separate federal claim for denial of due process was properly removed and not subject to remand).

Because these are not takings claims, they are not subject to the ripeness

[9] Doc 7-3 p12 ¶44, pp14-15 ¶¶61-62, 65-66.
[10] Doc 7-3 p15 ¶65.
[11] Doc 7-3 p15 ¶66.
[12] The City does not concede or agree that Plaintiffs have stated any valid causes of action, particularly when the complaint pertains to the operation and maintenance of equipment installed by Plaintiffs as part of their houses that is the same as for all homeowners who have such equipment in their house, whether installed as part of an FDD program or installed when the house was built.
[13] Doc 7-3 p15 ¶67.

requirement that applies to federal takings claims. Plaintiffs' argument that they could not be the basis for removal because they are not ripe fails as to these claims. Ripeness in this context[14] applies only to actual federal takings claims and to any federal claims that are intertwined with those takings claims such as a claim for lack of due process.[15] *McNamara v City of Rittman,* 473 F3d 633, 639 (6th Cir 2007) (procedural due process and equal protection claims that are ancillary to taking claims are subject to the same ripeness requirements). Plaintiffs' claims for compensation for "mandatory work and physical labor" are distinct in both nature and facts from the claims they characterize as takings and related due process claims in their third and fourth causes of action.

Because Plaintiffs' claims relative to their alleged work as home owners are not takings claims and are distinct from any takings claims, subject matter jurisdiction in this Court is proper, as these federal claims do not need to ripen in order to be considered. Although they are barred by the three year statute of limitations that applies to personal injury claims brought under 42 USC §1983,[16] that failing does not preclude removal or require remand; it simply makes them subject to dismissal with prejudice by this Court after the removal (and denial of

[14] Lack of ripeness may be an issue in other cases involving other types of claims; the City limits its argument to the claims asserted by Plaintiffs in this case.
[15] Doc 7-3 p15 ¶¶62, 66.
[16] MCL §600.5805(10) (provides a three year limitation period for injury to a person or property); *Searcy v Oakland Cnty*, 735 FSupp2d 759, 765 (ED Mich 2010) (that the statute of limitations is three years is well settled).

Plaintiffs' motion to remand).

Plaintiffs' motion for remand does not address these other federal claims. If Plaintiffs' omission of these claims from their motion is a concession that removal of those claims is proper, then their motion to remand should be denied. In the alternative, if Plaintiffs have now abandoned all the federal claims in their complaint other than the claims they label as "takings" or "inverse condemnation," the City welcomes that amendment and invites Plaintiffs to withdraw those claims with prejudice.[17] However, a plaintiff's amendment of his or her complaint to eliminate all the federal claims upon which removal was based neither makes the removal improper nor requires the case to be remanded. *Harper*, 392 F3d at 210.[18] Even if Plaintiffs now abandon their claims that are not takings or related due process claims, this Court should retain (and then dismiss) both the claims that Plaintiffs label as federal takings and related due process claims and Plaintiffs' state law claims.

B. Plaintiffs' Requests for Injunctive and Declaratory Relief

Plaintiffs' requests for non-compensatory relief set out in their fifth and sixth "causes of action" are challenges to the facial validity of the City's FDD

[17] Plaintiffs cannot be allowed to withdraw those claims for convenience, only to reassert them at a later time.

[18] A court may exercise its discretion to exercise and retain supplemental jurisdiction over state law claims that remain, even when no federal claims remain. *Carnegie-Mellon Univ. v Cohill*, 484 US 343, 345, 108 SCt 614, 98 LEd2d 720 (1988); *Harper*, 392 F3d at 210.

ordinance. The requests for this Court to declare the FDD ordinance invalid and/or to stop its continued operation are distinct from their takings claims and their requests for compensation.[19] In *Lingle v Chevron U.S.A. Inc.*, 544 US 528, 125 SCt 2074, 161 LEd2d 876 (2005), the United States Supreme Court rejected the "substantially advances" inquiry as part of a takings claim, pointing out that a claim for just compensation under the takings clause assumes and is premised on the taking being a proper exercise of government power. 544 US at 542543. The Court further noted, "Conversely, if a government action is found to be impermissible - for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process - that is the end of the inquiry. No amount of compensation can authorize such action." 544 US at 543. See *Alto Eldorado P'ship v Cnty of Santa Fe*, 634 F3d 1170, 1175-1176 (10th Cir 2011) (regulatory action that exceeds government's authority is invalid whether compensation is provided or not); *John Corp. v City of Houston*, 214 F3d 573, 585 (5th Cir 2000) (plaintiff's constitutional challenge to law and ordinance on due process grounds was separate from plaintiff's takings claim and was ripe for review even though plaintiff's takings claims were not); see also *MHC Fin. Ltd. P'ship v City of San*

[19] These requests include assertions of inappropriate delegation of government obligations (¶44), enactment of the ordinance in violation of law and Plaintiffs' constitutional rights (¶53), lack of an adequate remedy at law (¶69), request for a remedy in addition to compensation (¶72), and request for a declaration that the FDD ordinance is unconstitutional and invalid (¶74). (Doc 7-3)

Rafael, 714 F3d 1118, 1130 n. 7 (9th Cir. 2013) cert. denied, ___ US ___, 134 SCt 900, 187 LEd2d 776 (2014) (private takings challenge need not comply with *Williamson*). Following the analysis in these cases, Plaintiffs' challenges to the FDD ordinance, which are separate from their claims for damages on a theory of takings without compensation, are ripe and properly removed to this Court.

III. PLAINTIFFS' "TAKINGS" CLAIMS ARE NOT ACTUALLY CLAIMS FOR UNCONSTITUTIONAL TAKINGS WITHOUT COMPENSATION, ARE NOT BARRED AS UNRIPE, AND ARE PROPERLY BEFORE THIS COURT ON REMOVAL, EVEN THOUGH BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS

In *Majeske*, 177 F Supp 2d at 670 (ED Mich 2001), this Court quoted with approval from *Hood v City of Boston*, 891 FSupp 51, 54 (D Mass 1995):

> "[It] is ... a court's responsibility, in considering either the propriety of removal or the propriety of remand, to look beyond the statutory citations in the pleadings to the nature of the claims as they appear on the face of the complaint at the time the petition for removal was filed."

Following *Majeske* and *Hood*, an examination of Plaintiffs' 5th Amendment claims beyond the "takings" and "inverse condemnation" references or labels in the complaint is in order to identify the actual nature of the claims to determine if they are subject to, and premature because of, the ripeness doctrine (and should never have been included in the complaint because they are unripe) or whether, on their face, they are not actually takings claims subject to the ripeness requirement.

Plaintiffs' claims for "takings" under the 5th Amendment and Mich. Const.

of 1963, Art. X, §2 do not identify any property that has been physically appropriated by the City or any occupation of their property by property of a third party.[20] Their complaint centers on the sump pumps they elected to install or have installed. See, e.g., Doc 7-3 pp12-13 ¶¶43, 48. They recognize that they own their sump pumps. See, e.g., question and answer 16 on p. 11 of the Homeowner Information Packet, attached as Exhibit 2 to and incorporated as part of Plaintiffs' complaint (Doc 7-3 p 33):

> **"Q 16. Who owns/maintains the sump, pump and additional plumbing lines?**
> "Once installed, the sump pump and lines are owned and maintained by the homeowner."

Although Plaintiffs allege that their sump pumps are a "physical intrusion" or "occupation" by the City (Doc 7-3 p12 ¶43 and pp14-15 ¶¶65-66), this assertion is conclusory, unsupported by the actual allegations in the complaint. Nowhere do they - or could they - assert that the City has any ownership of their sump pumps or plumbing. Their assertion of intrusion or occupation by the City is actually contradicted by the language of Sec. 2:51.1 of City Code and by the information in the Homeowner Information Packet, both of which Plaintiffs rely on as part of

[20] For purposes of Plaintiffs' motion for remand, only Plaintiffs' claims for alleged violation of the 5th Amendment need be considered. Because 42 USC §1983 is simply the vehicle for asserting federal claim, the City's argument relative to Plaintiffs' 5th Amendment claims applies equally to those same claims as asserted under 42 USC §1983.

their complaint,[21] and both of which confirm that the sump pumps belong to them.

Sec. 2:51.1(9) provides explicitly for property owners to contract directly with a selected contractor for the disconnect work to be done and requires the property owner's approval of the work before a contractor can be paid. Sec. 2:51.1(12) provides a process for a property owner to get approval for an increase in the funding cap when necessary for their property. Plaintiffs allege that the sump pumps and footing drain disconnects on their property are working as part of their properties, despite questioning the FDD program that led to their installation. See, e.g., Doc 7-3 pp 8-9 ¶¶30-33 (installed as part of Plaintiff Yu's house and working all the time) and p10 ¶¶37-38 (Plaintiffs Boyer/Raab's sump pump discharges water from their house's footing drain to their back yard). The answer to question 19 on p. 11 of the Homeowner Information Packet, attached as Exhibit 2 to and incorporated as part of Plaintiffs' complaint (Doc 7-3 p 33) points out that the City of Ann Arbor, like most other Michigan communities, changed their building code in 1982 to require new buildings to use sump pumps tor similar systems to direct footing drain flow to the storm water system and not to the sanitary system.

Although Plaintiffs Boyer/Raab complain about the expense for having and maintaining operational sump pumps (Doc 7-3 p12 ¶¶44-45, 47), those allegations on their face do not state a claim for a taking. Although they also mention briefly

[21] Exhibits 1 and 2 to Plaintiffs' Complaint (Doc 7-3 pp19-36).

that they have experienced flooding and water damage (Doc 7-3 p12 ¶46), they attribute this to the footing drain disconnect program and not to the footing drain disconnect on their property or the sump pump in their house. They do not allege an affirmative action by the City that is directly aimed at their property and is a substantial cause of the damages they allege, as required for a valid de facto taking or inverse condemnation claim. See *Tini Bikinis-Saginaw, LLC v Saginaw Charter Twp*., 836 F Supp 2d 504, 524 (ED Mich 2011); *Blue Harvest Inc. v Dep't of Transp.*, 288 Mich App 267, 277-278, 792 NW2d 798 (2010) (a valid claim requires affirmative acts that directly and not merely incidentally affect the plaintiff's property); *Cummins v Robinson Twp*, 283 Mich App 677, 708, 770 NW2d 421 (2009) (claim fails because plaintiffs did not allege or produce evidence of deliberative actions or causal connection to alleged damages).

Thus, despite the "takings" and "inverse condemnation" labels, Plaintiffs' actual claims are not claims for any kind of taking and fail on their face to state inverse condemnation claims. Their claims are like the takings claim rejected in a challenge to an ordinance that mandated abandonment of a functional septic tank and connection to a township sewer system for public health and welfare reasons. *Renne v Waterford Twp*, 73 Mich App 685, 689-690, 252 NW2d 842 (1977); see also *Loretto v Teleprompter Manhattan CA TV Corp*., 458 US 419, 102 SCt 3164, 73 LEd2d 868 (1982) (regulations such as those that require "landlords to comply

with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like," are not constitutionally suspect because they do not involve government occupation or a government-authorized occupation by a third party.) 458 US 440; *Wilkins v Daniels*, 744 F.3d 409, 419 (6th Cir 2014) (no regulatory taking, following *Loretto*).

Thus, if there were merit to these claims, they are not takings claims at all and are not subject to the ripeness requirement of true claims for takings without just compensation. That these claims are time-barred by the three year statute of limitations for injury to persons or property, MCL §600.5805(10), neither makes removal to this Court improper nor constitutes grounds for remand.

IV. EVEN IF PLAINTIFFS' COMPLAINT IS TREATED AS STATING FEDERAL TAKINGS CLAIMS, THE LACK OF RIPENESS DOES NOT REQUIRE REMAND OF PLAINTIFFS' COMPLAINT

Assuming without agreeing for purposes of Plaintiffs' motion to remand that their complaint actually states federal takings claims, the lack of ripeness of these claims neither barred removal nor requires remand of the case.

Plaintiffs recognize that subject matter jurisdiction in this Court is proper for their federal takings claims, but argue that jurisdiction over those claims in this Court is premature. Case law that addresses whether remand or dismissal of federal takings claims that are not ripe is somewhat murky and sometimes inconsistent. However, as explained more fully below, that the best way to reconcile the case

law is to rely primarily on cases that involve federal takings claims and in which dismissal and/or remand for lack of ripeness is at issue. An analysis of relevant cases leads to the conclusion that prematurity or lack of ripeness is not the same as an absence of subject matter jurisdiction and a lack of ripeness does not require remand.

In this case, as in other cases in which removal was based on federal questions in the complaint and in which the issue of remand or dismissal is based on the federal takings claims being unripe, there is no question that the federal court has subject matter jurisdiction over the takings claims; the only issue is what the court can or must do during the period of time before those claims ripen. Ripeness is properly considered a threshold question as opposed to a jurisdictional question. As the United States Supreme Court said in *Suitum v Tahoe Regional Planning Agency*, 520 US 725, 117 SCt 1659, 137 LEd2d 980 (1997), relying on the ripeness requirement of *Williamson County Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172, 105 SCt 3108, 87 LEd2d 126 (1985), "[T]he only issue is whether [plaintiff's] claim of a regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under prudential ripeness principles." 520 US at 733.

The Court further noted that the "ripeness doctrine is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to

exercise jurisdiction" 520 US 733, n 7 (internal citations omitted). The defendant in *Suitum* did not dispute that the plaintiff presented a sufficient case and controversy to satisfy Article III requirements; the only issue before the Court was whether she did or did not satisfy the "prudential ripeness" requirements. *Id.*[22]

In *Stop the Beach Renourishment, Inc. v Florida Dep't of Envtl. Prot.*, 560 US 702, 729, 130 SCt 2592, 177 LEd2d 184 (2010), the Supreme Court reiterated its position in *Suitum*, holding that challenges to the plaintiffs' takings claims based on lack of standing and ripeness were waived because "[n]either objection ... is jurisdictional."

In *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp.*, 549 US 422, 127 SCt 1184, 167 LEd2d 15 (2007), the United States Supreme Court observed that "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." 549 US at 431 (internal cite and quotation marks omitted). The Court further cited with approval the statement by the Court of Appeals for the Seventh Circuit in *Intec USA, LLC v Engle*, 467 F3d 1038, 1041 (7th Cir 2006), that "[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." 549 US at 431.

Recently, in *Wilkins v Daniels, supra*, the Court of Appeals for the Sixth

[22] Because *Suitum* was a case brought originally in federal court, and because the United States Supreme Court determined the plaintiff's takings claim to be ripe, the remainder of the decision has no bearing on the present case.

Circuit addressed its options for decision in a case in which the plaintiff had not sought compensation in Ohio state courts and did not argue that an adequate remedy was not available in state court; in other words, in a case in which the ripeness requirements of *Williamson County* were not satisfied. 744 F3d at418. Rather than remand the case for dismissal for lack of subject matter jurisdiction, the Court of Appeals reached the merits of the case and affirmed the District Court's decision on the merits. The Court of Appeals explained its decision to reach the merits, relying on *Suitum*, *supra*, for the proposition that "ripeness is a prudential doctrine." 744 F3d at 418.

> "In regulatory takings cases involving sensitive issues of state policy, or cases that turn on whether the plaintiff has a property interest as defined by state law, ripeness concerns will prevent a federal court from reaching the merits prematurely. But where it is clear that there has been no 'taking,' an issue of federal constitutional law, no jurisprudential purpose is served by delaying consideration of the issue. If anything, dismissing the case on ripeness grounds does a disservice to the federalism principles embodied in this doctrine as it would require the state courts to adjudicate a claim, already before the federal court, that clearly has no merit. We therefore turn to whether the [Ohio Dangerous Wild Animals and Restricted Snakes] Act effects a taking". *Id.*

This Court should follow the Court of Appeals' analysis and approach in *Wilkins*, premised on the approach in *Suitum*, and treat the ripeness of any federal takings claims in Plaintiffs' complaint as a threshold or prudential issue and not an issue of subject matter jurisdiction. A lack of ripeness still allows a court to make decisions that are not on the merits, as well as some that are on the merits,

particularly if they serve the interest of judicial economy and are consistent with or serve the purposes of the ripeness doctrine, e.g., a determination that a claim such as Plaintiffs' claims in this case can never ripen because it is time-barred.

Ripeness is properly considered a threshold or prudential question and not a question of subject matter jurisdiction. If Plaintiffs' takings claims are adjudicated as inverse condemnation claims in a Michigan court, they could then be ripe for consideration by this Court, which will have always had federal question subject matter jurisdiction over the claims, albeit held in abeyance for prudential reasons pending adjudication of Plaintiffs' state law claims in state court.

Although not a takings case, in *Dielsi v Falk*, 916 FSupp 985 (CD Cal 1996), the Court of Appeals for the Ninth Circuit addressed a similar situation in a case removed to federal court by the defendant. In *Dielsi* the court held that it had removal jurisdiction over plaintiff's federal copyright claim, then had to address the consequence of the plaintiff having failed to register his copyright, a necessary requirement for the federal court to have subject matter jurisdiction. 916 FSupp at 993-994. The court did not remand the case; instead, it dismissed the case without prejudice for lack of subject matter jurisdiction. 916 FSupp at 994. Although the case is distinguishable to some extent from the present case because federal courts have exclusive jurisdiction over copyright claims, the court's reasoning is not dependent on its exclusive jurisdiction and is instructive. The court observed that a

defendant does not waive jurisdictional challenges when it removes a case to federal court, citing a line if cases under the Employee Retirement Income Security Act (ERISA) in which plaintiffs' ERISA claims were not yet ripe and were "*dismissed* (not remanded)" on the basis of that deficiency. 916 FSupp at 994 (emphasis in original). Following the reasoning of the decisions in the ERISA cases, the court held that plaintiff's copyright claims were properly removed to federal court, but because they were "jurisdictionally defective," dismissed them without prejudice under Fed. R. Civ. P. 12(b)(1). Although a federal court does not have exclusive jurisdiction over a federal takings claim, a remand cannot be based on that non-exclusive jurisdiction. Therefore, once a federal takings claim is properly removed to a federal court, the reasoning of *Dielsi* is equally applicable.

In *In re Facebook, Inc., IPO Securities and Derivative Litigation*, 922 FSupp2d 445 (SD NY 2013), the court addressed competing motions for remand or for dismissal in a case removed on federal question grounds. 922 FSupp2d at 454. Following *Sinochem* and distinguishing cases that pre-date *Sinochem*, the court recognized that it could look at various "threshold grounds for denying audience to a case on the merits," including "resolution of justiciability issues before deciding whether jurisdiction is proper." *Id* (internal quotation marks omitted). Citing *Tenet v Doe*, 544 US 1, 6 n 4, 125 SCt 1230, 161 LEd2d 82 (2005), the court concluded that ripeness was among the threshold issues that "may be resolved before

addressing jurisdiction." 922 FSupp2d at 455. On that basis, and for "procedural convenience, efficiency and judicial economy," the court concluded that consideration of the threshold dismissal issue first was warranted, held that it had discretion to address "non-merits threshold grounds for dismissal before jurisdiction," and proceeded to consider issues concerning venue and justiciability, i.e., whether plaintiffs had standing and whether their claims were ripe. 922 FSupp2d at 456, 463, 473. Because the court dismissed the plaintiffs' claims for lack of standing and ripeness, their motions for remand were denied as moot.

The decisions in *Dielsi* and *In re Facebook* are consistent with current law in the Sixth Circuit, as articulated in *Wilkins*.

The decision in *Wilkins* is consistent with decisions of Courts of Appeals in other Circuits. For example, In *Pascoag Reservoir & Dam, LLC v Rhode Island*, 337 F3d 87 (1st Cir 2003), the Court affirmed the decision of the District Court dismissal of the plaintiffs' federal takings claim as time-barred by the state statute of limitations and/or laches. The Court recognized that a federal takings claim is ripe only after a state court renders a final decision on the merits, and that the federal statute of limitations normally does not begin to run in a federal takings claim until the claim is ripe under federal law, but held that the plaintiffs, by their delay, had forfeited their federal takings claims. [23]

[23] A decision whether a claim is time-barred is not a decision on the merits.

> "Pascoag did not satisfy the *Williamson County* prerequisites for a federal claim. We have stated that takings claims are 'unripe until the potential state remedy has been more fully pursued.' [*Gilbert v City of Cambridge*, 932 F2d 51, 65 (1st Cir 1991)]. The situation here is different. As the Rhode Island Supreme Court noted, there is a fatal flaw in Pascoag's claim: it is too late for any state law cause of action. *Williamson County* requires the pursuit of state remedies before a taking case is heard in federal court. Adequate state remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim." 337 F3d 94 (emphasis added; footnote omitted).

See also *Gamble v Eau Claire Co.*, 5 F3d 285, 286 (7th Cir1993) (federal takings claim dismissed because plaintiff had let the time pass for seeking a state remedy).

As argued in the City's Motion to Dismiss, because Plaintiffs' state inverse condemnation claims are time-barred, with the consequence that their federal takings and due process claims can never ripen, this Court should dismiss those claims with prejudice. *Vandor, Inc. v Militello*, 301 F3d 37, 39 (2d Cir 2002) (federal takings claim dismissed with prejudice). Because remand of this case to state court could not result in Plaintiffs' federal takings claims becoming ripe, dismissal of those claims with prejudice serves the interest of judicial economy.

The cases Plaintiffs rely on to support their request for remand rather than dismissal are not relevant, not pertinent or not clear precedent.

The issue in *Armstrong v Armstrong*, 508 F2d 348 (1st Cir 1974), was not whether a claim was ripe for federal court consideration. It arose out of a divorce action and comity required it to be remanded to the state court; therefore, there was no federal question claim or defense over which the federal court had original

jurisdiction or on which the federal court ever could rule. *Balzer v Bay Winds Federal Credit Union*, 622 F Supp 2d 628 (WD Mich 2009), is also a case in which the federal court could never have subject matter jurisdiction due to the Michigan residency of multiple defendants in a case removed to a federal court in Michigan on the basis of diversity only; there was no federal question claim or defense over which the federal court had original jurisdiction or on which it could rule. Neither *Armstrong* nor *Balzer* provides useful guidance for this case.

Plaintiffs also rely on *Oakland 40, LLC v City of South Lyon*, No. 10-14456, 2011 WL 1884188 (ED Mich 5/18/11),[24] an unreported case from this Court, for the proposition that lack of ripeness means the Court lacks subject matter jurisdiction and that remand is, therefore, required. As discussed above, ripeness is more a threshold or prudential issue than an issue of subject matter jurisdiction. Furthermore, other decisions of this Court, albeit also unreported, are directly contrary to the decision in *Oakland 40*. See, e.g., *JGA Dev., LLC v Charter Twp. of Fenton,* Civ. No. 05-70984, 2006 WL 618881 at *4 (ED Mich 3/9/06)[25] (because the plaintiff had not pursued an inverse condemnation action in state court, plaintiff's federal taking claim was not ripe for adjudication and was dismissed without prejudice). Unlike the decision in *Oakland 40*, the decision in *JGA* is both correct and consistent with the Court of Appeals' decision in *Wilkins*.

[24] Copy attached as Ex 1.
[25] Copy attached as Ex 2.

V. PLAINTIFFS' FEDERAL TAKINGS CLAIMS ARE NOT RIPE FOR CONSIDERATION IN EITHER FEDERAL OR STATE COURT

Plaintiffs misconstrue the *Williamson County* ripeness requirements as precluding only a federal court from considering their federal takings claims. However, ripeness applies to the claim, not the forum in which it is heard. State courts apply the *Williamson County* ripeness analysis to federal takings claims in state court actions. In *Electro-Tech, Inc. v H. F. Campbell Co.*, 433 Mich 57, 80-91, 445 NW2d 61 (1989), cert den 493 US 1021, 110 SCt 721, 107 LEd2d 741 (1990), the Michigan Supreme Court affirmed and applied to federal takings claims in a state court action the finality and ripeness requirements of *Williamson County*. Michigan cases since *Electro-Tech* follow *Electro-Tech* and the requirements of *Williamson County*; however, reported Michigan cases since then have failed on the finality of action requirement of *Williamson County* and Michigan courts have not had to address the requirement that state court proceedings be concluded before a federal takings claim can be asserted. State courts in other states have reached the same conclusion. See, e.g., *Abbott v City of Paris*, ___ SW3d ___, 2014 WL 895195 at*2-3 (Tex App 2/18/14) (plaintiffs' federal takings claim in state court action are barred as unripe because state court proceedings on state claims are not yet concluded);[26] *Hehr v City of McCall*, 155 Idaho 92, 305 P3d 536, 541, 542 (2013) (plaintiff's federal takings claims were

[26] Copy attached as Exh 3.

barred in state court as unripe because plaintiff had not used available state procedures for relief, including a state inverse condemnation action).

Plaintiffs' complaint as Plaintiffs wrote it governs both the propriety of removal and the motion for remand.[27] As noted by the Court in *Andre-Pearson v Grand Valley Health Plan, Inc.*, 963 F Supp 2d 766, 770 (WD Mich 2013), "[a]s the master of the complaint, a plaintiff may avoid federal jurisdiction by relying exclusively on state law." As masters of the complaint in this case, Plaintiffs could have omitted from the complaint federal claims they now agree are unripe. However, because ripeness is a requirement for federal takings claims regardless of the forum in which they are raised, Plaintiffs cannot argue that their federal takings claims are not ripe, yet leave those claims in their complaint.

VI. DISMISSAL AS OPPOSED TO REMAND IS APPROPRIATE

Plaintiffs rely on 28 USC §1447(c) to argue that a case can be remanded at any time a federal District Court determines it does not have subject matter jurisdiction. However, that determination is premature because Plaintiffs included federal claims in their complaint that were not struck before removal and on which federal question jurisdiction in this Court is properly based.

The City does not dispute that this Court may remand state law claims if no federal claims remain and if the Court chooses not to exercise supplemental

[27] Plaintiffs agree that the decision whether the case should be remanded is based on their complaint at the time of removal. Pltffs' Remand Brief p 4 (Doc 7 p 12).

jurisdiction over the state law claims. However, even accepting for argument purposes that Plaintiffs' complaint includes takings claims, those claims cannot ripen for consideration by either this Court or a state court because they are barred by the applicable statute of limitation. In the interest of efficiency and judicial economy, Plaintiffs' claims should not be remanded; as the argued in the City's Motion to Dismiss (Doc 2), all can and should be dismissed with prejudice for failure to state a claim upon which relief can be granted and/or because they are barred by the applicable statute of limitations.

VII. PLAINTIFFS ARE NOT ENTITLED TO COSTS OR FEES OR COSTS

Although 28 USC §1447(c) allows for, but does not mandate that a court require payment of "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The decision to award costs and/or fees rests with the sound discretion of the trial court. *Martin v Franklin Capital Corp.*, 546 US 132, 136–137, 126 SCt 704, 163 LEd2d 547 (2005); *Warthman v Genoa Twp Bd of Trustees*, 549 F3d 1055, 1059 (6th Cir 2008). In *Martin*, the United States Supreme Court provided guidance as to when an award of costs and fees is appropriate, namely "only where the removing party lacked an objectively reasonable basis for seeking removal." *Id*. at 141. *Martin* is followed in the Sixth Circuit. See, e.g., *Paul v Kaiser Found. Health Plan of Ohio*, 701 F.3d 514, 523 (6th Cir. 2012) (when an objectively reasonable basis exists, fees should be

denied); *Warthman, supra* (award of fees or costs "is inappropriate where the defendant's attempt to remove the action was 'fairly supportable,' or where there has not been at least some finding of fault with the defendant's decision to remove"). If it is a close call, an award of fees is properly denied. *Paul, supra*.

The City's removal of Plaintiffs' complaint was objectively reasonable; the removal was well founded, based on the complaint Plaintiffs filed and applicable law. As in *Bauknight v Monroe Cnty*, 446 F3d 1327, 1332 (11th Cir 2006), a very similar case, an award of costs and fees is not appropriate.

CONCLUSION

Plaintiffs' Motion to Remand should be denied. Because the law governing removal and remand is clear, the City also should be awarded its costs and attorney fees for having to defend against Plaintiffs' motion. The City defers to the Court's scheduling of motions, but suggests in the interest of judicial economy that the Court consider together the Motion to Remand and the City's Motion to Dismiss as has been done and been useful when motions to remand and to dismiss are both filed. See, e.g., *Paul, supra; Dielsi, supra; Bauknight, supra; Oakland 40, supra.*

Dated: April 17, 2014

Respectfully submitted,

By: /s/ Abigail Elias
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OFFICE OF THE CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiffs' Counsel, Salem F. Samaan (for himself and for M. Michael Koroi), and I hereby certify that I have mailed by US Mail, first class postage prepaid, the document to the following non-ECF participant: Irvin A. Mermelstein.

/s/ Alex L. Keszler
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INDEX OF EXHIBITS

Exhibit 1, *Oakland 40, LLC v City of South Lyon*, No. 10-14456, 2011 WL 1884188 (ED Mich 5/18/11)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANITA YU, JOHN BOYER, and MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

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Exhibit 1, *Oakland 40, LLC v City of South Lyon*, No. 10-14456, 2011 WL 1884188 (ED Mich 5/18/11)

2011 WL 1884188
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

OAKLAND 40, LLC, Plaintiff,
v.
CITY OF SOUTH LYON, Defendant.

No. 10–14456. | May 18, 2011.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER CLARIFYING MAY 3, 2011 ORDER AND DENYING MOTIONS FOR RECONSIDERATION AND TO CORRECT ORDER

JOHN CORBETT O'MEARA, District Judge.

***1** Before the court are Defendant's motion for reconsideration and motion to correct the court's May 3, 2011 order, filed May 16, 2011. Defendant seeks reconsideration of the court's order granting Plaintiff's motion to remand and denying Defendant's motion to dismiss.

BACKGROUND FACTS

This dispute involves a parcel of vacant land in the City of South Lyon, Michigan, which was purchased by Plaintiff, Oakland 40, LLC, in 2000. At the time Plaintiff purchased the property, it was zoned "IRO," or industrial, research, and office. Plaintiff sought to have the property rezoned as residential, or to obtain a variance, several times. Most recently, Plaintiff filed a request with the city's Planning Commission for conditional rezoning on March 19, 2010. The Planning Commission recommended denial of the conditional rezoning; the City Council accepted the recommendation and denied the conditional rezoning on June 14, 2010.

On October 11, 2010, Plaintiff filed this suit in Oakland County Circuit Court. The complaint contains federal and state taking/inverse condemnation claims, federal and state due process claims, and a state statutory claim based upon the Michigan Zoning Enabling Act. Defendant removed the case to this court on November 8, 2010. Plaintiff filed a motion to remand on December 8, 2010; Defendant filed a motion to dismiss on February 10, 2010. The court heard oral argument on April 28, 2011, and granted Plaintiff's motion to remand from the bench. The court entered an order granting the motion to remand and denying the motion to dismiss on May 3, 2011. As discussed below, reconsideration is not warranted. *See* LR 7.1(g)(3) (standard for motion for reconsideration).

LAW AND ANALYSIS

The basis for both motions is the argument that Plaintiff's federal taking and due process claims are not ripe. Plaintiff contends that, because these claims are not ripe, and the court lacks jurisdiction, the court should remand the entire case to state court. Defendant argues, however, that the court should dismiss Plaintiff's unripe federal claims and remand only the state claims.

I. *Removal*

A defendant may remove an action to federal court if the action could have been filed there originally. *See* 28 U.S.C. § 1441. Defendant removed this action based upon federal question jurisdiction, because Plaintiff included federal constitutional claims in its complaint. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Generally, federal question jurisdiction is governed by the well-pleaded-complaint rule, which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Here, it is undisputed that Plaintiff's complaint contains federal claims on its face. However, Plaintiff argues that the court nonetheless lacks subject matter jurisdiction because the federal claims are not ripe.

II. *Ripeness*

***2** Both parties agree that Plaintiff's federal takings and due process claims are not ripe under the test set forth

in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Under *Williamson County*, takings claims are not ripe until (1) the municipality has reached a final decision regarding the application of the regulation to the property at issue; and (2) the owner has first sought redress of the alleged constitutional deprivation through available state remedies. *Id.* at 193, 195. "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury...." *Id.* at 193. With respect to the remedies requirement, the Supreme Court explained that the "Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.... if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 194–95.

It is undisputed that Plaintiff has not met the second prong of the *Williamson County* test, as Plaintiff has not pursued its state claims to completion. Defendant argues that, as a result, Plaintiff's federal claims must be dismissed and the state claims must be remanded. *See Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 157 (6th Cir.1992) ("Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed."). Plaintiff, on the other hand, seeks remand of all its claims. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

Although it appears counterintuitive to remand *federal* claims to state court, Plaintiff is correct. Under 28 U.S.C. § 1447(c), this court "shall" remand the case if the court lacks subject matter jurisdiction; and ripeness is a jurisdictional requirement. See *Bigelow*, 970 F.2d at 157. *See, e.g., Smith v. Wisconsin Dept. of Agriculture*, 23 F.3d 1134, 1142 (7th Cir.2004) ("Because Lundeen's claim is not yet ripe, the district court lacked subject-matter jurisdiction and was required under § 1447(c) to remand the claim to the state court from which it was removed."); *Coyne v. American Tobacco Co.*, 183 F.3d 488, 496 (6th Cir.1999) (holding district court must remand case to state court where it determined that the plaintiff lacked standing). The Seventh Circuit has explained:

> While some consider it odd that a state court might have the authority to hear a federal constitutional claim in a setting where a federal court would not, it is clear that Article III's "case or controversy" limitations apply only to the federal courts. Perhaps, were the claim remanded to Wisconsin state court, it would there be dismissed on state ripeness or standing grounds. But again, § 1447(c) says that a case removed to federal court "shall be remanded" to the state court if it is discovered that the federal court lacks subject matter jurisdiction. Wisconsin's doctrines of standing and ripeness are the business of the Wisconsin courts, and it is not for us to venture how the case would there be resolved

***3** *Smith*, 23 F.3d at 1142 (citations omitted).

Defendant argues that Michigan courts also apply the *Williamson* ripeness doctrine and that remand would be futile. The plain language of § 1447 does not provide the court with discretion, however. The Sixth Circuit has rejected a "futility" exception to § 1447's remand requirement. *See Coyne*, 183 F.3d at 496 ("Defendants contend that remand to state court in this case would be futile, as the state court, as a matter of state law, would dismiss the claims against Defendants for lack of standing. We reject Defendants' argument since the futility of a remand to state court does not provide an exception to the plain and unambiguous language of § 1447(c)."). *See also Primate Protection League v. Tulane Educ. Fund*, 500 U.S. 72, 89, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991) (noting that § 1447 does not provide discretion to dismiss rather than remand). Therefore, the court must remand all of Plaintiff's claims to state court. [1]

Defendant takes issue with the court's denial of its motion to dismiss. However, the granting of Plaintiff's motion to remand precludes the relief that Defendant sought in this court. The court clarifies, however, that it denied Defendant's motion to dismiss because the appropriate remedy was remand, not dismissal. As should be clear by the above discussion, the court's disposition of this case is not intended to affect the state court's adjudication of the federal or state claims. *See Smith*, 23 F.3d at 1142 ("[State] doctrines of standing and ripeness are the business of the [state] courts, and it is not for us to venture how the case would there be resolved.").

IT IS HEREBY ORDERED that Defendant's motions for reconsideration and to correct the May 3, 2011 order are DENIED.

ORDER

Footnotes

1 The court has declined to award Plaintiff the fees incurred in removal. *See* 28 U.S.C. § 1447(c). The court finds that Defendant's removal of this action was not objectively unreasonable. Plaintiff pleaded federal constitutional claims in its complaint and did not affirmatively state that the claims were not ripe. Under similar circumstances, the Eleventh Circuit found that the defendant's removal of the action was not objectively unreasonable. *See Bauknight v. Monroe County, Florida*, 446 F.3d 1327, 1331 (11th Cir.2006). The court in *Bauknight* also noted that "several district courts outside of this circuit are divided on whether a defendant's right to removal of a federal claim is separate from the issue of ripeness." *Id.* (citing, *inter alia, Seiler v. Charter Twp. of Northville*, 53 F.Supp.2d 957 (E.D.Mich.1999) ("The right to remove federal claims is separate and distinct from the question of whether those claims are ripe for adjudication.")).

End of Document

Exhibit 2, *JGA Dev., LLC v Charter Twp. of Fenton,* Civ. No. 05-70984, 2006 WL 618881 (ED Mich 3/9/06)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

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Exhibit 2, *JGA Dev., LLC v Charter Twp. of Fenton,* Civ. No. 05-70984, 2006 WL 618881 (ED Mich 3/9/06)

2006 WL 618881
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan, Southern Division.

JGA DEVELOPMENT, LLC and Kingsway Builders, Inc., a Michigan Corporation, Plaintiffs,
v.
CHARTER TOWNSHIP OF FENTON, a Michigan Municipal Corporation, Defendant.

No. Civ. 05-70984. | March 9, 2006.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

ZATKOFF, J.

I. INTRODUCTION

***1** This matter is before the Court on Defendant's Motion to Dismiss and Motion for Summary Judgment filed on December 6, 2005. Plaintiff has responded to Defendant's motions, and Defendant has replied to the responses. The Court finds that the facts and legal arguments are adequately presented in the parties' papers and the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. MICH. LR 7.1(e)(2), it is hereby ORDERED that the motion be resolved on the briefs submitted. For the reasons set forth below, Defendant's Motion to Dismiss and Motion for Summary Judgment are GRANTED IN PART.

II. BACKGROUND

In January of 2000, Plaintiff purchased a 60-acre parcel of land in Fenton Township, Michigan ("the Property"). The Property was zoned R-1A, Single-Family Residential. This classification permitted residential development at a maximum density of one unit per acre. Contemporaneously with the purchase, Plaintiff submitted an application to rezone the Property from R-1A to a Planned Unit Development ("PUD") that would allow for development at a maximum density of 3.2 units per acre.[1] The Planning Commission recommended denying the application because the proposed development was too dense, and the Township Board subsequently denied the application.

In July of 2001, Plaintiff again submitted an application to rezone the property from R-1A to PUD. At a hearing before the Planning Commission on August 14, 2001, Plaintiff proposed to build 138 attached and detached single family units, with a density of 2.5 or 2.33 units per acre. Water would be provided through a community well. The Commission tabled the proposal for resolution at a later date.

On October 2, 2001, the Planning Commission adopted amendments to the Township Land Use Plan. One pertinent change involved PUD zoning, and read as follows:
Those portions of the Medium Density Residential District which have the following characteristics may be considered for residential development up to 2.5 units per acre with 50% open space through the Township's PUD zoning districts:

• Access to sewer

• Access to County Paved Road

• Close to a city or commercial center

• Not adjacent to a river or lake

• Not in an area of concentrated wetlands

• Not in an area where the development will significantly impact the adjacent land uses

• Other criteria determined by the Planning Commission to be relevant to a particular parcel

Defendant's Motion for Summary Judgment at 3.

After again considering Plaintiff's proposed PUD on October 9, 2001, the Planning Commission recommended accepting it. On November 12, 2001, the Township Board approved the PUD in Ordinance No. 585.[2] The PUD allowed for

development up to a maximum density of 2.33 units per acre, with 39% of the land remaining as open space.

After the approval of its PUD, Plaintiff met with the Michigan Department of Environmental Quality ("MDEQ") to begin the process of applying for a Type I community well permit. MDEQ authorized Plaintiff to proceed with test well drilling. Plaintiff also began investigating the possibility of looping its well into the water supply of the neighboring city of Linden. However, after drilling three test wells, Plaintiff discovered that there was insufficient water to loop into the Linden system. In early 2004, Plaintiff dug a new test well to determine the feasibility of building a community well solely for the development. The level of arsenic was below the Maximum Contaminant Level (the maximum permissible level for safe drinking water). However, levels of iron, chloride, sodium, and "hardness" were above the Secondary Maximum Contaminant Level (the suggested maximum level for desirable water quality). Plaintiff then began to investigate the possibility of purchasing water from Linden.

***2** On December 18, 2002, the Township again amended its Land Use Plan. The maximum permissible density for the medium density residential classification was changed from 2.5 units per acre to 1.5 units per acre. In July 2004, members of the Planning Commission suggested that Plaintiff's PUD should be reexamined, because it had been approved under a Land Use Plan that provided for a higher density than was allowed under the new plan. On July 20, 2004, the Planning Commission adopted a resolution calling for the Property to be rezoned from PUD to R-3, which allows for a maximum density of 1.5 units per acre. An application to rezone was filed, and a hearing on the issue was scheduled for September 14, 2004. Michigan law requires notice of a proposed rezoning to be given at least eight days before the hearing. M.C.L. § 125.284(4). On September 3, the Commission sent a letter to Plaintiff informing them of the hearing. Plaintiff does not allege than it received the letter less than eight days before the hearing.

The hearing before the Planning Commission was held as scheduled on September 14, 2004. Plaintiff explained that the delay in development was due to the problems it encountered when trying to establish a water supply for the development. The Commission found that the only reason for the delay in development was Plaintiff's unwillingness to build a community well, and desire to purchase water from the Linden. The Commission voted to recommend rezoning to the Township Board.

Plaintiff requested, and received, two adjournments of the hearing regarding the proposed rezoning before the Township Board. The hearing was held on October 18, 2004. The Planning Commission stated that it initiated the rezoning because the density allowed by the PUD no longer conformed to the Township's Land Use Plan, and no site plan had been submitted since the Property was rezoned to PUD in 2001. Plaintiff stated that the primary focus of its efforts towards development had been obtaining a water supply, and that it had spent over $130,000 in these efforts. One of the Trustees mentioned problems with one of Plaintiff's previous developments, which petitioned for annexation into Linden over water issues. In response, Plaintiff stated that it had no desire to annex the Property into Linden. The Board heard from several residents who expressed concerns over the density allowed by the current PUD, and its potential impact on the roads and sewers. The residents recommended that the Property be rezoned to R-3. No residents spoke in favor of the proposed development. On November 1, 2004, the Board voted to rezone the Property to R-3. On February 14, 2005, Plaintiff brought suit in Genessee County Circuit Court. Defendant removed the case to this Court on March 14, 2005, on the basis of federal question jurisdiction.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate only if the answers to the interrogatories, depositions, admissions, and pleadings combined with the affidavits in support show that no genuine issue as to any material fact remains and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citations omitted). In application of this summary judgment standard, the Court must view all materials supplied, including all pleadings, in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

***3** The moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. *See* FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324. The non-moving party must do more than show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for summary judgment. *See Moore v. Phillip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir.1993).

B. Dismissal under 12(b)(1)

Motions to dismiss due to lack of subject matter jurisdiction are governed by FED. R. CIV. P. 12(b)(1). When subject matter jurisdiction is challenged, Plaintiff has the burden of proving that the Court properly has jurisdiction. *See Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 915 (6th Cir.1986). The Court has the power to resolve factual disputes when subject matter jurisdiction is at issue. *See Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir.1990).

IV. ANALYSIS

A. Ripeness of the Takings Claim

Defendant, relying on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), argues that Plaintiff's takings claim is not ripe for adjudication, and should be dismissed under Rule 12(b)(1). *Williamson County* established a two prong standard to determine if a takings claim was ripe. First, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Second, a takings claim is not ripe until the property owner seeks "compensation through the procedures the State has provided for doing so." *Id.* at 194.

Defendant argues that Plaintiff has not obtained a final decision from the Township regarding the precise nature of the development that will be allowed on the Property. In addition, Defendant argues that Plaintiff has not utilized Michigan's procedures for seeking compensation for the alleged taking. Therefore, Plaintiff has not met the *Williamson County* standard, and its takings claim is not ripe.

In response, Plaintiff argues that the first prong of the *Williamson County* standard has been met. Plaintiff claims that the R-3 classification thoroughly defines the full extent of development allowed on the Property, and thus the final decision prong has been met. Plaintiff implicitly concedes that the second prong has not been met, but argues that the test is prudential, rather than jurisdictional, and there is no reason for the Court to abstain from hearing the case.

***4** The Court need not consider whether the Township has made a final decision regarding the Property sufficient to satisfy the first part of the *Williamson County* test, because the second part, utilization of state compensation procedures, has clearly not been met. Plaintiff's argument that the Court can waive the second requirement is unpersuasive. Plaintiff relies on Chief Justice Rehnquist's concurrence in *San Remo Hotel, L.P. v. City & County of San Francisco*, --- U.S. ----, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). The concurrence questioned the validity of the second *Williamson County* prong, and suggested that the Supreme Court reexamine it. *Id.* at 2510 (Rehnquist, C.J., concurring). However, until the Supreme Court overrules *Williamson County*, this Court is bound to follow it. Pursuant to *Williamson County*, The Sixth Circuit requires Michigan plaintiffs to pursue a state inverse condemnation action to satisfy the ripeness requirement. *See Seguin v. Sterling Heights*, 968 F.2d 584, 588 (6th Cir.1992); *Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 158 (6th Cir.1992). Since Plaintiff has not pursued an inverse condemnation action in Michigan state court, its takings claim is not ripe for adjudication in this Court, and must therefore be dismissed without prejudice.

Plaintiff also claims that Defendant's removal of this case to federal court constitutes a waiver of the ripeness issue. Plaintiff relies on *Lapides v. Board of Regents of the University of Georgia*, 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002), which held that a state waives its sovereign immunity defense when it removes an action to federal court. However, the Sixth Circuit has expressly refused to extend *Lapides* beyond the sovereign immunity context. *Dantz v. Am. Apple Group, LLC*, 123 Fed. Appx. 702, 707 (6th Cir.2005). Furthermore, the Sixth Circuit has affirmed the dismissal of takings claims on ripeness

grounds when the defendants removed the action to federal court. *See Martin v. Jefferson County*, No. 94-6511, 1996 U.S.App. LEXIS 6121 (6th Cir.1996); *Michigan Chrome & Chem. Co. v. City of Detroit*, Nos. 92-1694/1916, 1993 U.S.App. LEXIS 28028 (6th Cir.1993). In the instant case, Defendant's "right to remove federal claims is separate and distinct from the question of whether those claims are ripe for adjudication." *Seiler v. Charter Twp.*, 53 F.Supp.2d 957, 962 (E.D.Mich.1999). Since Plaintiff's takings claim is not ripe, it must be dismissed without prejudice.

B. Ripeness of the Procedural Due Process, Substantive Due Process, and Equal Protection Claims

Defendant argues that Plaintiff's procedural due process, substantive due process, and equal protection claims are also not ripe for adjudication. Defendant relies on *Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154 (6th Cir.1992). The plaintiffs in *Bigelow* brought a takings claim based on the cancellation of their fishing licenses by the state. The plaintiffs also brought a procedural due process claim, because they did not have an opportunity to defend their fishing rights before they were taken. The Sixth Circuit held the plaintiffs' takings claim was not ripe, since they had not utilized the state's inverse condemnation procedure. *Id.* at 158. In addition, because the procedural due process claim was ancillary to the takings claim, it was also dismissed on ripeness grounds. *Id.* at 160. The Sixth Circuit has subsequently held that substantive due process and equal protection claims that are ancillary to a takings claim are also subject to the *Williamson County* ripeness requirements. *See Peters v. Fair*, 427 F.3d 1035, 1037 (6th Cir.2005); *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir.2002). Defendant argues that Plaintiff's procedural due process, substantive due process, and equal protection claims are ancillary to the takings claim, and are thus not ripe for adjudication.

***5** In response, Plaintiff relies on *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F.2d 890 (6th Cir.1991). In *Nasierowski*, the plaintiff purchased some property in reliance on the city's representations that he would be allowed to undertake his proposed development. However, the city subsequently changed the zoning on the property to prohibit the development, without giving any prior notice to the plaintiff. The plaintiff brought suit, alleging, *inter alia*, a violation of procedural due process (the plaintiff did not bring a takings claim). The district court that held the plaintiff's procedural due process claim did not meet the *Williamson County* ripeness requirements. *Id.* at 893. However, the Sixth Circuit reversed. The *Nasierowski* Court held that the *Williamson County* ripeness requirements were not applicable, since the changing of the plaintiff's zoning "was an act that in and of itself inflicted immediate injury on [the plaintiff]." *Id.* at 895.

Defendant argues that the instant case differs from *Nasierowski* because Plaintiff made a takings claim along with due process and equal protection claims. Thus, unlike *Nasierowski*, the instant case does not involve "pure" due process and equal protection claims, and all the claims are subject to the *Williamson County* ripeness requirements. There is some support for the argument that a due process claim, ripe standing alone, may become unripe when joined with a takings claim. *The Bigelow* Court, which ultimately held that the plaintiffs' joined due process and takings claims were unripe, noted that "[s]tanding alone, the plaintiffs' procedural due process claims might be ripe for review." *Bigelow*, 970 F.2d at 159.

However, *Bigelow* does not stand for the proposition that a due process or equal protection claim automatically becomes unripe when joined with an unripe takings claim. In *Seguin v. City of Sterling Heights*, 968 F.2d 584 (6th Cir.1992), the plaintiffs brought procedural due process, equal protection, and takings claims after the zoning on their property was changed. The Sixth Circuit held that the takings and equal protection claims were unripe, but that the procedural due process claim was ripe. The Court noted that "the plaintiffs' injury occurred when the City Council passed the zoning ordinance. It was at that time that the plaintiffs were first subjected to procedures which they claimed violated the Due Process Clause." *Id.* at 589. *Bigelow*, decided less than a month later, did not overrule *Seguin*. The *Bigelow* Court noted that *Seguin* and *Nasierowski* held that the *Williamson County* ripeness requirements do not apply to procedural due process challenges to a zoning ordinance. *Bigelow*, 970 F.2d at 159. The Court also affirmed *Nasierowski's* holding that *Williamson County* does not apply "when the denial of procedural due process itself creates an injury." *Id.* at 160.

***6** Thus, the crucial question is whether the due process and equal protection claims are truly independent claims, or are ancillary to the takings claim. The *Williamson County* ripeness requirements only apply if the claims are ancillary. Factors to consider are whether the claims stem from an immediate and concrete injury, arise from the same nucleus of facts as the takings claim, or are an attempt to circumvent the ripeness requirement. *See Nasierowski*, 949 F.2d at 894;

Ardire v. Rump, No. 92-4204, 1993 U.S.App. LEXIS 17220, *14 (6th Cir.1993); *Bigelow*, 970 F.2d at 160.

The Court finds that the facts in this case are closer to *Nasierowski* than to *Bigelow*. Plaintiff has suffered an immediate and concrete injury: the loss of its ability to proceed with planning according to the PUD. The *Nasierowski* Court noted that "the Council's passage of the new zoning ordinance, with Rice's amendment, was an act that *in and of itself* inflicted immediate injury on Nasierowski." *Nasierowski*, 949 F.2d at 895 (emphasis in original). Defendant argues that Plaintiff did not spend as much effort on development as the plaintiff in *Nasierowski*. However, this argument merely goes to the degree of the injury. Plaintiff's injury may not be as great as the injury suffered by the plaintiff in *Nasierowski*, but Plaintiff has nevertheless suffered an immediate and concrete injury: the loss of its right to proceed under its PUD zoning.

Furthermore, as Plaintiff notes, the due process and equal protection claims are conceptually distinct from the takings claim. It would be possible for Defendant to rezone Plaintiff's property in a way that would violate Plaintiff's due process rights, but not sufficiently decrease the value of the property to support a takings claim. Likewise, the rezoning could sufficiently decrease the value of the property to support a takings claims, and yet be done in a manner that comported with due process.

Defendant counters that Plaintiff is not only claiming a taking with regards to the decrease in value of the Property, but with regards to the revocation of its PUD. The takings claims regarding the PUD, and the due process and equal protection claims all stem from the same nucleus of facts. Thus, the due process and equal protection claims are ancillary to the takings claim.

The Court finds this argument unpersuasive. The analysis of the takings claim will involve different facts than the analysis of the due process and equal protection claims. The due process and equal protection claims will turn on whether Plaintiff was given notice and an opportunity to be heard, and how similarly situated persons were treated. In contrast, the takings claim will turn on the value of the PUD, and whether Plaintiff was due compensation for its revocation.

In addition, it does not appear that Plaintiff's due process and equal protection claims are an attempt to circumvent the ripeness requirement. In *Bigelow*, the loss of the fishing licenses was a *fait accompli;* the key issue was whether the plaintiffs had been properly compensated for them. The compensation sought under the due process claim was ancillary to that sought under the takings claim. In the instant case, however, Plaintiff does not merely seek compensation, but the return of its rights under the PUD. The first relief Plaintiff seeks is that the Court:

> ***7** Enjoin the Township from interfering with the Plaintiff's reasonable development of its Property under the conditions approved in the PUD ordinance, or otherwise interfering with the Plaintiff's reasonable use of its land.

Plaintiff's Complaint at 31. Furthermore, in the 121 paragraphs of Plaintiff's complaint, only 7 deal with the takings claim. Plaintiff's Complaint is focused on its due process and equal protection claims, and regaining its rights under the PUD. Clearly, Plaintiff's due process and equal protection claims are not an attempt to circumvent the ripeness requirement.

For all the above reasons, the Court finds that Plaintiff's due process and equal protection claims are not ancillary to the takings claim, and thus are ripe for adjudication.

B. Merits of the Procedural Due Process and Substantive Due Process Claims

1. Property Interest

Defendant argues that Plaintiff's procedural and substantive due process claims cannot stand because Plaintiff lacked a property interest in its PUD. A plaintiff must possess a property interest to assert procedural and substantive due process claims under the Michigan and United States Constitutions. *See Hamby v. Neel*, 368 F.3d 549, 557 (6th Cir.2004); *Michigan Educ. Ass'n. v. State Bd. of Educ.*, 163 Mich.App. 92, 98, 414 N.W.2d 153 (1987). Property interests are determined by "existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Defendant argues that under Michigan law, property owners do not have an inherently vested property right in the zoning of their property. This assertion is correct: to obtain vested

property rights in a zoning classification, the owner must have obtained a building permit and begun construction. *Schubiner v. West Bloomfield Township*, 133 Mich.App. 490, 501, 351 N.W.2d 214 (1984). This standard is strictly applied; "[t]he making of preparatory plans, landscaping, and the removal of an existing structure is not sufficient" to confer vested rights. *Id.* Defendant argues that because Plaintiff did not apply for a building permit or begin construction, it did not acquire vested property rights in its PUD zoning.

However, Defendant's argument ignores the fact that the PUD zoning in this case is a particularized type of zoning, and has characteristics not found in a typical zoning ordinance. Defendant's zoning ordinance states that:

> Approval of the conceptual PUD plan shall confer upon the owner the right to proceed through the subsequent planning phase for a period not to exceed three (3) years from date of approval. If so requested by the petitioner, an extension of a two (2) year period may be granted by the Planning Commission.

Plaintiff's Response to Defendant's Motion for Summary Judgment, Exh. U.

Defendant argues that the approval of the conceptual PUD does not automatically grant a owner the right to begin the actual development. This assertion is correct; the owner must continue through a detailed approval process after the initial approval of the conceptual PUD. However, while final approval is not guaranteed, the ordinance does provide the owner with the right to *proceed through the subsequent planning phase.* The owner's ability to proceed does not depend on the Planning Commission's unrestricted discretion; the owner is granted a right to proceed through the process for a period not to exceed three years. Thus, Plaintiff had a property interest in its PUD, because the PUD gave Plaintiff the right to proceed through the planning phase. By revoking Plaintiff's PUD, Defendant took away this right.

***8** Defendant argues that if the ordinance is interpreted as granting Plaintiff a property interest, the Township would be permanently prevented from exercising its legislative right to zone property. However, this argument lacks merit. Because the right to proceed is limited to three years, the Township would have complete discretion to revoke the PUD after that period. Alternatively, the Township could revoke the PUD before the expiration of the three year period, provided it proceeded in a manner consistent with the owner's due process rights.

Defendant also argues that Plaintiff did not have a property interest in its PUD based on the timing of the rezoning. Plaintiff's PUD was granted on November 12, 2001. The Property was rezoned on November 1, 2004, eleven days before the expiration of the three year period. Defendant argues that it would have been impossible for Plaintiff to obtain final site approval and building permits, and to begin construction before the expiration of the three year period. This argument is unpersuasive; Defendant's pragmatic observations do not alter the language of the ordinance. The ordinance does not give the Planning Commission the discretion to revoke a PUD based on its opinion that an owner will not have time to meet the requirements. Rather, the owner is given the right to proceed for a period not to exceed three years.

Since Plaintiff had a property interest in its PUD, the Court must now proceed with a procedural and substantive due process analysis. The same analysis applies to due process claims made under the Michigan and United States Constitutions. *Lucas v. Monroe County*, 203 F.3d 964, 972 (6th Cir.2000).

2. Substantive Due Process Claim

The standard of review used to evaluate Plaintiff's substantive due process claim depends on whether the rezoning is characterized as a legislative or administrative action. *Pearson v. Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir.1992). Since the rezoning in the instant case involved a single piece of property and affected only one owner, it should most likely be considered an administrative action. *Id.* However, the Court need not decide the issue. The legislative standard is more deferential; thus, an action that survives the administrative standard will survive the legislative standard. *Id.* Because the Court finds Defendant's action survives the administrative standard, the action need not be characterized as administrative or legislative.

To prevail under the administrative standard, Plaintiff must show that Defendant's action was "arbitrary and capricious," and not supported by any "rational basis." *Id.* The Sixth Circuit has noted that federal courts should only make a limited review of the evidence, and has admonished against having federal juries "sit as local boards of zoning appeals." *Id.* at 1222. The Sixth Circuit has also held that:

> [I]t is extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process. The vast majority of such attacks may readily be disposed of on summary judgment, as in the case at bar, thus keeping interference by federal courts with local government to a salutary minimum.

***9** *Id.* Based on a review of the facts of the instant case, the Court finds that Defendant's action had a rational basis.

The Planning Commission sought the rezoning of Plaintiff's land because Plaintiff's PUD was not in conformance with the current Land Use Plan. At the hearing, the Board heard from six area residents who opposed the proposed development, and supported the rezoning. Residents stated that the initial granting of the PUD was a mistake, and expressed concerns regarding the proposed development's impact on water, roads, and sewers. The Court finds that the Land Use Plan and the concerns raised by local residents provided a rational basis for the rezoning. Thus, Plaintiff's substantive due process claim fails as a matter of law.

3. Procedural Due Process Claim

The Sixth Circuit has noted that "[p]rocedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren v. City of Athens,* 411 F.3d 697, 708 (6th Cir.2005). Under Michigan law, notice of a proposed zoning must be made not less than eight days before the hearing. M.C.L. § 125.284. Plaintiff does not allege that it received notice of the proposed rezoning less than eight days before the Planning Commission hearing on September 14, 2004. However, Plaintiff claims that the notice was vague and did not give reasons for the rezoning, thus depriving Plaintiff of the ability to prepare a defense.

The Court finds this argument unpersuasive. First, M.C.L. § 125.284 does not require particularized reasons to be given in the notice. Second, the subject of the meeting on September 14, 2004, was whether the Planning Commission would recommend that the Property would be rezoned, not whether the Property would actually be rezoned. The actual rezoning of the Property was considered at the Township Board meetings on October 18, 2004, and November 1, 2004. Since the reasons for rezoning the Property were discussed at the meeting on September 14, Plaintiff had more than a month to prepare a response before the actual rezoning hearings took place.

Plaintiff does not deny that it was given an opportunity to be heard at the meetings. However, Plaintiff argues that the hearing was meaningless because the Board was biased against it. Plaintiff notes that five out of the seven Board members were known to oppose Plaintiff's PUD, and one Board member also served on the Planning Commission, and had voted to recommend the rezoning of the Property. Plaintiff argues that this was akin to "a traffic cop sitting as the judge in traffic court."

However, this analogy ignores the reality that there are fundamental differences between the rights of a criminal defendant, which are guaranteed by the Constitution, and property rights, which are to some extent subject to the political process. State and local governments have broad authority to regulate an owner's property rights through the political process. Of course, the government may have to pay for what it has taken, but, as noted above, this is a conceptually different issue from that of due process.

***10** Based on Plaintiff's argument, if an individual publicly opposed a zoning classification, and was then elected to a township board, he would be barred from participating in a zoning decision because of his "bias." This is clearly not the case. The Supreme Court has noted that a decision maker is not "disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute." *Hortonville Joint School District. v. Hortonville Educ. Ass'n.*, 426 U.S. 482, 293 (1976). Furthermore, as Defendant points out, Michigan law specifically allows one member of the Planning Commission to also be a member of the Zoning Board. M.C.L. § 125.33.

Due Process does not require officials to operate in an objective vacuum, i.e., to disregard either their prior political stances or the views of their constituents. In the instant case, Plaintiff was given an opportunity to present its views at a hearing before the Township Board. The Board also heard from other members of the community who opposed Plaintiff's position. The Board decided to accept the position of Plaintiff's opponents. Of course, government officials may not persecute individuals with arbitrary and capricious decisions, but, as discussed above, there were rational reasons for the Board's decision. If Plaintiff does not like the result, it

can seek to reverse the decision through the political process. Plaintiff can also pursue an state inverse condemnation action. However, the fact that members of the Board had previously opposed Plaintiff's PUD does mean that Plaintiff's due process rights were violated. Since Plaintiff received notice and an opportunity to be heard, its procedural due process claim fails as a matter of law.

D. Merits of the Equal Protection Claim

The Equal Protection Clause of the Michigan Constitution is coextensive with that of the United States Constitution. *Crego v. Coleman*, 463 Mich. 248, 258, 615 N.W.2d 218 (2000). The standard of review given to an equal protection claim depends on the classification involved. *Id.* at 259, 615 N.W.2d 218. In the instant case, Plaintiff does not claim to be a member of a protected class. Rather, Plaintiff is proceeding under the "class of one" theory annunciated in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). To succeed under this theory, Plaintiff must show that it was treated "differently from others similarly situated and that there is no rational basis for such difference in treatment." *Warren*, 411 F.3d at 710.

Plaintiff argues that it was treated differently than two other similarly situated developers, Harrold and Daystar. Like Plaintiff, Harrold and Daystar both received PUD zoning that allowed for higher density development, Harrold in 2001 and Daystar in 1999. In 2004, Harrold's property was rezoned along with Plaintiff's. However, Harrold's property was not rezoned to R-3, but to another PUD, albeit one with reduced density (2.4 units per acre to 1.9). Daystar's property was not rezoned.

***11** Defendant argues that Harrold and Daystar are not similarly situated, because they proceeded with the process to obtain site plan approval. Plaintiff counters that Harrold's final site plan had expired, and Daystar's preliminary site plan had expired. Therefore, from a functional standpoint, Plaintiff, Harrold, and Daystar were in the same position. The Court need not decide whether Plaintiff was similarly situated to Harrold and Daystar, however, because Plaintiff cannot show that there was no rational basis for Defendant's action.

Plaintiff may show lack of rational basis by disproving "every conceivable basis which might support the government action or demonstrating that the challenged government action was motivated by animus or ill-will." *Warren*, 411 F.3d at 711 (quotation omitted). In *Warren*, the defendant had erected barriers which blocked access to the drive-through window at the plaintiff's Dairy Queen. The district court found the defendant violated the plaintiff's procedural due process and equal protection rights. The Sixth Circuit affirmed the procedural due process holding, because the plaintiff did not receive a hearing. *Id.* at 709. However, the Sixth Circuit reversed the equal protection ruling. The Court held that:

> Here, despite the district court's ruling and appellees' arguments, the Warrens cannot negative all the bases upon which the City's act was premised. The City acted in response to numerous complaints from Sunset Drive residents who were concerned about traffic congestion and safety. Surely, responding to these concerns, which were legitimate state interests, constituted at least one conceivable basis for the placement of the barricades.

Id. at 711.

Similarly, in the current case Defendant responded to complaints from area residents. The residents stated concerns over the impact on water, roads, and sewers, and expressed their desire to have the Property rezoned. Minutes of Fenton Board of Trustees Meeting of October 18, 2004, at 4. As in *Warren*, the residents' concerns constitute a conceivable basis for Defendant's actions.

Plaintiff also argues the Defendant's action was motivated by animus. One of Plaintiff's other developments, Owen Road, obtained water from the city of Linden, and subsequently applied for annexation into Linden. Plaintiff alleges that Defendant's action of rezoning the Property was in retaliation for Owen Road.

The Court finds this argument unpersuasive. It is true that there was a connection between the Owen Road development and the rezoning of the Property. At the meeting on October 18, 2004, one of the Board members expressed concern that the Property was a "mirror image of the Owen Road property." Minutes of Fenton Board of Trustees Meeting of October 18, 2004, at 3. However, Plaintiff has not provided any evidence showing that the connection was due to an arbitrary animus. Rather, the evidence shows the connection was made due to the similarity of issues. Plaintiff's conceptual plan, which was approved with the initial PUD zoning, showed that water would be provided by a community well

on the Property. Plaintiff subsequently attempted to purchase water from Linden. It was not irrational for the Board to be concerned that Plaintiff would subsequently petition for annexation into Linden, as it had with the Owen Road property.

***12** Since there was a rational basis for Defendant's action, Plaintiff's equal protection claim fails as a matter of law.

E. § 1983 Claim

As Defendant notes, Count VIII, Plaintiff's § 1983 claim, does not constitute a separate claim, but is the mechanism for Plaintiff's due process and equal protection claims. Since those claims fail as a matter of law, the § 1983 claim must be dismissed as well.

F. Violation of the TZA, Breach of PUD Agreement, and Exclusionary Zoning

Counts I, II, and V are based upon state law. 28 U.S.C. § 1367(c)(3) states that a district court may decline supplemental jurisdiction over a pendent state law claim when it has dismissed all federal claims. In the instant case, Plaintiff's federal claims have all been dismissed, and the Court finds that Plaintiff's remaining state law claims would more appropriately be resolved in state court. Therefore, Plaintiff's claims of violation of the TZA, breach of PUD agreement, and exclusionary zoning are remanded to Genesee County Circuit Court.

V. CONCLUSION

For the above reasons, Defendant's Motion to Dismiss and Motion for Summary Judgment are GRANTED IN PART. Counts III, IV, VII, and VIII (procedural due process, substantive due process, equal protection, and § 1983) are dismissed with prejudice. Count VI (takings) is dismissed without prejudice. Counts I, II, and V (violation of the TZA, breach of PUD agreement, and exclusionary zoning) are remanded to Genesee County Circuit Court.

IT IS SO ORDERED.

Footnotes

1 Michigan law allows for zoning ordinances to contain “planned unit development” provisions, which give the ordinances the ability to allow for flexible development within a zoning district. *See* M.C.L. § 125.286c.

2 In Fenton Township, PUDs are granted through an amendment to the Zoning Ordinance for the specific property at issue. Ordinance No. 585 specifically addressed Plaintiff and the Property.

Exhibit 3, *Abbott v City of Paris*, ___ SW3d ___, 2014 WL 895195 (Tex App 2/18/14)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

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Exhibit 3, *Abbott v City of Paris*, ___ SW3d ___, 2014 WL 895195 (Tex App 2/18/14)

2014 WL 895195
Only the Westlaw citation is currently available.

Court of Appeals of Texas,
Texarkana.

Ranger ABBOTT, Appellant
v.
CITY OF PARIS, TEXAS, and
Kevin Carruth, Appellees.

No. 06–13–00092–CV. | Submitted Feb. 18, 2014. | Decided March 7, 2014.

Synopsis

Background: Property owner sued city after city denied owner's request for permit to expand non-conforming use in order to expand existing mobile home park, asserting claims for eminent domain and violations of due process and equal protection. The 62nd District Court, Lamar County, granted city's plea to jurisdiction based on lack of subject matter jurisdiction, and owner appealed.

Holdings: The Court of Appeals, Carter, J., held that:

[1] owner's federal takings claim was not ripe for adjudication;

[2] owner failed to exhaust administrative remedies, as prerequisite to suit;

[3] owner failed to demonstrate that exhaustion of remedies would be futile;

[4] res judicata barred consideration of property owner's claim that city violated rights to substantive due process;

[5] request to have property rezoned would not violate owner's right to procedural due process; and

[6] res judicata barred consideration of owner's equal protection claim.

Affirmed.

West Headnotes (19)

[1] Appeal and Error
Cases Triable in Appellate Court

Whether a trial court has subject-matter jurisdiction is a question of law subject to de novo review.

Cases that cite this headnote

[2] Pleading
Scope of Inquiry and Matters Considered in General

Pleading
Questions of Law and Fact

If a plea to the jurisdiction challenges the existence of jurisdictional facts, the court considers relevant evidence on that issue, and if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the plea to the jurisdiction is determined as a matter of law.

Cases that cite this headnote

[3] Eminent Domain
Conditions Precedent to Action; Ripeness

Property owner's federal takings claim arising out of city's denial of request to expand nonconforming use of property for mobile home park in area zoned commercial was not ripe for adjudication, where state proceedings had not yet concluded.

Cases that cite this headnote

[4] Action
Moot, Hypothetical or Abstract Questions

A controversy is “ripe” for the courts when it has ‘legally matured’.

Cases that cite this headnote

[5] Administrative Law and Procedure

Finality; Ripeness

An administrative action must be final before it is judicially reviewable.

Cases that cite this headnote

[6] Administrative Law and Procedure

Finality; Ripeness

The requirement that an administrative action is final before it is judicially reviewable is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.

Cases that cite this headnote

[7] Eminent Domain

Conditions Precedent to Action; Ripeness

There can be no taking by eminent domain until the property owner has obtained a final decision of the governing zoning agency that inflicted an actual, concrete injury.

Cases that cite this headnote

[8] Eminent Domain

Conditions Precedent to Action; Ripeness

Property owner did not exhaust administrative remedies, and thus, claim for eminent domain based on inverse condemnation arising out of city's denial of request for permit to expand nonconforming use of property for expansion of mobile home park in area zoned for commercial use was not ripe for adjudication, where owner made no attempt to have property at issue rezoned for single-family dwelling use, even after he was informed that city lacked authority to grant owner's request and that request to amend zoning was owner's exclusive remedy.

Cases that cite this headnote

[9] Zoning and Planning

Power and Authority

A board of adjustment is restricted in its decisions to the powers vested in it by the enabling act and the particular zoning regulation in question.

Cases that cite this headnote

[10] Zoning and Planning

Power and Authority

A municipal board of adjustment must act within the strictures set by the legislature and city council and may not stray outside its specifically granted authority.

Cases that cite this headnote

[11] Zoning and Planning

Limitations on and Sparing Exercise of Power

Zoning and Planning

Effect of Determination; Res Judicata and Collateral Estoppel

If a land use is prohibited under a zoning ordinance, either explicitly or impliedly, any special exception allowing it is void and subject to collateral attack.

Cases that cite this headnote

[12] Eminent Domain

Conditions Precedent to Action; Ripeness

Property owner's purely speculative assertion that request for rezoning of property from commercial to single-family dwelling use would be denied was insufficient to excuse requirement that he exhaust administrative remedies on grounds that exhaustion would be futile, as prerequisite to eminent domain action against city based on inverse condemnation arising out of city's denial of request for permit to expand nonconforming use of property for expansion of mobile home park.

Cases that cite this headnote

[13] Judgment

Nature and Elements of Bar or Estoppel by Former Adjudication

Judgment

Matters Which Might Have Been Litigated

"Res judicata," or "claims preclusion," prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit.

Cases that cite this headnote

[14] Judgment

Nature and Requisites of Former Recovery as Bar in General

Res judicata, or claim preclusion, requires proof of three elements: (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on the same claims that were raised or could have been raised in the first action.

Cases that cite this headnote

[15] Zoning and Planning

Res Judicata and Collateral Estoppel

Doctrine of res judicata barred consideration of property owner's claim on appeal that, upon alleged ratification of city manager's letter to property owner that existing mobile home park on partial tract of land was approved non-conforming use, property owner was denied opportunity to be heard and conducted "closed-door" session on application for permit to expand non-conforming use to expand mobile home park on undeveloped portion of land that was zoned for commercial use, in alleged violation of due process, where claim could have been raised and addressed on appeal from prior suit in which owner challenged denial of permit. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[16] Constitutional Law

Proceedings and Review

Zoning and Planning

Change from Business, Commercial, or Industrial Use to Residential Use

Grant of request to have property rezoned from commercial to single-family dwelling use, which was property owner's exclusive remedy for expanding currently existing mobile home park that had been approved as non-conforming use, would not violate property owner's right to procedural due process, where zoning ordinance and procedures in place for requesting zoning change provided owner with appropriate and meaningful opportunity to be heard. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[17] Zoning and Planning

Res Judicata and Collateral Estoppel

Doctrine of res judicata barred reconsideration on appeal of property owner's claim that city's denial of request to expand non-conforming use of property violated equal protection, after claim was raised and rejected on owner's appeal from dismissal of previous lawsuit. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[18] Constitutional Law

"Class of One" Claims

Constitutional Law

"Class of One" Claims

An equal protection claim may be asserted by a plaintiff as a class of one if he alleges that he has been intentionally treated differently from others similarly situated, and there is no rational basis for the difference in treatment. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[19] Constitutional Law

"Class of One" Claims

On a claim for a "class of one" violation of equal protection, it is critical that the plaintiff allege he is being treated differently from those whose situation is directly comparable in all material respects. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

Buddy Apple, Mark H. How, Mark Frels, for Appellant.

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Before MORRISS, C.J., CARTER and MOSELEY, JJ.

Opinion

OPINION

Opinion by Justice CARTER.

I. Factual and Procedural History

***1** This lawsuit, stemming from Ranger Abbott's purchase in 2008 of a 7.77–acre tract of land (the Property) in Paris, Texas, is burdened with a complex history involving a previous lawsuit and appeal to this Court. Both suits concern attempts by Abbott to expand a mobile home park on the Property. When Abbott purchased the Property, approximately one-half of it was being used as a mobile home park and was so used prior to the City's annexation of the Property. Although the remainder of the Property was unused, Abbott intended to expand the mobile home park to encompass all of the Property.

While the Property was zoned "Commercial" when Abbott acquired it, the Paris City Manager at that time, Kevin Carruth, informed Abbott by letter that a mobile home park was an "approved, non-conforming use" of the Property. Abbott understood Carruth's letter to mean that expansion of the mobile home park onto the unused portion of the Property would also be permitted as an approved, nonconforming use. Problems arose, however, when Abbott submitted a plat to the City's Planning and Zoning Department (the Department) detailing proposed locations of new roadways, driveways, trailer pads, and utilities. Upon receiving the plat, the Department informed Abbott that the placement of additional manufactured homes on the Property would require a change in zoning designation from "Commercial" to "Single–Family Dwelling No. 3." Believing that this rezoning requirement amounted to a breach of Carruth's letter —interpreted by Abbott as a contract—Abbott sued the City. Shortly after suit was filed, Abbott's building permit request for the placement of additional manufactured housing on the unused portions of the Property was denied because the unused portion of the Property was not zoned for use as a mobile home park.

Abbott did not attempt to have any portion of the Property rezoned.[1] Instead, he pursued litigation against the City and Carruth[2] alleging numerous claims, including breach of contract. The City filed a plea to the jurisdiction, which the trial court granted, but only with respect to the claims filed under the Texas Tort Claims Act. The trial court denied the City's plea to the jurisdiction relating to Abbott's claims for "inverse condemnation, ... violations of procedural and substantive due process and equal protection[,] ... breach of contract[,] and declaratory relief." *City of Paris v. Abbott,* 360 S.W.3d 567, 570 (Tex.App.-Texarkana 2011, pet. denied). The City appealed the denial of the plea on these claims. Because the trial court did not have subject-matter jurisdiction, this Court reversed the trial court's judgment and rendered judgment dismissing Abbott's lawsuit. *Id.* That decision was based primarily on the fact that Abbott failed to exhaust all available administrative remedies prior to bringing the lawsuit. *Id.* at 573–74, 577, 579, 582.

In October 2012, Abbott filed a second lawsuit against the City alleging that, although he undertook additional efforts to resolve the expansion issue through appropriate administrative channels after this Court's 2011 opinion was issued, those efforts were arbitrarily rejected. Abbott alleged causes of action against the City for (1) regulatory taking, (2) denial of due process of law, and (3) denial of equal protection under the law. In response, the City filed a plea to the jurisdiction alleging that Abbott failed to present any statute or recognized theory of law that would satisfy a valid waiver of governmental immunity and further claiming that Abbott failed to exhaust his administrative remedies. The trial court granted the City's plea to the jurisdiction.

***2** Abbott appeals, claiming that the trial court erred in granting the City's plea to the jurisdiction because (1) he fully pursued all administrative remedies available with the City, (2) he established a claim for inverse condemnation, (3) the City violated his procedural and substantive due process rights, and (4) the City violated his equal protection rights. Because Abbott, once again, failed to exhaust all available administrative remedies, the trial court lacked subject-matter jurisdiction. As a result, we affirm the judgment of the trial court.

II. Standard of Review

[1] [2] In reviewing a trial court's ruling on a plea to the jurisdiction, we first look to the pleadings to determine if jurisdiction is proper. *City of Waco v. Kirwan,* 298 S.W.3d 618, 621 (Tex.2009). We construe the pleadings in favor of the nonmovant. *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 226 (Tex.2004); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 446 (Tex.1993). Whether a trial court has subject-matter jurisdiction is a question of law subject to de novo review. *Tex. Natural Res. Conservation Comm'n v. IT–Davy,* 74 S.W.3d 849, 855 (Tex.2002); *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 928 (Tex.1998). If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence on that issue. *Kirwan,* 298 S.W.3d at 622. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the plea to the jurisdiction is determined as a matter of law. *Id.*

III. Analysis

Abbott contends that he exhausted all available administrative remedies and that exhaustion should no longer hinder subject-matter jurisdiction in the trial court. In his previous lawsuit, Abbott asserted a breach of contract claim against the City based on Carruth's letter. The pursuit of that contract claim required the exhaustion of administrative remedies. *Abbott,* 360 S.W.3d at 572. This Court determined that, because Abbott failed to exhaust his administrative remedies with respect to the contract claim, the trial court did not have subject-matter jurisdiction over that breach of contract claim. *Id.* at 573. This case, however, does not involve a breach of contract claim. Instead, Abbott asserts federal and state (1) takings claims, (2) due process claims, and (3) equal protection claims. Each of these claims was likewise asserted in Abbott's previous lawsuit.

A. The Takings Claims

In an exhaustive analysis of Abbott's previously asserted takings claims, this Court determined that the trial court had no jurisdiction over either the federal or state claims. Because state proceedings had not concluded, Abbott's federal takings claim was not ripe. *Id.* at 579. Further, Abbott's state takings claim was not ripe based on Abbott's failure to obtain a final decision through the use of administrative procedures. *Id.* at 582.

***3 [3]** Abbott now reasserts his takings claims on the apparent basis that, because he has now exhausted all administrative remedies, these claims are ripe for adjudication. We disagree. Abbott's federal takings claim remains in the same posture it was in when we previously reviewed this matter. As before, Abbott's federal takings claim is not ripe because state proceedings have not yet concluded. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 195, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."); *Hallco Tex., Inc. v. McMullen Cnty.,* 221 S.W.3d 50, 59 (Tex.2006) ("[A] federal [takings] claim is not ripe until state court proceedings have been concluded.").

[4] [5] [6] [7] In our previous decision, we explained that the " 'ripeness doctrine' involves the issue of jurisdiction of the subject matter and power to render particular relief." *Abbott,* 360 S.W.3d at 578 (citing *Mayhew,* 964 S.W.2d at 928). "A controversy is 'ripe' for the courts when it has 'legally matured.' " *Id.* (citing *Abbott Labs. v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). Further, "[a]n administrative action must be final before it is judicially reviewable. The finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* at 579 (citations omitted). " 'There can be no 'taking' by eminent domain until this condition is complied with.' " *Id.* (quoting *City of El Paso v. Madero Dev.,* 803 S.W.2d 396, 400 (Tex.App.-El Paso 1991, writ denied)).

Prior to filing his initial lawsuit, Abbott did not attempt to have any portion of the Property rezoned. This failure was fatal to the trial court's jurisdiction over Abbott's state takings claim because there was no final, administrative action resolving the zoning question. *Id.* at 582. In our previous opinion, we outlined the administrative procedures at Abbott's disposal:

> Under the City's ordinances, the city council is responsible for enacting zoning ordinances. PARIS, TEX., ZONING ORDINANCE 1710 § 1–100 App. C (1957). The planning commission is responsible for more specific regulations governing the subdivision of land. Section 21–100 of the Paris Zoning Ordinance, entitled "Amendments" allows

any person having a proprietary interest in any property to petition the planning and zoning commission for a change or amendment to the provisions of the Zoning Ordinance. PARIS, TEX., ZONING ORDINANCE 1710 § 21–100 App. C (1957). Once the petition is made, the city council may amend, supplement, or change by ordinance the established boundaries of the districts or the regulations, provided the matter is submitted to the planning and zoning commission for its recommendation and report. PARIS, TEX., ZONING ORDINANCE 1710 §§ 21–101, 21–102 App. C (1957). After compliance with procedure for public hearing outlined in Sections 21–103–21.105, the city council votes on the proposed amendment. PARIS, TEX., ZONING ORDINANCE 1710 §§ 21–103–21.105 App. C (1957). The decision of the Paris city council may be appealed to a board of adjustment, which may "authorize in specific cases a variance from the terms of a zoning ordinance," under certain circumstances. TEX. LOC. GOV'T CODE ANN.. § 211.009(a)(3) (West 2008); PARIS, TEX., ZONING ORDINANCE 1710 § 21–106 App. C (1957).

***4** *Id.* at 581–82.

[8] Abbott acknowledges that he has never attempted to have any portion of the Property rezoned, even after our 2011 opinion issued. Abbott further acknowledges that the decision not to request rezoning was a deliberate choice he made while he was represented by counsel and with full knowledge of the forms and procedures in place for requesting a zoning change. Instead, Abbott took a different tack. After the issuance of our 2011 opinion and in an evident attempt to exhaust his administrative remedies, Abbott presented the City with a document captioned "Application for Extension Confirmation of Existing Non–Conforming Use." Abbott testified that this was not a form he received from the City; rather, his attorney prepared the form. The City does not have a form for seeking an extension of a nonconforming use. The City refused to accept Abbott's form and offered Abbott the City's form for requesting a zoning change.

Abbott's "Application for Extension Confirmation of Existing Non–Conforming Use" requested "[t]hat [the] existing[,] non-conforming use of the remainder (less than 50%) of the tract be confirmed as to the remainder of the tract." Essentially, Abbott was seeking both an extension or continuation and an enlargement of the existing, nonconforming use. The City of Paris' zoning ordinance sets forth the parameters of permissible nonconforming structures and uses. *See* PARIS, TEX. ZONING ORDINANCE 1710 §§ 15–100–102 (1988). Nothing in that zoning ordinance permits the expansion of a nonconforming use.[3] To the contrary, the relevant sections of the ordinance appear to move in the opposite direction, toward the ultimate elimination of nonconforming uses and structures. Thus, the relief Abbott sought in his application was not relief that was available under the City's ordinance. The City's refusal to accept Abbott's application was not based merely or even primarily on the fact that it was not submitted on a City-promulgated form; rather, it was primarily based on the unavailability of the requested relief under the City's zoning ordinance. In other words, the driving force behind the decision to reject Abbott's application was the fact that the City lacked the power to grant the relief Abbott requested in the application.

After the City refused to file Abbott's application, Abbott attempted to appeal what he describes as the City's "summary denial" of that application. The attempted appeal was made to the board of adjustment and was submitted on a City-promulgated form. Abbott's form of appeal indicated that he wished to appeal from "Zoning Ordinance No. 1710, Section 15–100(c), 15.101."[4] Section 15–100(c) permits nonconforming uses or structures on property that has been annexed into the City if the nonconforming uses or structures (1) were in existence at the time of annexation and (2) have been in regular and continuous use since annexation. *See* PARIS, TEX. ZONING ORDINANCE 1710 § 15–100(c). Section 15–101 generally addresses changes from one nonconforming use to another, more restrictive nonconforming use of the same classification. *See* PARIS, TEX. ZONING ORDINANCE 1710 § 15–101.

***5** The City advised Abbott that the change he was seeking —expansion of the mobile home park use to the entirety of the Property—required a zoning change. Shawn Napier, the City of Paris Director for Engineering, Planning & Development, told Abbott that the board of adjustment had no authority to change zoning and, as a result, would not accept Abbott's appeal. Napier advised Abbott that requests for zoning changes had to be filed with the planning and zoning commission. Moreover, Napier noted that Abbott's appeal to the board of adjustment failed to specify the grounds for appeal. *See* TEX. LOC. GOV'T CODE ANN.. § 211.010(b) (West 2008); PARIS, TEX. ZONING ORDINANCE 1710 § 16–102 (1988). Napier testified that Abbott's appeal form was rejected as incomplete because it failed to set out what Abbott was attempting to accomplish. It clearly did not, however, seek a variance—a matter within the jurisdiction of the board

of adjustment. *See* PARIS, TEX. ZONING ORDINANCE 1710 § 16–200 (1988).

Even if Abbott's appeal to the board of adjustment had been accepted, the board lacked the authority to provide the type of relief Abbott ultimately seeks. The entirety of the Property is zoned "Commercial." The nonconforming mobile home park use, which is limited to a well-defined portion of the Property, is permitted under Section 15–100(c) because it was in existence at the time the Property was annexed by the City and has been in regular and continuous use since that time. The parameters of that permitted, nonconforming use, however, are limited and are defined by the scope of the use at the time the Property was annexed. Section 15–100(c) is simply not applicable to the undeveloped portion of the Property that was not used as a mobile home park at the time the Property was annexed. As a result, the undeveloped portion of the Property is subject to the permitted uses and restrictions of its "Commercial" zoning classification, which does not allow for mobile home park use. Under the City's current zoning ordinance, the only way Abbott can achieve his goal of using the undeveloped portion of the Property as a mobile home park is to secure a change in the zoning classification from "Commercial" to a classification that supports mobile home park use, e.g., "Single–Family Dwelling No. 3."

[9] **[10]** **[11]** A board of adjustment is restricted in its decisions to the powers vested in it by the enabling act and the particular zoning regulation in question. *Driskell v. Bd. of Adjustment*, 195 S.W.2d 594, 598–99 (Tex.Civ.App.-Fort Worth 1946, writ ref'd n.r.e.). In other words, a municipal board of adjustment "must act within the strictures set by the legislature and city council and may not stray outside its specifically granted authority." *W. Tex. Water Refiners, Inc. v. S & B Beverage Co.*, 915 S.W.2d 623, 626 (Tex.App.-El Paso 1996, no writ). If a use is prohibited under a zoning ordinance, either explicitly or impliedly, any special exception allowing it is void and subject to collateral attack. *Id.* at 627; *Swain v. Bd. of Adjustments of the City of Univ. Park*, 433 S.W.2d 727, 731–32 (Tex.Civ.App.-Dallas 1968, writ ref'd. n.r.e.).

***6** The procedure for changing or amending zoning is set out in the zoning ordinance. PARIS, TEX. ZONING ORDINANCE 1710 §§ 21–100–106 (1988). A property owner may petition the planning and zoning commission for an amendment to the provisions of the zoning ordinance; the commission may study the proposal and make a recommendation to the city council. The city council is authorized to amend the boundaries of the zoning district in accordance with Section 21 of the Zoning Ordinance. A board of adjustment has no power to grant zoning exceptions or variances that amount to an ordinance amendment. Tex. Att'y Gen. Op. No. JM–493 (1986). [5] Tacitly acknowledging this conundrum, Abbott complains that the zoning ordinance restricts the board's power by allowing only certain "special exceptions" to the zoning regulations in the form of a variance, none of which apply to his situation. [6] Abbott thus claims he was denied the availability of any administrative remedy by appeal to the board of adjustment and relies on *Mayhew* for the proposition that there is no requirement that a plaintiff submit futile variance requests or reapplications. *Mayhew*, 964 S.W.2d at 937. Abbott concludes that, because he has no administrative remedy by appeal to the board of adjustment (and further efforts to seek such a remedy would be futile), he has satisfied the requirement that he exhaust all available administrative remedies, and his takings claims are ripe for judicial review. [7]

In further support of this position, Abbott contends that the City did not advise him that his only administrative remedy was to request a zoning change until after this Court issued its 2011 opinion. Abbott further contends that a change in the Property's zoning classification, as a practical matter, is highly unlikely. We first note that it is Abbott's responsibility, not the City's, to determine all available administrative remedies. Further, and contrary to Abbott's assertions before this Court, the record establishes that the City advised Abbott on numerous occasions that a zoning change request was the appropriate course of action. Abbott was advised prior to his original lawsuit in 2010 that he should file an application for rezoning. Later, Abbott was advised on more than one occasion by City employees that he needed to seek a zoning change.

[12] Abbott's claim that a zoning change request would not be granted is pure speculation. Abbott acknowledged that he does not know how the planning and zoning commission would respond to an application to rezone the Property (or a part thereof). In fact, Abbott cannot know the outcome of a rezoning request until such request has been made. To date, that has not been done. Abbott has presented no evidence that he is excused from pursuing the rezoning application as an available administrative remedy, and there is no credible evidence to support the conclusion that the filing of a rezoning application would have been futile. [8]

***7** As in his previous appeal, Abbott relies on the futility exception to the final decision rule of *Mayhew*, 964 S.W.2d at 929, 931 ("futile variance requests or re-applications are not required"). In our previous opinion, we distinguished *Mayhew*, finding, "The lack of a final opinion from the city council, failure to apply for rezoning or variance, and lack of attempt at negotiation or compromise after the permit denial distinguish this case from *Mayhew* and lead us to conclude that the futility doctrine cannot be employed here." *Abbott*, 360 S.W.3d at 581. We ultimately concluded that Abbott's takings claims were not ripe for adjudication. *Id.* at 582. They remain so.

[13] **[14]** Abbott's ineffectual attempts to obtain a final decision from the City—presenting a document requesting relief not permitted under the City's zoning ordinance and attempting to appeal the City's rejection of this document to the board of adjustment, which had no jurisdiction to act—are not sufficient to invoke the futility exception. Abbott has not filed for rezoning, has not requested a variance, and has not appealed the denial of the building permit application. Because Abbott has not obtained a final decision through use of administrative procedures, we conclude that Abbott's state takings claim was not ripe. [9]

B. Due Process Claims

[15] Abbott contends that his substantive due process rights were violated when, after the initial ratification of the city manager's letter, he was denied an opportunity to be heard and further consideration by city officials was conducted in closed-door sessions in violation of the Texas Open Meetings Act. He claims such actions were both arbitrary and irrational with no foundation in reason. Consequently, Abbott contends that such actions should be set aside based on a violation of substantive due process, citing *Mayhew*, 964 S.W.2d at 938. The issue of the city manager's letter predated Abbott's first lawsuit and was addressed by this Court in its previous opinion. In that appeal, although he had the opportunity to do so, Abbott did not raise a due process claim relating to the alleged ratification of the city manager's letter. We find that this issue is now barred by the doctrine of res judicata. *See Amstadt*, 919 S.W.2d at 652.

[16] Abbott also alleges a procedural due process violation based on the City's position that rezoning is the appropriate course of action, "thus requiring [him] to seek relief through a complicated process, rather than through an administrative agency." The zoning ordinance and the procedures in place for requesting a zoning change provide an appropriate and meaningful opportunity to be heard. Because Abbott failed to avail himself of this opportunity to be heard, he cannot now assert that his procedural due process rights were violated.

C. Equal Protection Claim

[17] **[18]** **[19]** Finally, Abbott asserts an as-applied equal protection claim, contending that he has been treated differently from other similarly-situated landowners without any reasonable basis. *See Mayhew*, 964 S.W.2d at 939. As recognized in our previous opinion, "An equal protection claim may be asserted by a plaintiff as a 'class of one' if he alleges that he has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." *Abbott*, 360 S.W.3d at 583 (quoting *City of Dallas v. Jones*, 331 S.W.3d 781, 787 (Tex.App.-Dallas 2010, pet dism'd)). Abbott's pleadings invoking the Equal Protection Clause assert that "Defendants' actions in denying Plaintiff's right to develop his property in accordance with the City Manager's Letter, constitutes a violation of Plaintiff's right to equal protection ... inasmuch as the City's conduct was not rationally related to a legitimate state interest and unfairly discriminates against the Plaintiff." These are the same allegations pled in Abbott's original lawsuit. Our decision in that case bars reconsideration of this issue now. *See Amstadt*, 919 S.W.2d at 652. [10]

IV. Conclusion

***8** We affirm the judgment of the trial court.

Footnotes

1 The City concedes that a mobile home park is an existing, nonconforming use of that portion of the Property that was so used at the time the Property was annexed. The City further concedes that this nonconforming use will remain viable for that portion of the Property in the future. The controversy centers on the proposed expansion of the mobile home park use to previously unused portions of the Property.

2 The City and Carruth, appellees in this Court, will be referred to jointly as the City.

3 Section 15–100 provides,

A nonconforming status shall exist under the following provisions of this ordinance:

a. When a use or structure which does not conform to the regulations prescribed in the district in which such use or structure is located was in existence and lawfully operating prior to September 9, 1957, and has been operating since without discontinuance.

b. When on the effective date of this ordinance the use or structure was in existence and lawfully constructed, located and operating in accordance with the provision of the prior zoning ordinance or which was a nonconforming use thereunder, and which use or structure does not now conform to the regulations herein prescribed for the district in which such use or structure is located.

c. When a use or structure which does not conform to the regulations prescribed in the district in which such use or structure is located was in existence at the time of annexation to the City of Paris and has since been in regular and continuous use.

PARIS, TEX. ZONING ORDINANCE 1710 § 15–100.

Section 15–101 provides,

Any nonconforming use of land or structures may be continued for definite periods of time subject to such regulations as the Board of Adjustment may require for immediate preservation of the adjoining property prior to the ultimate removal of the nonconforming use. The Building Official may grant a change of occupancy from one nonconforming use to another, providing the use is within the same, or higher or more restricted classification as the original nonconforming use. In the event a nonconforming use of a building may be changed to another nonconforming use of more restricted classification, it shall not later be changed to a less restrictive classification of use and the prior less restrictive classification shall be considered to have been abandoned.

PARIS, TEX. ZONING ORDINANCE 1710 § 15–101.

Section 15–102 provides,

If a structure occupied by a nonconforming use is destroyed by fire, the elements or other cause, it may not be rebuilt except to conform to the provisions of this ordinance. In the case of partial destruction of a nonconforming use not exceeding seventy-five (75) percent of its reasonable value, reconstruction will be permitted but the size or function of the nonconforming use cannot be expanded.

PARIS, TEX. ZONING ORDINANCE 1710 § 15–102.

4 The text of these sections is recited in footnote 3 of this opinion.

5 Certain, enumerated matters fall within the jurisdiction of the City of Paris Board of Adjustment:

Jurisdiction: When in its judgment, the public convenience and welfare will be substantially served and the appropriate use of the neighboring property will not be substantially or permanently injured, the Board of Adjustment may, in specific cases, after public notice and public hearing, and subject to appropriate conditions and safeguards authorize the following special exceptions to the regulations herein established.

a. Permit the reconstruction, extension or enlargement of a building occupied by nonconforming use on the lot or tract occupied by such building provided such reconstruction does not prevent the return of such property to a conforming use.

b. Permit such modifications of the height, yard, area, coverage and parking regulations as may be necessary to secure appropriate development of a parcel of land which differs from other parcels in the district by being of such restricted area, shape, or slope that it cannot be appropriately developed without such modification.

c. Require the discontinuance of nonconforming uses of land or structure under any plan whereby the full value of the structure and facilities can be amortized within a definite period of time, taking into consideration the general character of the neighborhood and the necessity for all property to conform to the regulations of this ordinance. All actions to discontinue a nonconforming use of land or structure shall be taken with due regard for the property rights for the persons affected when considered in the light of the public welfare and the character of the area surrounding the designated nonconforming use and the conservation and preservation of property. The Board shall from time to time on its own motion or upon cause presented by interested property owners inquire into the existence, continuation or maintenance of any nonconforming use within the City.

PARIS, TEX. ZONING ORDINANCE 1710 § 16–200.

6 *See* footnote 4.

7 Abbott further complains that the factors set forth in the board of adjustment's variance application packet as failing to qualify as unnecessary hardships (required for a variance) limited his ability to seek administrative relief from the board. Given the fact that Abbott's appeal to the board of adjustment did not request a variance, this complaint is spurious. Further, the City's listing of circumstances which fail to qualify as unnecessary hardships is well defined in Texas caselaw. *See Bd. of Adjustment of City of Piney Point Village v. Solar*, 171 S.W.3d 251, 255 (Tex.App.-Houston [14th Dist.] 2005, pet. denied) (financial hardship does not constitute unnecessary hardship sufficient to support variance); *Ferris v. City of Austin*, 150 S.W.3d 514, 522 (Tex.App.-Austin 2004, no pet.) (self-imposed hardship or one that is only financial does not justify variance); *Bd. of Adjustment of City of San Antonio v. Willie*, 511 S.W.2d 591, 594 (Tex.Civ.App.-San Antonio 1974, writ ref'd n.r.e.) (variance not authorized merely to accommodate highest and best use of property).

8 Abbott testified on this issue:

Q. Do you have any belief that the City of Paris would not have rezoned the property had you so applied?

A. I—I don't know the answer to that.

Q. So I mean you're not taking the position, "well, I didn't file for a rezoning application because I knew the City of Paris was going to deny it." You don't know what would have happened if you had filed the application. Is that a fair statement?

A. That's correct. There were several variables.

Q. All right. What were the variables?

A. There could have been disputes within the City Council or within the City, with any of the adjoining neighbors.

Q. Was one of your concerns, "well, if I file an application to rezone, these neighbors around here might all show up en masse and protest it"?

A. That was definitely a possibility.

Q. All right. But you don't know that?

A. I don't know that.

Q. And whether or not there had been any disputes on the City Council about the rezoning, you don't know that?

A. No.

Q. All right. Whether Planning and Zoning Commission would have approved a rezoning, you don't know that?

A. No, sir.

Q. Whether you could have sought any relief from the Board of Adjustments, you don't know that?

A. No, sir.

Q. All right. But you consciously chose not to apply to rezone the property?

A. That's correct.

9 Abbott contends that he is entitled to pursue his takings claims on the additional ground that the City's repudiation of the agreements set forth in the city manager's letter did not substantially advance a legitimate governmental interest, in reliance on *Sheffield Development Co. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex.2004). In his original appeal, Abbott claimed the city manager's letter amounted to a contract. We addressed that contention and determined that the trial court lacked jurisdiction over that claim. *Abbott*, 360 S.W.3d at 576–77. Res judicata was raised as an affirmative defense in the City's answer to Abbott's second lawsuit. *See* TEX.R. CIV. P. 94. "Res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit." *Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex.1992). It requires proof of three elements: (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on the same claims that were raised or could have been raised in the first action. *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex.1996). Because Abbott could have raised the repudiation claim in connection with the initial lawsuit, the judgment in that lawsuit precludes its relitigation here.

10 As we stated in our previous opinion, "It is critical ... that the plaintiff allege he is being treated differently from those whose situation is directly comparable in all material respects." *Abbott*, 360 S.W.3d at 583. As in the previous lawsuit, Abbott has failed to allege facts that show he was treated differently from others who were similarly situated.

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