UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ONEIDA SEVEN GENERATIONS CORPORATION and GREEN BAY RENEWABLE ENERGY, LLC,

Plaintiffs,

v. Case No. 1:16-cv-01700

CITY OF GREEN BAY,

Defendant.

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

ARGUMENT

OSGC's arguments against dismissal are rife with contradiction. OSGC invokes federal court jurisdiction, but assert that this Court lacks authority to determine whether OSGC has the capacity to bring this Complaint. Dock. No. 14, pp. 31–32.[1] OSGC claims that it exhausted the state law remedies before repairing to federal court and that state law remedies were inadequate, but admit that state law remedies could have reversed the exact land-use decision of which OSGC complains. *Id.*, p. 18. OSGC complains that the decision to revoke its conditional use permit violated due process, but assert a constitutionally protected interest in their building permit. *Id.*, p. 15. But the most glaring contradictions are the two favorable state court decisions as Exhibits A and B to a Complaint for deprivation of due process. Dock. No. 1. This is more than the Constitution and § 1983 can bear. Plaintiffs fail to state a claim, fail to establish subject matter

[1] Citations are to docket page number.

jurisdiction, and fail to prove corporate capacity to sue. For any one of the following, independent reasons, the Complaint should be dismissed.

A. <u>The Business Committee cannot cure OSGC's lack of capacity by resolution. This Court is authorized to find as much, or if the Court lacks authority, should dismiss the Complaint.</u>

Despite having brought this complaint in federal court, OSGC now argues that a federal court cannot decide whether OSGC has capacity to bring this suit. Dock. No., pp. 31–32. Although they fail to name it, OSGC has invoked the "tribal exhaustion rule." As explained by the Seventh Circuit, "[t]he concept of federal court abstention in cases involving Indian tribes known as the 'tribal exhaustion rule' generally 'requires that federal courts abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in tribal court." *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 784 (7th Cir. 2014). This rule plainly does not apply where a plaintiff has voluntarily submitted its claim to the Court's authority.

In *Altheimer & Gray v. Sioux Manufacturing Corporation*, the Seventh Circuit held that the doctrine of tribal exhaustion did not bar a federal court from deciding a contract dispute filed against tribal defendants where the defendants had, "explicitly agreed to submit to the venue and jurisdiction of federal and state courts." 983 F.2d 803, 815 (7th Cir. 1993); *see also Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 196–98 (7th Cir. 2015) (applying *Altheimer*, 983 F.2d 803 and holding the same). While the defendants in *Altheimer* and *Stifel* agreed by contract, OSGC has just as clearly "agreed to submit to the venue and jurisdiction" of this Court by selecting this forum. OSGC cannot ask the Court to hear its Complaint and deny the Court's authority in the same action.[2]

[2] Additionally, the Seventh Circuit has recognized, but not resolved, a circuit split as to whether the doctrine of tribal exhaustion applies at all where there is no pending tribal court action. *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 784 (7th Cir. 2014).

> The courts of appeals that have addressed this issue have reached opposite conclusions. In *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 80 (2d Cir. 2001), the Court of Appeals for the

But even if OSGC was correct that the Court must abstain from deciding OSGC's capacity, Business Committee Resolution No. 02-22-17-E (the "Resolution") would not become binding authority. Courts abstaining in deference to tribal jurisdiction do not simply adopt the tribal court decision—they dismiss. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 20 n. 14 (1987) (affirming district court's decision to abstain, but remanding for a determination on whether to dismiss or stay pending further tribal court proceedings). If this Court cannot decide whether OSGC has capacity to bring this lawsuit, the lawsuit must be dismissed.

This Court can and should decide whether OSGC lacks capacity to sue, and not by reference to the Resolution. OSGC's reliance on the Resolution ignores the fundamental problem with OSGC's capacity—the Oneida General Tribal Council, not the Business Committee, voted to dissolve OSGC and then affirmed that OSGC cannot continue litigation against the City. Dock. No. 12-1, 12-3. OSGC acknowledges that the powers of the Business Committee are "subject to General Tribal Council review." Dock. No. 14, p. 33; *see also* Dock. No. 10-1, Constitution and By-Laws of the Oneida Nation (2015), Article III, § 3 (The business committee may only "perform such duties as may be authorized by the General Tribal Council."). As the subordinate entity, the

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> Second Circuit held that tribal exhaustion was not required absent an ongoing tribal proceeding…. *But see, e.g.*, *United States v. Plainbull*, 957 F.3d 724, 728 (9th Cir. 1992) (rejecting the Government's argument that "the district court abused its discretion by abstaining from the merits of this case because there was no concurrent action pending in the tribal courts" because "[w]hether a tribal action is pending, however does not determine whether abstention is appropriate.")

Id., 784 n. 44. The cases cited by Plaintiffs do not inform this issue because, in both cases, a tribal authority had previously adjudicated the issue. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 9 (1987) (declining jurisdiction over personal injury claim previously adjudicated in Blackfeet Tribal Court because "tribal appellate courts must have the opportunity to review lower tribal court decisions"); *Charles Mix v. U.S. DOI*, 674 F.3d 898, 903 (8th Cir. 2012) (declining jurisdiction over a land-use decision affirmed by the Bureau of Indian Affairs and the Interior Board of Indian Appeals because the Eighth Circuit lacked jurisdiction to review decisions of the Interior Board of Indian Appeals). It remains an open question in the Seventh Circuit as to whether a federal court may decide tribal issues where no tribal court action is pending. It is a question this Court need not answer because Plaintiffs have voluntarily submitted to the authority of the Court.

Business Committee cannot interpret its own authority to override the will of the General Tribal Council.

B. <u>The adequacy of OSGC's state law remedies is not determined by its alleged losses.</u>

OSGC does not dispute that to state a claim for procedural or substantive due process, it must show that its state law remedies were inadequate. *See* Dock. No. 14, pp. 20–22; *see also Bettendorf v. St. Croix County*, 631 F. 3d 421, 427 (7th Cir. 2011) ("Where a claimant has availed himself of the remedies guaranteed by state law, due process is satisfied unless he can show that such remedies were inadequate."); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 ("Labels [procedural or substantive due process] do not matter.").

Rather, OSGC argues that the inadequacy of its state law remedies can be "readily inferred from the facts alleged." *Id.*, p. 22 n. 3. Specifically, OSGC complains that state law remedies did not provide "timely re-issuance of the CUP" or "appropriate compensation for the significant damages it suffered as a result of the City's wrongful actions." *Id.*, p. 22. According to OSGC, the appellate judgments were untimely because they did not arrive in time to allow OSGC to take advantage of grants and other incentives that made the project economically viable. *Id.*, 20–21. Thus, OSGC argues that its state law remedies were inadequate by counting its alleged damages.

But adequacy of state law remedies is not measured by damages. *Hudson v. Palmer*, 468 U.S. 517, 535 (1984). Rather, adequacy refers to whether the state law provides sufficient process to meet constitutional requirements. *Id.*; *Barry Aviation, Inc. v. Land O' Lakes Municipal Airport Com'n*, 366 F. Supp. 2d 792, 810 (W.D. Wis. 2005) ("The fact that a plaintiff 'might not be able to recover under [state law] remedies the full amount of which he might receive in a § 1983 action is not determinative of the adequacy of state remedies") (citations omitted). In land-use decisions, the opportunity to seek certiorari review is sufficient process to meet constitutional requirements. *River Park*, 23 F.3d at 167; *Brick v. County of Walworth*, 856 F.Supp. 509 (E.D. Wis. 1994);

Magulski v. County of Racine, 879 F.Supp. 83 (E.D. Wis. 1995); *Donohoo v. Hanson*, No. 14-309, 2015 WL 5177968 (W.D. Wis. Sept. 3, 2015). OSGC's alleged losses (including lost grants, contracts, and permits) do not undermine the adequacy of its available state law remedies.

For the same reason, OSGC cannot escape the holdings of *Donohoo v. Hanson*, No. 14-309, 2015 WL 5177968 (W.D. Wis. Sept. 3, 2015), *Harding v. City of Door*, 879 F.2d 439, 431 (7th Cir. 1989), and *Minneapolis Auto Parts Co. v. City of Minneapolis*, 572 F. Supp. 389, 393 (D. Minn. 1983), all finding no due process violation where plaintiffs had the opportunity for appellate review and prevailed. OSGC attempts to distinguish those cases on the basis that in those cases, "plaintiffs actually received the permit it sought during or as a result of the state court proceedings." Dock. No. 14, p. 22. This distinction fails legally and factually.

Legally, the relief ultimately granted in a state court proceeding does not determine whether OSGC's due process rights were violated. Due *process* is, of course, concerned with *process*. *See CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, No. 12–C–1166, 2013 WL 3354511 (E.D. Wis. July 3, 2013), *aff'd* 769 F.3d 485 (7th Cir. 2014) ("Due process requires only a state court remedy, not a guaranteed win by the applicant's contractual deadline."). Regardless of the outcome, OSGC had the "*opportunity* to apply for a writ" and, again, this is sufficient to satisfy due process. *River Park*, 23 F.3d at 167 (emphasis added).

Factually, the distinction fails because OSGC also prevailed in state court. The only reason it has not "receive the permit it sought during or as a result of the state court proceedings" is that it has failed to enforce the state court judgments. *See infra* Part C). Again though, even if OSGC had lost, its opportunity to apply for a writ of certiorari satisfied due process. *River Park*, 23 F.3d at 167.

C. <u>"Procedural obstacles" do not excuse OSGC from pursuing its state law remedies and its failure to do so bars its federal due process claims.</u>

OSGC does not dispute that a plaintiff with available state law remedies against a land-use decision must pursue those remedies before repairing to federal court. *See* Dock. No. 1, p. 10–14; *see also CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d at 489 (7th Cir. 2014). Instead, OSGC simultaneously argues that it "exhausted" those remedies[3] and that "procedural and practical obstacles" barred it from pursing those remedies. Dock. No. 14, p. 16. OSGC cannot have it both ways—either OSGC pursued available state remedies or it did not. OSGC admits that it did not: "Could OSGC eventually have placed this dispute in a posture in which the City was under an enforceable order to re-issue the CUP? Probably…" Dock. No. 14, p. 18.

OSGC attempts to hedge this admission by arguing that the path to enforcing the judgment was "unclear" and untimely. *Id.* at 17–18. These arguments go to adequacy of state law remedies—not whether those remedies were "exhausted." In any event, the arguments are without merit.

Specifically, OSGC argues that it could not enforce its state court judgments because "the judgment of the appellate courts did not 'require' the City to do anything" and, according to OSGC, Wisconsin law "limits the reviewing court's authority in a certiorari proceeding." Dock. No. 14, pp. 17, 18. This is patently false. Obviously a certiorari court has the authority to reverse a circuit court, which must then proceed in accordance with the judgment. *See* Wis. Stat. § 68.13(1); Exhibit A (reversing the circuit court); Exhibit B (affirming reversal); *see also* Wis. Stat. § 808.09

[3] Technically, the requirement that Plaintiffs repair to state court is "not because the owner must 'exhaust' state remedies." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994). "Rather the idea in zoning cases is that the due process clause permits municipalities to use political methods to decide, so the only procedural rules at stake are those local law provides, and these rules must be vindicated in local courts." *Id*. The upshot, however, is the same. Plaintiffs cannot state a claim for due process violations based on an objectionable land-use decision without pursuing state law remedies. *Id.*; *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 796 F.3d 485 (7th Cir. 2014); *Gamble v. Eau Claire County*, 5 F.3d 285, 286–87 (7th Cir. 1993).

("In all cases, an appellate court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance with the judgment or decision.")

OSGC also complains that it could not enforce the judgment until the record was remitted to the circuit court and because of this delay, the "unique confluence of circumstances that would have allowed construction of the facility had disappeared." Dock. No. 14, pp. 17, 18. Again, "[t]he fact that a plaintiff might not be able to recover under state law remedies the full amount of which he might receive in a § 1983 action is not determinative of the adequacy of the state remedies." *Barry Aviation v. Land O'Lakes Municipal Airport Com'n*, 366 F.Supp.2d 792 (W.D. Wis. 2005).

If OSGC was not satisfied with the outcome of certiorari review, it also could have sought a writ of mandamus to compel the issuance of the building permit. Indeed, OSGC initially filed exactly such a writ of mandamus, but voluntarily dismissed it. *See* Gunta Decl., ¶¶ 3, 4, Exhibit 9, Petition for Writ of Mandamus, *Oneida Seven Generations Corporation et al. v. City of Green Bay*, Case No. 12CV2262 (filed with Brown County Circuit Court of Wisconsin, November 14, 2012). The opportunity to file a writ of mandamus defeated plaintiffs' due process claims in *CEnergy-Glenmore* and the opportunity, along with the opportunity to enforce its judgment, defeats OSGC's claim here. 769 F.3d 485, 489 (7th Cir. 2014).

Neither *Guerro v. City of Kenosha Housing Authority* nor *Hanlon v. Town of Milton* excuse OSGC's failure to fully pursue its state court remedies. *Guerro* denied equitable relief as outside the scope of a certiorari action. 2011 WI App 138, ¶ 9, 337 Wis. 2d 484, 805 N.W.2d 127. Despite the relief sought being unavailable on certiorari, *Guerro* nevertheless reinforced that "a litigant cannot claim a deprivation of due process until he or she has, in fact, pursued the post deprivation process provided." *Id.*, ¶ 14. In *Guerro*, the "post deprivation process provided" was certiorari under Wis. Stat. § 68.13. *Id.* Here, the available post deprivation process also includes

enforcement of the state court judgments and OSGC failed to pursue them. Wis. Stat. §§ 815.02, 785.03(1)(a).

Likewise, *Hanlon* held that claim preclusion does not bar plaintiffs who have pursued a certiorari action from pursuing a § 1983 action. 2000 WI 61, ¶ 4, 612 N.W.2d 44. It does not address, let alone excuse, any prerequisites to stating a claim under § 1983, pursuit of state law remedies. *See id.* Such a holding could not be reconciled with *CEnergy-Glenmore*, 769 F.3d at 488 (denying due process claims under § 1983 where plaintiffs "ignored potential state law remedies.").

Finally, OSGC states that "the City apparently recognizes that OSGC filed a request for an administrative appeal, filed a Notice of Claim, filed a certiorari action in state court, and pursued that action all the way to the Wisconsin Supreme Court." Dock. No. 14, p. 16. Any facts cited by the City are "recognized" only for the limited purpose of supporting its Motion to Dismiss, under which all allegations in the Complaint "must be accepted as true." *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007).

The statutory framework is in place for OSGC to enforce the appellate judgments. Any "procedural obstacles" do not excuse OSGC from taking advantage of available state court remedies—"The due process clause requires that a claimant receive adequate process, not the most advantageous process available to him…." *Bettendorf v. St. Croix County*, 631 F.3d 421, 426 (7th Cir. 2011).

D. <u>OSGC's investment on the CUP does not transform the CUP into a protectable property interest.</u>

OSGC does not dispute that a conditional use permit is not a constitutionally protected property interest. *See* Dock. 14, p. 9. Instead, OSGC claims its "combined interests" are "sufficient to warrant due process protection." *Id.* The "combined interests" are the assets OSGC acquired in reliance on the CUP—"a building permit from the City, air permits from the state and

federal regulators, contractors from third-parties, and various grants and tax-credits." *Id.*; *see also* Dock. No. 1, Complaint, ¶ 4 ("Thereafter, and in reliance on the CUP, OSGC invested significant funds developing the project. OSGC completed a substantial environmental permitting process with both state and federal regulators. Eventually, OSGC obtained all necessary permits to being construction of the facility.") In other words, OSGC asks the court to find that its investments made in reliance on the CUP give rise to a protectable property interest independent of the CUP.

Wisconsin courts do not recognize this theory. *Rainbow Springs Gold Co., Inc. v. Town of Mukwonago*, 2005 WI App 163, ¶¶ 14, 18, 284 Wis.2d 519, 702 N.W.2d 40 (finding no property interest in a revoked conditional use permit despite plaintiff losing the use of a recreational resort facility, a convention center, two golf courses, a haunted hotel, and a full-service restaurant all operated in reliance on the CUP).

Nor do the cases cited by OSGC. OSGC misquotes *Bd. of Regents v. Roth* as holding that property interests "essentially encompass[] any 'legitimate claim of entitlement.'" Dock. No. 14, p. 15 (citing 408 U.S. 564, 576–77 (1972)). Rather, *Roth* established that a "legitimate claim of entitlement" is a threshold attribute of a protected property interest. 408 U.S. at 577 ("To have a property interest in a benefit, a person … must [] have a legitimate claim of entitle to it."). *Roth* further established that protected property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and support claims of entitlement to those benefits." *Id.* (finding no property interest.)

Consistent with *Roth*, in the cases cited by OSGC, courts found a protected property interest where the interest relied on state laws. *Building Height Cases*, 181 Wis. 519, 549–50, 195 N.W. 544 (1923) (protecting investments made in reliance on an ordinance); *Peninsula Props., Inc. v. City of Sturgeon Bay*, No. 04-692, 2006 WL 1308093, *2 (E.D. Wis. May 8, 2006)

(protecting building permits sought pursuant to state law); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) (protecting a zoning designation where state law required the City to grant plaintiff's zoning application).

Unlike these interests, OSGC's alleged interest was not made in reliance on state law—it was made "in reliance on the CUP." Dock. No., Complaint, ¶ 4. The CUP cannot "support claims of entitlement" (*Roth*, 408 U.S. at 577) because "[a] conditional use permit is not property." *Id.*, Exhibit B, p. 35, ¶ 93 (*Oneida Seven Generations Corp., LLC v. City of Green Bay*, 2015 WI 50, ¶ 41–42, 362 Wis. 2d 290, 865 N.W.2d 162 (quoting *Rainbow Springs*, 2005 WI App 163, ¶ 18, 284 Wis. 2d 519, 702 N.W.2d 40)).

E. <u>OSGC has not alleged a violation of procedural due process.</u>

To support its claim for procedural due process, OSGC cites to *Owen v. Lash*, 682 F.2d 648 (7th Cir. 1982) and *Zinerman v. Burch*, 494 U.S. 113 (1990). Dock. No. 14, pp. 23, 24. Its reliance on these cases is misplaced. The due process claim in *Lash* and *Zinerman* and was for deprivation of liberty where plaintiffs were involuntarily detained in state prison and a state mental health facility, respectively. As explained in *Mathews*, due process is "a flexible concept that varies with the particular situation." 494 U.S. 113, 127. The process owed in a deprivation of liberty is not the same as what is owed in land-use decisions. Again, all that is owed in land-use decisions is "the opportunity to apply for a writ." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994). Thus, even if, as alleged, the City did not provide "a meaningful hearing prior to revoking the CUP" (Dock. No. 14, p. 23), the opportunity for certiorari review was a sufficient procedural safeguard. *See id.*; *see also CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485, 489 (7th Cir. 2014) ("[A] post-deprivation remedy is sufficient to satisfy due process in such situations [land-use decisions].").

OSGC outlines additional steps the City could have taken, including that "the City should have devised a manner to consider that decision that would have prevented a fabricated reason for it." Dock. No. 14, p. 23. Whatever process OSGC had in mind by this, procedural due process does not turn on what additional process the city could have provided. The Seventh Circuit has rejected such arguments as "speculative" and "irrelevant." *Bettendorf v. St. Croix County*, 631 F.3d 421 (7th Cir. 2011). Where the plaintiffs in *Bettendorf* complained that another procedure would have provided "more or better process" than it received in state court proceedings, the Seventh Circuit denied his claim, holding "[t]he due process clause requires that a claimant receive adequate process, not the most advantageous process available to him." *Id.*

The theme throughout OSGC's Complaint and arguments is that OSGC is not dissatisfied with the process they received—it is dissatisfied with its losses. In *Shipyard Development, LLC v. City of Sturgeon Bay*, this Court denied just such a claim: "[I]t is clear from its complaint that Shipyard is not seeking notice and a hearing on its right to a prompt determination. Shipyard wants money for the losses it claims to have sustained as a result of the delay. Shipyard's claims are not for a denial of procedural protections." No. 09-C-216, 2011 WL 748146 (E.D. Wis. Feb. 24, 2011).

F. <u>OSGC has not alleged a violation of substantive due process.</u>

As an initial matter, OSGC accuses the City of conflating substantive due process with procedural due process and cites *River Park, Inc. v. City of Highland Park* as an example of a case relied on by the City that involved only procedural due process claims. Dock. No. 14, p. 24. This criticism ignores that the Seventh Circuit applied *River Park* to claims for substantive and procedural due process in *CEnergy-Glenmore*. 769 F.3d at 489 ("[R]egardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court.") (citing *River*

Park, 23 F.3d at 167 ("Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court.") Thus, the requirements of *River Park* apply to both substantive and procedural due process claims. That said, the City agrees that substantive and procedural due process claims are distinct insofar as substantive due process claims are "very limited" and a more "difficult undertaking, especially if the claim involves zoning or other real property regulatory actions by a governmental body." *Bettendorf*, 631 F.3d at 426; *see also Donohoo v. Hanson*, No. 14-309, 2015 WL 5177968, *9 (W.D. Wis. Sept. 3, 2015) ("To prevail on a claim that defendants deprived him of substantive due process, Donohoo's burden is even greater [than for a procedural due process claim].")

OSGC attempts to distinguish *CEnergy-Glenmore* by citing the loss of its building permit and "significant funds spent in reliance on the town's actions." Dock. No. 14, p. 26. As to the building permit, the loss of a building permit clearly does not entitle plaintiffs to a claim for substantive due process. *Harding v. County of Door*, 870 F.3d 430 (7th Cir. 1989) (finding no substantive due process violation for withdrawal of building permit). As to the "significant funds," OSGC has put the cart before the horse. Before it can state a claim for damages under section 1983, OSGC must first allege a constitutional violation. Instead, OSGC asks the Court to find a violation based on the measure of its losses. OSGC repeats this theme throughout its bulleted list of grievances. Dock. No. 14, pp. 27, 28. The "magnitude" of OSGC's damages is not a proxy for arbitrariness.

The only Seventh Circuit case OSGC cites as having found a violation of substantive due process is *Peninsula Properties, Inc. v. City of Sturgeon Bay*, No. 04-692, 2005 WL 2234000 (E.D. Wis. Aug. 17, 2005). There, plaintiffs presented a viable case for substantive due process violations by alleging that the City "refused to act as a means to coerce a citizen to take unwarranted action." *Id.*, *8. OSGC has not alleged conduct that amounts to coercion. *See*

Complaint. Nor does the conduct support an inference "that the City intentionally sought to harm OSGC." Dock. No. 14, p. 28. The worst that might be said about the allegations is that the City yielded to political pressure, an allegation that decidedly does not support a claim for procedural due process. *River Park*, 23 F.3d at 167 ("the due process clause permits municipalities to use political methods to decide [land-use matters]").

G. <u>The Complaint has not alleged a claim or standing on behalf of GBRE.</u>

Plaintiffs argue that by referring to OSGC and its subsidiary GBRE collectively, they are excused from showing that GBRE is independently entitled to relief. Dock. No. 14, p. 30. According to Plaintiffs, the facts alleged on behalf of OSGC were alleged for both entities and the City is free to parse out the distinctions in discovery. *Id.*

Exactly this style of "vague drafting" was rejected by the Eastern District in *Holmes v. City of Racine*, No. 14-CV-208-JPS, 2014 WL 3738050, *12 (E.D. Wis. July 30, 2014) (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555 (YEAR)). There, multiple plaintiffs pursued RICO claims against multiple defendants, but the plaintiffs' complaint failed to make clear which defendants harmed which plaintiffs. *Id.* The court found this insufficient to confer standing:

> Here is what is clear: each plaintiff must allege facts that, taken as true, would show a claim for relief that is plausible on its face. In other words, the Court will not allow them to escape dismissal simply by pleading a host of facts which they then incorporate into claims against all or groups of the defendants…. [A]bsent factual allegations that would establish facial plausibility of RICO claims against specific defendants *by specific plaintiffs*, the Court will be obliged to dismiss the RICO portions of the plaintiffs' amended complaint.

Id. (citing *Aschcroft v. Iqbal*, 556 U.S. 662, 663) (2009)) (emphasis added). This reasoning applies with equal force here—Plaintiffs' Complaint failed to establish facial plausibility of claims against the City "by specific plaintiffs" and must be dismissed for lack of standing.

The reasoning from *Holmes* also renders GBRE's claim deficient for purposes of Rule 8(a)(2). Where a complaint fails to show damages sufficient to confer standing, it also necessarily fails to "show[] that the pleader is entitled to relief," fails to "give the defendant fair notice of what the… claim is and the grounds upon which it rests," and fails to satisfy Rule 8. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (citing Fed. R. Civ. P. 8(a)(2)).

Dated this 14th day of March, 2017.

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/s/ Gregg J. Gunta

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March 14, 2017

Via ECF

Jon W. Sanfilippo, Clerk
United States District Court
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Re: Oneida Seven Generations Corporation, et al. v. City of Green
Case No. 16-C-1700

Dear Mr. Sanfilippo:

Defendant, City of Green Bay, electronically files its Reply in Support of Defendant's Motion to Dismiss Plaintiff's Complaint with unpublished cases, and Second Declaration of Gregg J. Gunta in Support of Defendant's Motion to Dismiss the Complaint for Lack of Capacity to Sue, with exhibit.

Thank you in advance for your assistance with this matter.

Very truly yours,

/s/ Gregg J. Gunta

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2014 WL 3738050
United States District Court,
E.D. Wisconsin.

Thomas J. HOLMES, Otha Keith Fair, Jose Maldonado, Maria E. Maldonado, Cerafin Davalos, Wilbur Jones, Pythaphone Khampane, and Omjai Nueakeaw, Plaintiffs,
v.
CITY OF RACINE, Gary Becker, John Dickert, Downtown Racine Corporation, Tavern League of Racine City, Kurt S. Wahlen, Jeffrey A. Coe, James Kaplan, Gregory T. Helding, David L. Maack, Aron Wisneski, Robert Mozol, Devin P. Sutherland, Mark L. Levine, Joseph G. Legath, Douglas E. Nicholson, Monte G. Osterman, Mary Osterman, and Gregory S. Bach, Defendants.

No. 14–CV–208–JPS.
|
Signed July 30, 2014.

Attorneys and Law Firms

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ORDER

J.P. STADTMUELLER, District Judge.

***1** The plaintiffs—black, Hispanic, and Thai former owners of bars in downtown Racine, Wisconsin—filed their complaint in this action on February 25, 2014. (Docket # 1 ("Compl."), ¶¶ 9–15). In it, they allege that the defendants—the City of Racine, local politicians, a political group, and a nonprofit—engaged in various activities designed to eliminate minority-owned bars, specifically those owned by the plaintiffs, from operating in downtown Racine. (*E.g.*, Compl., ¶ 4). This, the plaintiffs assert, violated their civil rights and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and thus they brought suit against the defendants under the Civil Rights Act ("CRA"), 42 U.S.C. §§ 1983, 1985(3), and RICO, 18 U.S.C. §§ 1962(b)-(d). (*E.g.*, Compl., ¶ 5).

The defendants, in four separate groups (which the Court will discuss in further detail later in this opinion, but essentially deriving from the identity of the attorneys representing them), moved to dismiss the complaint. (Docket # 25, # 28, # 31, # 36). The plaintiffs responded to the defendants' four separate motions, largely opposing them. (Docket # 45, # 46, # 47, # 48). However, the plaintiffs did agree to dismiss certain aspects of their claims (which, again, the Court will discuss more fully, as follows). (*See* Docket # 45 at 41, 43, 48–50). The plaintiffs also entered a stipulation to dismiss one of the individual defendants (Docket # 49), which the Court adopted (Docket # 50). Thereafter, the separate groups of defendants filed their respective reply briefs, (Docket # 52, # 55, # 57, # 58), meaning that the motions to dismiss are now fully briefed and ready for a decision.

Needless to say, this matter is very complex. If the four separate motions to dismiss were not enough, several of the briefs in support of those motions exceed the typical page limits. (*See* Docket # 20, # 43, # 51). But that is not to say that the motions were unnecessary; indeed, they raise legitimate shortcomings with the plaintiffs' complaint. Due to the vast number of plaintiffs and named defendants, the complaint suffers from its breadth, creating significant confusion as to who, precisely, is claiming what against whom.

Thus, given the complexity, the Court believes that it is best to use this order to try to clear up the confusion. This requires that the Court take pains to be very specific, starting by describing the general nature of the plaintiffs' allegations, then specifically detailing the plaintiffs' claims and which aspects of those claims the plaintiffs have agreed to dismiss. After providing that background, the Court will address the remaining substance of the outstanding motions to dismiss.

In the end, the Court finds that it has no choice but to dismiss the complaint. As already noted and as will be

described in further detail, the complaint is much too vague to provide any meaningful notice to the defendants of the respective plaintiffs' claims. This is not to say that the plaintiffs' claims are necessarily without merit—in fact, their general allegations suggest a case with serious potential that should proceed to discovery. For that reason, the Court will allow the plaintiffs an opportunity to amend their complaint in a way that comports with the following discussion.

1. PLAINTIFFS' ALLEGATIONS

***2** The Court begins with a general discussion of the plaintiffs' factual allegations. At this stage of the proceedings, the Court must accept all of the plaintiffs' well-pleaded factual allegations as true. *See, e.g., Ashcroft v. Iqbal,* 556 U.S. 662, 663 (2009) (complaint must "contain sufficient factual matter, *accepted as true,* to 'state a claim to relief that is plausible on its face.' ") (emphasis added; quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Thus, in describing the plaintiffs' allegations, the Court does not mean to imply that they are necessarily true. Rather, the Court recounts them only for the purpose of providing the relevant record upon which it must assess the defendants' motions to dismiss.

1.1 The Parties

There are eight plaintiffs in this case. They are all either black, Hispanic, or Thai, and owned several bars located in downtown Racine:

(1) **Thomas Holmes** is black and owned and operated the **Park 6 Bar** from 2008 to 2012 (Compl., ¶ 9);

(2) **Otha Keith Fair** is black and owned and operated **The Place on 6th, LLC,** from 2009 to 2012 (Compl., ¶ 10);

(3–4) **Pythaphone Khampane** and **Omjai Nueakeaw** are Thai–American and Thai, respectively, and together owned and operated **Ginger's Lounge** from 2008 to 2011 (Compl.¶¶ 11–12);

(5) **Wilbur Jones** is black and owned and operated **Viper's Lounge** from 1998 to 2008 (Compl.¶ 13);

(6) **Cerafin Davalos** is Hispanic and owned and operated **Cera's Tequila Bar** from 2006 to 2008 (Compl.¶ 14);

(7–8) **Jose Maldonado** and **Maria Maldonado** are Hispanic and together owned and operated **The Cruise Inn** from 2001 to 2006 (Compl.¶ 15).

They brought suit against a number of defendants, including the City of Racine and various individuals and groups involved in Racine's local politics. (*See* Compl. ¶¶ 16–35). Those defendants have since split into several separate groups, as follows:

(1) the **Municipal Defendants,** which includes:

(a) **the City of Racine** (hereinafter "Racine" or "the City") (Compl.¶ 16);

(b) **John Dickert,** Racine's current mayor, who has held that position since May of 2009 (Compl.¶ 17);

(c) **Gary Becker,** Racine's former mayor, who served in that position from May of 2003 until May of 2009 (Compl.¶ 18);

(d) **Kurt Wahlen,** who served as Racine's police chief from 2007 until April of 2012 (Compl.¶ 21);

(e) **Jeffrey Coe,** an alderman sitting on Racine's Common Council from April of 2001 through April of 2005, April of 2007 through April of 2011, and April of 2013 through present (Compl.¶ 22);

(f) **James Kaplan,** an alderman sitting on Racine's Common Council from April of 2006 through present, during which time he has served on the City's Board of Health and Licensing Committee (Compl.¶ 23);

(g) **Raymond DeHahn,** an alderman sitting on Racine's Common Council from April of 2005 through April of 2011, during which time he served on the City's Licensing Committee (Compl.¶ 24);

***3** (h) **Gregory Helding,** an alderman sitting on Racine's Common Council from April of 2005 through present, during which time he served on the City's Licensing Committee (Compl.¶ 25);

(i) **David Maack,** an alderman sitting on Racine's Common Council from April of 2000 through April of 2010, during which time he served on the City's Licensing Committee (Compl.¶ 26);

(j) **Aron Wisneski,** an alderman sitting on Racine's Common Council from April of 2006 through April of 2012, during which time he served on the City's Licensing Committee (Compl.¶ 27);

(k) **Robert Mozol,** an alderman sitting on Racine's Common Council from April of 2007 through April of 2013, during which time he served on the City's Licensing Committee (Compl.¶ 28);

(l) **Devin Sutherland,** who serves as manager of Racine's Downtown Business Improvement District ("BID # 1") and executive director of the Downtown Racine Corporation (the Court will discuss both BID # 1 and the Downtown Racine Corporation in further detail, below) (Compl.¶ 29);

(m) **Mark Levine,** who serves as the chairman of BID # 1 and also owns property within BID # 1 (Compl.¶ 30);

(n) **Joseph LeGath,** a member of the BID # 1 board, who also owns several bars in Racine and serves as the director of the Racine City Tavern League (which the Court will discuss further, below) (Compl.¶ 31); and

(o) **Gregory Bach,** Mayor Dickert's assistant (Compl.¶ 35);

(2) the **Political Staff Defendants,** a term the Court has created to describe the group that include:

(a) **Doug Nicholson,** a member of the Racine City Tavern League, who owns several bars withing BID # 1 and also serves on the City's Board of Ethics (Compl.¶ 32);

(b) **Monte Osterman,** who assisted Mayor Dickert with his 2009 and 2011 mayoral campaigns (Compl.¶ 33); and

(c) **Mary Jerger Osterman,** who served as Mayor Dickert's treasurer for his 2009 and 2011 mayoral campaigns (Compl.¶ 34);

(3) the **Downtown Racine Corporation,** a private, non-profit corporation that works to enhance Downtown Racine's image and functionality and contracts with the City to manage BID # 1, the Downtown Racine Corporation is managed by an Executive Director (Devin Sutherland, one of the Municipal Defendants) and governed by a Board of Directors (some of whom are named Municipal Defendants) (Compl.¶ 19); and

(4) the **Racine City Tavern League** (the "Tavern League"), a nonprofit corporation that, essentially, serves as a lobbying group for alcohol retailers in Racine, Wisconsin (Compl.¶ 20), and currently has approximately 83 members, the vast majority of whom are white (Compl.¶ 20).

1.2 The Plaintiffs' Factual Allegations

Current–Mayor Dickert was elected in May of 2009.[1] (Compl.¶ 17, 39). He replaced former-Mayor Becker, who was found to have engaged in criminal conduct and resigned in January of 2009. (Compl .¶ 39).

From the start of his campaign, current-Mayor Dickert made clear his intent to "revitalize" and "clean up" downtown Racine, getting rid of "undesirable" or "problem" patrons. (Compl.¶ 40). This was obviously a view he shared with some members of the Tavern League—including Municipal Defendant LeGath and Political Staff Defendant Nicholson—who contributed large amounts of money to current-Mayor Dickert's campaign. (Compl.¶ 41). Those contributions were allegedly in excess of statutory limits, and the campaign allegedly fraudulently reported them when depositing them into the campaign account. (Compl.¶ 41).

***4** There were allegedly some other financial shenanigans going on, both during and after current-Mayor Dickert's election. First, he allegedly received sizeable personal loans from family members and staff members, which he deposited into his personal account; he then wrote checks to his campaign from those funds, all to avoid contribution limits. (Compl.¶ 42). Further, after becoming mayor, Dickert allegedly continued to accept money from Tavern League members and other business owners in Racine. (Compl.¶ 43). He deposited that money into his campaign accounts for use in his 2011 reelection campaign, and allegedly has continued to receive such contributions. (Compl.¶ 43).

So, why did the donors make these allegedly illegal contributions to current-Mayor Dickert? According to the plaintiffs, it was to both sway Dickert's agenda and to, essentially, buy positions in Racine's municipal

government from which they could control the agenda further. (Compl.¶¶ 41, 44).

The plaintiffs allege that "Dickert conspired with Alderpersons, Police Department officials, the Downtown Racine Corporation, BID # 1 Board members, and business and property owners to prevent minority bar owners from obtaining and/or maintaining their liquor licenses and to ensure white Tavern League members kept their respective liquor licenses." (Compl.¶ 44). According to this theory, the Police Department (presumably at current-Mayor Dickert's direction) would target minority-owned bars and report crimes and other disturbances that occurred there at a higher rate. Citizens (presumably at the control of either the Dickert campaign, the Tavern League, or conspiring business owners) would do the same. Those reports resulted in the minority-owned bars being called before the Common Council for a hearing. There, the Common Council often required that the minority-owned bars take expensive steps to combat the problems, such as installing cameras or hiring off-duty police officers to provide security. If the owners could afford to take such steps—and not all could, instead choosing to voluntarily relinquish their licenses—they then had to walk a very tight rope, because the slightest slip-up would result in additional hearings and, eventually, the loss of their liquor licenses. [2] Those lost liquor licenses were, in turn, acquired by white individuals. (Compl.¶¶ 44, 46–67, 90–138). White-owned bars, meanwhile, were reported far less often—occasionally even receiving the benefit of having police officers list the location of a disturbance as having occurred in a general area or separate address, so as to disguise the fact that the disturbance had occurred in their bar. Then, even when the white owners were called before the Common Council, they escaped with less or no additional safety requirements and did not face the same license-loss prospects that the minority owners did. (Compl.¶ 68–89). [3]

And, if this course of conduct was intended to rid downtown Racine of all minority-owned bars, it succeeded: there currently are not any minority-owned bars in downtown Racine. (Compl.¶ 65). The plaintiffs all lost or relinquished their licenses, some after spending large amounts of money on complying with Common Council safety requirements.

2. PLAINTIFFS' CLAIMS AND AGREEMENTS TO DISMISS

***5** On the basis of those alleged facts, the plaintiffs filed suit against the defendants. Their complaint alleges five separate claims.

(1) The CRA conspiracy claim, pursuant to 42 U.S.C. § 1985(3). In this claim, the plaintiffs claim that the defendants conspired to deprive the plaintiffs of their civil rights, specifically the equal protection of the law and equal privileges and immunities under the law, on the basis of their race (Compl.¶¶ 139–45).

(2) The general CRA claim, pursuant to 42 U.S.C. § 1983. In this claim, the plaintiffs allege that each of the defendants, acting under color of state law, deprived the plaintiffs of their civil rights, specifically the equal protection of the law and equal privileges and immunities under the law, on the basis of their race (Compl.¶¶ 146–50).

(3) The RICO acquisition claim, pursuant to 18 U.S.C. § 1962(b). In this claim, the plaintiffs allege that the defendants targeted the plaintiffs and obtained power or control over their businesses through a scheme of corrupt and illegal activities (Compl.¶¶ 151–66). [4]

(4) The RICO conduct claim, pursuant to 18 U.S.C. § 1962(c). In this claim, the plaintiffs allege that the defendants conducted corrupt and illegal activities through their businesses or the Racine municipal government (Compl.¶ ¶ 167–74).

(5) The RICO conspiracy claim. In this claim, the plaintiffs allege that the defendants conspired in carrying out the corrupt and illegal activities. (Compl.¶¶ 175–84).

One of the first giveaways that the plaintiffs' complaint may have problems is the fact that it totally fails to clarify who is making which of these claims against whom and in what capacity. Rather than work with a rifle, the plaintiffs unholstered their bazooka: without any clarifying language in the complaint, it seems clear that *each* plaintiff intends to allege *each* claim against *each* defendant (and in the case of the individual defendants, those claims are against them in *each* of their capacities—official *and* individual).

They have attempted to walk that back a bit by agreeing to narrow their claims slightly in the following ways:

(1) dismissing all claims against Raymond DeHahn (Docket # 49, # 50);

(2) dismissing their RICO claims against Racine (Docket # 45 at 41);

(3) dismissing their RICO claims against individual Municipal Defendants (Dickert, Becker, Wahlen, Coe, Kaplan, DeHahn, Helding, Maack, Wisneski, Mozol, Sutherland, Levine, LeGath and Bach), to the extent that such claims were made against them in their "official capacity" (Docket # 45 at 41);

(4) dismissing their CRA claims against the individual Municipal Defendants (Dickert, Becker, Wahlen, Coe, Kaplan, DeHahn, Helding, Maack, Wisneski, Mozol, Sutherland, Levine, LeGath and Bach) in their "official capacity" (Docket # 45 at 43);

(5) dismissing their RICO acquisition claim, pursuant to 18 U.S.C. § 1962(b), against Downtown Racine Corporation (Docket # 57 at 9); and

***6** (6) dismissing their RICO acquisition claim, pursuant to 18 U.S.C. § 1962(b), against the Political Staff Defendants (Osterman, Jerger, and Nicholson) (Docket # 52 at 7).

To some further unspecified extent, the plaintiffs have also acknowledged or not disputed that portions of their claims cannot lie in the following manner:

(1) that plaintiffs Davalos, Jones, and Fair cannot sustain their claims against the Municipal Defendants on the Common Council to the extent those claims are based upon the Common Council's decision to revoke or to not renew their liquor licenses (though they assert that they can maintain their claims relating to "side agreements") (Docket # 45 at 48);

(2) that plaintiffs Khampane, Nueakeaw, and Holmes cannot sustain their claims against Municipal Defendant Maack to the extent those claims are based upon the Common Council's decision to revoke or to not renew their liquor licenses (though they assert that they can maintain their claims relating to "side agreements") (Docket # 45 at 49–50); and

(3) that plaintiffs Fair and Holmes cannot sustain their claims against Municipal Defendant Wisneski to the extent those claims are based upon the Common Council's decision to revoke or to not renew their liquor licenses (though they assert that they can maintain their claims relating to "side agreements") (Docket # 45 at 49–50).

On this basis alone, the Court would find it appropriate to dismiss the plaintiffs' complaint in order to have them file an amended version. Frankly, given the breadth of the complaint and the plaintiffs' vague and haphazard attempts to pare it back, the Court is seriously confused about what claims are viable and against whom. Without a doubt, the parties, including the plaintiffs, must be too. Therefore, it would be appropriate to require an amended complaint if only so that the plaintiffs could clarify what claims they are actually continuing to assert in this case.

3. DISCUSSION

There are, however, other problems with the complaint. Rather than dismiss it on that basis alone to allow a clarifying amendment, only to have the same disputes bubble up to the surface again, the Court will address the merits of the defendants' motions to dismiss.

In doing so, the Court must accept all of the plaintiffs' well-pleaded factual allegations as true to determine whether the complaint states " 'a claim to relief that is plausible on its face.' " *Iqbal,* 556 U.S. at 663 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. This plausibility requirement helps "to protect defendants from having to undergo costly discovery unless a substantial case is brought against them." *United States v. Vaughn,* 722 F.3d 918, 926 (7th Cir.2013).

***7** With that standard in mind, the Court turns to addressing the substance of the defendants' motions to dismiss. Because of the vast number of allegations and the fact that those allegations affect different groups of defendants in different ways, the Court will address each group's motion to dismiss separately.

3.1 Municipal Defendants

The Municipal Defendants' motion to dismiss is the most substantial. In it, they point out serious problems with the plaintiffs' CRA and RICO claims against them.

3.1.1 CRA Claims

The Municipal Defendants have several valid concerns with the plaintiffs' CRA claims.

3.1.1.1 No Third Party Standing

First, the Municipal Defendants are right to clarify that the plaintiffs cannot bring claims on one another's behalf. It may not have been the plaintiffs' intent, but because their complaint does not specify individual claims, it seems that each individual plaintiff may be trying to allege claims on behalf of other plaintiffs or unnamed parties. To the extent they are attempting to do so, that is impermissible. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 17–18 (2004) (litigant cannot sue in federal court to enforce the rights of third parties); *Rawoof v. Texor Petroleum Co., Inc.,* 521 F.3d 750, 757 (7th Cir.2008). There is no doubt that each plaintiff has standing to bring his or her own CRA claims, and allegations with respect to other plaintiffs may be pertinent to each individual plaintiff's claims. (Docket # 45 at 42). The confusion creeps in because the plaintiffs lumped every single one of their individual claims into single claim sections for 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3), respectively. (Compl.¶¶ 139–50). That joining of the multiple individual claims only serves to confuse matters. Therefore, in filing an amended complaint, the plaintiffs should be sure to specify the extent of their individual claims.

3.1.1.2 Statute of Limitations on Maldonado Claims

Second,[5] there appear to be statute of limitations issues with the Maldonado plaintiffs' CRA claims. Under the applicable statute of limitations supplied by Wisconsin law, the Maldonados had to bring their CRA claims within six years of the date when they knew or should have known that their constitutional rights were violated. *See, e.g., Reget v. City of La Crosse,* 595 F.3d 691, 694 (7th Cir.2010) (six year limitations period on 42 U.S.C. § 1983 actions brought in Wisconsin, pursuant to Wis. Stat. § 895.53); *Gray v. Lacke,* 885 F.2d 399, 409 (7th Cir.1989) (same); *Draper v. Martin,* 664 F.3d 1110, 1113 (7th Cir.2011) (limitations period accrues when plaintiff knew or should have known of violation); *Hileman v. Maze,* 367 F.3d 694, 696 (7th Cir.2004) (same); *Kelly v. City of Chicago,* 4 F.3d 509, 511 (7th Cir.1993) (same). The Seventh Circuit uses a two-step test to determine the accrual date: first, identifying the injury, and, second, determining when the plaintiff could have sued for that injury. *Draper,* 664 F.3d at 1113 (citing *Hileman,* 367 F.3d at 696).

***8** So, what was the Maldonados' injury? Presumably when they were the victims of harmful actions—being subject to a due process hearing and "fines, threats, calls, and visits"—that forced them to sell their property, all of which allegedly occurred on the basis of their race.

Next, when could the Maldonados have sued for that injury? This question is up for debate. The Municipal Defendants argue that it accrued no later than January 9, 2007, the date on which the Maldonados sold their establishment. This would be the case if the Court were to adopt the Municipal Defendants' arguments and find that the Maldonados should have been aware that they were treated disparately from white owners, because those white owners' liquor license renewals were a matter of public record. (*See, e.g.,* Docket # 58 at 25–26). That argument gives every appearance of a stretch: it assumes that the Maldonados should have been aware of the issues at other establishments and aware that the owners were white, then utilized that information in conjunction with the public knowledge that the white owners' liquor licenses had been renewed. Thus, while the Municipal Defendants cite persuasive authority for the proposition that the Court should not extend the CRA accrual date when the Maldonados could have discovered their injury on the basis of public records (Docket # 58 at 26) (citing *Wise v. Hubbard,* 769 F.2d 1, 2–3 (1st Cir.1985); *Perry H. Bacon Trust v. Transition Partners, Ltd.,* 298 F.Supp.2d 1182, 1191–92 (D.Kan.2004); *Vieyra v. Harris County,* No. 10–CV–1412, 2010 WL 4791518, at *5 (S.D.Tex. Nov. 17, 2010); *Hanson v. Johnson,* No. Civ. 02–3709, 2003 WL 21639194, at * 3, *5 n. 2 (D. Minn. June 30, 2003); *Soliman v. Philip Morris Inc.,* 311 F.3d 966, 975 (9th Cir .2002)), the Maldonados would have needed much more detailed knowledge to have known they could sue for their injury.

Thus, in the end, the Court determines that the Maldonados may maintain their claims in the amended complaint. In other words, in dismissing the complaint,

the Court does not do so with prejudice against the Maldonados.

However, the Maldonados should be aware that their claims remain on thin ice. The Court has not definitively determined that their claims escape the statute of limitations. Rather, it has found only that—on the basis of the record before it—the claims escape dismissal at this early stage. If there is reason to believe that the Maldonados should have known that their claims had accrued (or if the defendants can provide controlling or better-applicable law), then their claims may still be subject to dismissal.

3.1.1.3 Failure to Allege Personal Involvement

Third, one of the symptoms of the plaintiffs' overly-broad complaint is the fact that they fail to adequately allege that certain of the Municipal Defendants had any personal involvement in the alleged deprivations of the plaintiffs' civil rights. Of course, to be held liable under 42 U.S.C. § 1983, an individual defendant "must be 'personally responsible for the deprivation of a constitutional right.' " *Sanville v. McCaughtry,* 266 F.3d 724, 740 (7th Cir.2001) (quoting *Chavez v. Ill. State Police,* 251 F.3d 612, 651 (7th Cir.2001)). Unfortunately, in painting with a broad brush, the plaintiffs fail to explain how a number of the Municipal Defendants—specifically Becker, Wahlen, Sutherland, Levine, LeGath, and Bach—had any personal responsibility for depriving the plaintiffs of their civil rights. By and large, the allegations are too bare-bones to find even the spectre of personal responsibility; meanwhile, the plaintiffs do not explain how some defendants—Bach, for example, who did not begin working for Dickert until 2009—should be liable to *each* of the plaintiffs, even those who suffered alleged deprivations when those defendants could not have participated in a deprivation. [6]

***9** Again, this is a problem that stems from the plaintiffs' overly-broad complaint. In failing to connect the dots between each individual plaintiff's claims against each individual defendant, the plaintiffs have failed to plead 42 U.S.C. § 1983 claims against many of the named Municipal Defendants.

This is not a basis to dismiss those claims with prejudice, though. The plaintiffs may amend their complaint to clearly specify the defendants' personal involvement.

3.1.2 RICO Claims

Each plaintiff apparently alleges three separate RICO claims against each defendant, pursuant to 18 U.S.C. §§ 1962(b), 1962(c), and 1962(d), respectively. There are multiple problems with each claim.

3.1.2.1 Failure to Adequately Allege Predicate Acts Dooms All Three RICO Claims

While 18 U.S.C. §§ 1962(b), 1962(c), and 1962(d) each have distinct elements, they all require the existence of a "pattern of racketeering activity." *See* 18 U.S.C. §§ 1962(b-d) (the terms of subsection (d) may not specifically mention a pattern requirement, but in requiring a violation of subsection (a), (b), or (c), it effectively imports those sections' pattern requirement). A pattern of racketeering activity requires at least two "predicate acts" of racketeering activity. 18 U.S.C. § 1961(5). This means that the plaintiffs have to have pleaded at least two "act[s] or threat[s] involving ... bribery [or] extortion ...," in order to state a claim under 18 U.S.C. §§ 1962(b), 1962(c), and 1962(d). *See, e.g.,* 18 U.S.C. §§ 1961(1, 5), 1962(b-d).

The Court begins by again highlighting the lack of clarity in the plaintiffs' complaint. Despite providing a fairly detailed factual recitation at the beginning of their complaint, the plaintiffs never circle back to those facts in their RICO claims section to provide a specific detail of what they believe the predicate acts to be.

However, reading the complaint as broadly as possible, the Court agrees with the Municipal Defendants that there may be two groups of acts that may constitute predicate acts: (1) the alleged interference with the plaintiffs' liquor licenses ("the Liquor License Acts"); and (2) the alleged bribes and improper contributions to current-Mayor Dickert during his campaign, which are now allegedly ongoing ("the Campaign Acts"). (Docket # 26 at 12).

3.1.2.1.1 Liquor License Acts

The Liquor License Acts, at least on the state of the pleadings, cannot be treated as predicate acts. To begin, to the extent that the plaintiffs may be arguing that the Liquor License Acts constituted civil rights violations, which, in turn, constitute predicate acts, they are incorrect as a matter of law. *See, e.g., Jennings v. Emry,* 910 F.2d 1434, 1438 (7th Cir.1990) (violations of civil rights are not

RICO predicate acts); *Giuliano v. Fulton,* 399 F.3d 381, 388 (1st Cir.2005) (same). The plaintiffs do not seem to push that argument, though.

Instead, they try to convince the Court that the Liquor License Acts constitute extortion, under both federal law (18 U.S.C. § 1951) and state law (Wis.Stat. § 943.30). (Docket # 45 at 11–17). Extortion would, of course, qualify as a predicate act. 18 U.S.C. § 1961(5). The problem is that the factual allegations are not sufficient to escape Rule 12(b)(6) dismissal.

***10** Under federal law, there is no extortion where the sole beneficiary is a governmental entity. *Wilkie v. Robbins,* 551 U.S. 537, 564–66 (2007). On the state of the pleadings, it seems as if Racine was the sole beneficiary of the Liquor License Acts.

Of course, the plaintiffs disagree. They argue that their allegations "clearly support the reasonable inference that Defendants stood to gain financially, and otherwise, from their extortionate acts." (Docket # 45 at 18). But the plaintiffs do not explain *how* their allegations support those assertions. Perhaps they mean that, in taking action against the plaintiffs, the defendants received financial rewards or secured liquor licenses for themselves or others. But there are no specific allegations in the complaint stating so.

The plaintiffs also argue that the Municipal Defendants benefitted politically from their acts. It is a regular occurrence that an elected official—such as an elected sheriff—takes a tough-on-crime stance, which results in (typically lawful) deprivations of others' liberties, and for which the official is eventually rewarded politically by the electorate. The Court hesitates to classify such activity as extortion, as it would seem to open up a world of lawsuits against elected officials who are zealous in carrying out their otherwise lawful functions. [7]

As to the whether the Liquor License Acts satisfy Wisconsin's extortion statute, an argument first raised in the plaintiffs' response briefs, the Court finds similar problems. To begin, there is a similar government-as-beneficiary problem. There is no Wisconsin case law on the topic, but the Court struggles to see how the outcome should differ under Wisconsin law as compared to federal law (although, if this issue comes up again, the Court will welcome argument from the plaintiffs on the topic). Additionally, the allegations simply do not raise the specter of an extortionate scheme: it is unclear what the plaintiffs were threatened with to coerce them to act.

Finally, as with just about every other aspect of the plaintiffs' complaint, the plaintiffs simply never specify *who* actually did *what* that would satisfy the elements of either 18 U.S.C. § 1951 and state law Wis. Stat. § 943.30.

3.1.2.1.2 Campaign Acts

Likewise, the Campaign Acts cannot be treated as predicate acts on the state of the pleadings. Any potential violations of Wisconsin's campaign finance laws, as found in Wisconsin Statutes Chapter 11, would not necessarily constitute predicate acts. The terms of 18 U.S.C. § 1961(5) do not clearly include campaign finance violations. Furthermore, as the Municipal Defendants correctly point out, there is some question as to whether Wisconsin's campaign finance laws are even valid in light of recent Supreme Court and Seventh Circuit decisions. (Docket # 26 at 20 n. 9 (citing *McCutcheon v. Federal Election Comm'n,* —— U.S. ——, 134 S.Ct. 1434 (2014); *Wis. Right to Life, Inc. v. Barland,* No. 12–2915, —— F.3d —— (7th Cir. May 14, 2014))). Finally, even if Chapter 11 violations were predicate acts, the plaintiffs have done nothing more than provide conclusory allegations that such violations occurred. The Court is not applying a heightened pleading standard when it finds so: simply put, the plaintiffs have not alleged any *factual* matter to support a finding of a Chapter 11 violation, instead providing only conclusions that such violations occurred. *(See, e.g.,* Compl. ¶¶ 41–43 (stating that excess contributions were made and falsely reported, but providing no factual detail in support)).

***11** The plaintiffs' argument that the Campaign Acts constituted bribery also fails for lack of specificity. The plaintiffs have not alleged any communication between the multiple defendants to indicate an agreed *quid pro quo* transaction, as would be necessary to establish bribery. *See Kaye v. D'Amato,* 357 Fed. App'x 706, 714 (7th Cir.2009). There are no allegations regarding who paid what to whom and in exchange for what; thus, all of the hallmarks of a bribery claim—be it under federal law (18 U.S.C. §§ 201(b), 201(c)) or state law (Wis.Stat. § 11.25(1)) —are entirely missing, except for the bald conclusory statements that excess donations or improper loans were made for the purpose of a *quid pro quo* transaction.

Likewise, the plaintiffs' argument that money laundering occurred is not adequately supported. Again, there are no factual allegations to support a finding of money laundering—only a bald conclusion that there was money laundering. This is not enough.

Finally, to the extent that the plaintiffs argue that the Campaign Acts (or for that matter, the Liquor License Acts) fall under the definition of "predicate acts" as defined by Wisconsin's state RICO act, that fact would be irrelevant. The Court cannot find a federal RICO violation without a federal RICO predicate act. There may be some substantial overlap between the two statutes, but Wisconsin RICO predicate acts do not *per se* constitute federal RICO predicate acts.

In the end, given the myriad other issues with the complaint, the Court was going to dismiss this complaint anyway and this predicate acts analysis is of little impact. Perhaps, if that were not the case, the Court would have given the plaintiffs' claims a more charitable reading. But, given that the plaintiffs must amend their complaint anyway, the Court raises these concerns with the hope that the plaintiffs will consider them and draft their complaint taking them into account. [8]

3.1.2.2 Plaintiffs' RICO Standing

The Municipal Defendants also argue that the plaintiffs lack standing to pursue their RICO claim because they failed to allege that each Municipal Defendant engaged in at least two predicate acts and that such predicate acts harmed the plaintiffs. This is an important point for the plaintiffs to consider in drafting their amended complaint.

Though the Seventh Circuit has never specifically stated so, the Second Circuit has made clear that, to succeed on a RICO claim against any given defendant, the plaintiff must prove the elements of the claim against that defendant. *DeFalco v. Bernas,* 244 F.3d 286, 315 n. 19 (2d Cir.2000). In other words, if a plaintiff sues twenty defendants, she must prove every element of her claim against each defendant if she wishes to recover from each of them. This is a wise rule: why should defendants who did not engage, for example, in at least two predicate acts be held liable on a RICO claim simply because they were named with other defendants who did commit the two predicate acts?

***12** The Municipal Defendants also point out that the plaintiffs' RICO claims do not make clear which defendants' actions harmed which plaintiffs. As a simple matter of standing, the individual plaintiffs cannot maintain claims against defendants who did not harm them. *E.g. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992) (requiring a causal connection between plaintiff's alleged injury and challenged action of defendant). Thus, where the plaintiffs do not make clear how they were harmed by specific defendants' actions, it is not clear that they have standing to sue those specific defendants.

These rules are important and should be considered but do not necessarily mean that each plaintiff must absolutely plead two specific predicate acts separately against every defendant he or she is suing. That may be the wiser course of action, but given that the Court is looking for "plausibility," that does not seem that it is an absolute requirement.

This is not an invitation to engage in the same sort of vague drafting that the Court has seen so far, though. Here is what is clear: each plaintiff must allege *facts* that, taken as true, would show a *claim to relief* that is plausible on its face. *Iqbal,* 556 U.S. at 663. In other words, the Court will not allow them to escape dismissal simply by pleading a host of facts which they then incorporate into claims against all or groups of the defendants. Rather, the Court expects to see each plaintiff who wishes to assert a RICO claim to plead factual allegations, as specifically as possible, against the specific defendant(s) they allege that claim against so as to show a claim to relief that is plausible on its face. The Court cannot tell the plaintiffs how to do this-that is a matter of judgment. Suffice it to say that, absent factual allegations that would establish facial plausibility of RICO claims against specific defendants by specific plaintiffs, the Court will be obliged to dismiss the RICO portions of the plaintiffs' amended complaint.

3.1.2.3 § 1962(d) Claims

Finally, the Court points out that it agrees with the Municipal Defendants that, to the extent that the plaintiffs fail to plead an agreement that would violate either 28 U.S.C. §§ 1962(b) or 1962(c), they also fail to state a claim under 28 U.S.C. § 1962(d). For the reasons described above, the plaintiffs have not adequately stated facts that would show either a scheme that would violate 28 U.S.C. §§ 1962(b) or 1962(c) or an agreement to engage in

such a scheme. In drafting their amended complaint, the plaintiffs should keep this in mind, so as to ensure that they adequately plead those elements.

3.2 Political Staff Defendants

Next, the Court turns to the motion to dismiss filed by the Political Staff Defendants—Osterman, Jerger, and Nicholson. They raise some of the same arguments as the Municipal Defendants and some additional arguments specific to their own circumstances. The Court addresses all of those arguments, as follows.

3.2.1 CRA Claims

***13** The Court finds that the plaintiffs' CRA claims against the Political Staff Defendants are troubled for the same reasons described in Sections 3.1.1.1, 3.1.1.2, and 3.1.1.3, *supra,* in addition to the fact that the plaintiffs have not pleaded factual allegations in sufficient detail as against the Political Staff Defendants. Thus, as the Court has repeated several times, the plaintiffs should ensure that their amended complaint adequately addresses these issues.

The Court also points out that it is unclear whether the Political Staff defendants engaged in state action so as to allow them to be liable under 42 U.S.C. § 1983. In any event, to the extent that the plaintiffs wish to proceed against the Political Staff Defendants under 42 U.S.C. § 1985(3), they must bear in mind the need to allege concerted action between the Political Staff Defendants and the government actors.

3.2.2 RICO Claims

The Political Staff Defendants also object to the RICO claims against them on several grounds.

3.2.2.1 Lack of Mayoral Power over Liquor Licenses

The Political Staff Defendants argue that they cannot possibly be liable for RICO claims because, to the extent that they engaged in any bribery or extortion, they did so in relation to the mayor, who lacks power to issue or revoke liquor licenses. *(See, e.g.,* Docket # 52 at 2–4). The plaintiffs certainly should have made their points on these allegations more clearly in their complaint. But, the Court has already decided to allow the plaintiffs to amend their complaint. It seems as though the plaintiffs are alleging that the mayor engaged in other, non-legislative activities as part of the alleged scheme (for instance, directing the police officers to focus more heavily on minority-owned businesses). This may play into a RICO scheme. Though tenuous, the Court will not foreclose the plaintiffs from trying to connect these dots in their amended complaint.

3.2.2.2 Bribery and 18 U.S.C. §§ 201(b), 201(c) Violations Not Sufficiently Pleaded

The Political Staff Defendants also argue that—to the extent that the plaintiffs allege bribery or a violation of 18 U.S.C. §§ 201(b) or 201(c) as a predicate act-such allegations are not sufficiently pleaded. The Court agrees. If the plaintiffs wish to sustain those claims in their amended complaint, they should be sure to pay close attention to the elements of those claims and be sure to include facts that would establish the facial plausibility of the claims.

3.2.2.3 Lack of Enterprise Allegations

The plaintiffs' complaint is also devoid of any allegations that would show that the Political Staff Defendants played a significant role in the operation or management of an enterprise. *See, e.g., United States v. Cummings,* 395 F.3d 392, 397–400 (7th Cir.2005). This does not necessarily mean that the Court is finding that the plaintiffs cannot adequately plead such allegations—only that, in amending their complaint, the plaintiffs must allege sufficient facts that would do so.

3.2.2.4 Actions Prior to Dickert's Election

***14** The Political Staff Defendants have been brought into this case primarily because of their association with current-Mayor Dickert's campaign. To the extent that the plaintiffs argue that the Political Staff Defendants should be liable to any of the plaintiffs for activities that occurred before that campaign, they need to reexamine their contentions. Perhaps the plaintiffs have some basis to believe that the Political Staff defendants were involved in some of the pre-campaign activities, but that is not at all clear from the complaint. If the plaintiffs maintain their complaint against the Political Staff defendants on this basis, they had better provide clear allegations to establish how the political staff defendants could possibly be liable for pre-campaign activities.

3.3 Downtown Racine Corporation [9]

Downtown Racine Corporation (and its executive director, Devin Sutherland) by and large reiterate the Municipal Defendants' arguments as to the CRA and RICO claims. Accordingly, for the same reasons described in Sections 3.1.1 and 3.1.2, *supra,* the Court finds that the plaintiffs cannot sustain their claims against Downtown Racine Corporation and Sutherland. (The Court's analysis of the Political Staff Defendants in Sections 3.2.1 and 3.2.2, *supra,* is also relevant to the plaintiffs' claims against Downtown Racine Corporation and Sutherland.) Again, the plaintiffs will be permitted to amend their complaint as more fully described in those sections to ensure that they adequately state claims against Downtown Racine Corporation and Sutherland.

3.4 Tavern League

The Tavern League reiterates many of the arguments raised by the Municipal Defendants and the Political Staff Defendants. Accordingly, for the same reasons described in Sections 3.1.1, 3.1.2, 3.2.1, and 3.2.2, *supra,* the court finds that the plaintiffs cannot sustain their claims against the Tavern League. The plaintiffs will also be permitted to amend their complaint as more fully described in those sections to ensure that they adequately state claims against the Tavern League.

Finally, to address the Tavern League's one argument that is not addressed elsewhere, the Court advises the plaintiffs that, if they wish to sustain their action against the Tavern League, they should make clear how the Tavern League—itself, as opposed to its individual members—is liable for any claim they levy against it.

4. CONCLUSION

In sum, the Court will grant the defendants' motions and dismiss the plaintiffs' complaint in its entirety. The complaint is so broad and vague as to be virtually functionless. The Court will, however, allow the plaintiffs to amend their complaint. In doing so, the plaintiffs should give careful consideration to the Court's discussion, above. Perhaps most importantly, the plaintiffs need to ensure that each of their separate claims is clearly delineated and supported by factual allegations.

By filing such a broad and vague complaint, the plaintiffs imposed significant burdens on a broad swath of defendants. Many of those defendants seem to have had little involvement in the activities that the plaintiffs complain of. Thus, the Court admonishes the plaintiffs to carefully consider what claims they are bringing and against whom and avoid bringing meritless claims against blameless defendants. The plaintiffs' shotgun approach in their initial complaint is likely one of the reasons that the plaintiffs felt the need to make their individual claims so vague. Working with a scalpel rather than a butcher knife requires more time, but leads to a more precise result. And that precision will pay dividends in the long run, allowing the Court and parties to avoid worthless discovery (and attendant disputes), motions, jury instructions, and the other trappings of litigation that only grow more complex with additional superfluous parties.

***15** The Court requests that the parties be sure to engage in meaningful discussions with each other at every stage of the litigation. For instance, to the extent that, in future briefing, the multiple groups of defendants find that their arguments overlap, they may wish to file a joint motion. This would reduce the number of duplicative arguments being made before the Court. Likewise, it would be wise for the parties to discuss the plaintiffs' amended complaint as it is being drafted. In doing so, the parties may realize that they can reach some common ground as to what claims and defendants should remain in the case.

Finally, the Court addresses the Municipal Defendants' request that the Court require a RICO case statement in the plaintiffs' amended complaint, as is standard practice in the Eastern District of Louisiana. (Docket # 58 at 30). To be sure, a RICO case statement may be a very useful item to include in a RICO complaint. The plaintiffs should certainly consider including it. The Court will not, however, require such a statement. The pleading standards are those described in *Iqbal, Twombly,* and Rule 8 of the Federal Rules of Civil Procedure. If the plaintiffs satisfy those standards in their amended complaint—with or without a RICO case statement—only then the Court will allow the case to proceed.

Accordingly,

IT IS ORDERED that the plaintiffs' complaint be and the same is hereby **DISMISSED without prejudice;** the plaintiffs shall file an amended complaint within **21 days** of the entry of this order; the defendants shall have **21 days**

after the plaintiffs have filed an amended complaint to file their respective answers or appropriate motions.

All Citations

Not Reported in F.Supp.2d, 2014 WL 3738050, RICO Bus.Disp.Guide 12,516, RICO Bus.Disp.Guide 12,546

Footnotes

1 The plaintiffs claim, however, that the illegal activities engaged in by the defendants extend back into the term of former-Mayor Becker. *(See, e.g.,* Compl. ¶¶ 140, 153).

2 This is a simplification of the hearing process, which was largely conducted before the Licensing Committee (a sub-committee of the Common Council), but is sufficient for the purposes deciding the motions to dismiss.

3 In an effort to keep this order as short as possible, the Court has not included all of the facts described by the plaintiffs. But those facts are enlightening. The plaintiffs have provided a long recitation of the municipal actions taken against them, which—when compared to those taken against white-owned bars with very similar problems—are (on their face) clearly harsher than those directed at their white counterparts. Of course, we are at an early stage of the proceedings and discovery may ultimately reveal reasons for that treatment. Nonetheless, on its face, the course of conduct is concerning.

4 Or, at least, that is what they must be claiming, because 18 U.S.C. § 1962(b) is directed at preventing unlawful acquisition of power or control of a business. However, as the Court will discuss in further detail, the plaintiffs do not seem to flesh out the power/control aspect of their claim.

5 The Municipal Defendants have made other arguments against the plaintiffs' complaint, some of which the plaintiffs agreed with. *(See* Docket # 45, at 43). The Court has already addressed the plaintiffs' concessions in that regard in Section 2, *supra.* Therefore, the Court does not repeat them in this section.

6 The same discussion applies to the plaintiffs' claims against Maack and Wisneski, which it seems that the plaintiffs have conceded they cannot maintain, though that is not absolutely clear. *(See* Section 2, *supra).* If the plaintiffs elect to amend their complaint, they should keep these facts in mind.

7 The Court is not entirely foreclosing this issue. If it comes up again later in the case, the plaintiffs are free to brief it further, but the Court will not side with them absent citation to solid authority.

8 The plaintiffs' failure to plead any RICO predicate acts effectively prevents the Court from determining whether they sufficiently alleged a "pattern of racketeering activity." *See DeGuelle c. Camilli,* 664 F.3d 192, 199 (7th Cir.2011) (citing *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229 (1989)). The Municipal Defendants argue that the plaintiffs have failed to make allegations in that regard but, without any predicate acts to analyze for a pattern, the Court finds that it is wiser not to reach that question.

9 Downtown Racine Corporation's brief also addresses the plaintiffs' claims against Devin Sutherland, who seems to be separately represented as one of the Municipal Defendants. *(See* Docket # 58, purporting to have been made on behalf of Sutherland). It is not entirely clear which group Sutherland falls into—a determination that is made all the more difficult by the fact that Sutherland is mentioned *only once* in the plaintiffs' complaint and his role in the alleged activities is otherwise left entirely unclear. (Compl.¶ 29).

2011 WL 748146
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

SHIPYARD DEVELOPMENT, LLC, Shipyard Partners, LLC Boat Works Lofts, LLC, and The Vegetable Truck, LLC, Plaintiffs,
v.
CITY OF STURGEON BAY, Defendant.

No. 09–C–216.
|
Feb. 24, 2011.

Attorneys and Law Firms

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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WILLIAM C. GRIESBACH, District Judge.

***1** A group of developers (collectively "Shipyard"), upset with conditions imposed on them in carrying out their plan to develop property in downtown Sturgeon Bay ("the City"), and with delays caused by the City Administrator, filed this lawsuit under 42 U.S.C. § 1983, claiming that the City had violated Shipyard's substantive and procedural due process rights. State law claims for breach of contract and bad faith are also alleged in the complaint. An additional claim that the City's conduct amounted to an unconstitutional taking of property without just compensation in violation of both the United States and Wisconsin constitutions has apparently been abandoned. Federal jurisdiction exists under 28 U.S .C. §§ 1331, 1343, and 1367, and the case is presently before the court on the City's motion for summary judgment.

The City's motion will be granted. Even viewing the evidence in the light most favorable to Shipyard and drawing all reasonable inferences in its favor, as the court must at this stage of the proceedings, Shipyard's complaints do not amount to the violation of rights guaranteed by the United States Constitution. Accordingly, Shipyard's federal claims will be dismissed. With the federal claims gone, Shipyard's remaining state law claims will be dismissed without prejudice for lack of jurisdiction.

I. BACKGROUND

For many years the Peterson companies ("Peterson") operated a large shipbuilding facility in downtown Sturgeon Bay, Wisconsin. When Peterson ceased operations in 1996, the once-bustling shipyard turned into a quiet underused tract of waterfront property. In 2001, in order to encourage redevelopment of the Peterson property the City expanded a previously-existing downtown tax increment financing ("TIF") district to include the former shipyard property. TIF is a public financing method which is used to fund redevelopment projects. When a city creates a TIF district, the entire property tax revenue generated by new development within the district can be first used to pay the project costs, including financing costs, incurred by the city before other taxing authorities are allowed to share in it. *See* Wis. Stat. § 66.1105; *see also Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie,* 93 Wis.2d 392, 401–04, 288 N.W.2d 85 (1980).

Peterson marketed its property to developers and, in early 2003, Shipyard expressed interest in developing the property and proposed a development project (the "Project"). Shipyard informed the City that the Project consisted of a series of planned unit developments ("PUD's"), which it wished to construct in the following sequence: (1) a condominium complex in Peterson's old Electric Building ("Boat Works Lofts 1"), with units to go on the market by the end of 2004; (2) a Marina consisting of a clubhouse and piers with boat slips, to open in 2005; (3) two four-unit condominium buildings near the Marina and Electric Building ("Boat Works Lofts 2"), with units to go on the market by the end of 2005; and (4) a condominium complex along South 3rd Street ("Harborview"), with units to go on the market by the end of 2005.

***2** Shipyard told the City that although it recognized its PUD applications and other Project-related activities would have to comply with applicable City ordinances, Shipyard did not want to purchase the Peterson property

or proceed with the Project unless: (1) the City approved of Shipyard's development concept; (2) the City would cooperate in helping Shipyard obtain necessary permits from other agencies for Project facilities and would not interfere with the same; and (3) the City would act expeditiously in processing Shipyard's PUD applications and reaching a formal Development Agreement with Shipyard relating to TIF funding for the Project and related matters and would provide reasonable TIF funding. (Plaintiff's Proposed Findings of Fact, Dkt 53, "PPFF" 5.) Although no written agreement was entered into at that time, the City was in favor of the proposed development and agreed that it would cooperate with Shipyard in getting the necessary permits, negotiating an agreement and moving the project along. In May 2003, Peterson agreed in principle to sell the Property to Shipyard for development. On August 11, 2003 Shipyard signed an Option To Purchase with Peterson giving Shipyard the right to purchase the Property for $2.3 million. Closing did not occur until October 29, 2004, however.

On March 1, 2005, Shipyard entered into a written Development Agreement with the City. Under the terms of the Development Agreement, the City agreed to contribute $2,861,292 toward completion of the development project of which $200,000 was designated for park improvements. The rest of the funds contributed by the City were to be used for such items as building demolition, site preparation, geotechnical and environmental studies, dock wall repairs, retaining walls, road construction, lighting and landscaping. (Doc. 40–1, at 15.) Some of this work was to be performed by the City, and some by Shipyard. The Development Agreement set out a procedure for Shipyard to obtain approval and reimbursement for costs assumed by the City. All other costs of the private improvements that comprised the Project were to be borne by Shipyard. In addition, the plans and specifications for each PUD required City approval.

The Project did not go as smoothly as Shipyard hoped and planned. A number of disputes arose between Shipyard and the City, several of which Shipyard has attempted to cast as constitutional violations. The first concerned two parcels of the Property that the City agreed to purchase separately from Peterson for use as a public park. In early 2003, prior to Shipyard's purchase of the Property, the City had discussed with Peterson the City's interest in purchasing certain parcels of the property for use as a park. The City had applied for a grant from the Wisconsin Coastal Management Council ("WCMC") to purchase the park parcels at an estimated total project cost of $500,000. WCMC's contribution was to be 75% of the value of the property, as determined by an appraisal. On April 4, 2003, the parcels were appraised at a value of $435,000. Both Peterson and Shipyard thought the appraisal was too low. Shipyard claims that park parcels had a value closer to $700,000. The difference mattered to Shipyard because the $2.3 million purchase price it had agreed to pay Peterson for the Property was to be reduced by the amount Peterson received for the park parcels. In addition to the price of the park parcels, Shipyard also disputed the boundaries. Shipyard claims that Krauss told it that if Shipyard disputed either the $435,000 purchase price or the boundaries for the park parcels, Shipyard's PUDs would not be approved and it would receive no TIF funding. Faced with such a threat, Shipyard claims it agreed to the reduced purchase price and compromised with the City over the boundary dispute. Shipyard contends that the City's threat to refuse to approve its PUDs and deny it TIF funding if Shipyard did not drop its objections to the purchase price and boundaries for the park parcels constitutes a violation of its right to substantive due process.

***3** A dispute also arose in connection with a part of the Project that dealt with what had been the Peterson Electric Shop and Shipyard's plan to construct a wall separating it from the City's new park. Shipyard intended to save the Electric Shop and convert it into six high-end condominium units overlooking both the park and the waters of Sturgeon Bay. This portion of the development was referred to as "Boat Works Lofts 1." The Electric Shop building encroached on the City's Pennsylvania Street right of way, but because the building was over 100 years old, it was a "grandfathered" legal nonconforming use under City Ordinance § 20.26. In the Spring of 2005, prior to renovating the Electric Shop, Shipyard discussed the encroachment with Krauss. (PPFF 76.) After Krauss indicated that he did not see any problem with the encroachment, Shipyard moved forward and renovated the Electric Shop building. In order to assure condominium purchasers that the encroachment would not be a problem, Shipyard asked the City in late summer or early fall of 2005 to grant it a license for the Electric Shop's encroachment on the Pennsylvania Street right of way. (PPFF 89.) By that time, however, the City had

become concerned over public access to the new City park along Pennsylvania Street.

Public access from Pennsylvania Street became a problem as a result of changes in the design of the wall that Shipyard intended to construct adjacent to the Electric Shop. At the City's request, Shipyard agreed to construct a stepped or terraced wall, as opposed to the vertical wall it originally planned to build. The stepped wall encroached further onto the City's right-of-way, however, and would have prevented construction of the sidewalk that the City planned for pedestrians and bicyclists to use to access the new park from Pennsylvania Street. Despite the fact that the City had already approved the design, Krauss ordered a stop to construction of the wall and insisted that Shipyard grant the City an easement along a portion of Oregon Street leading to the new park. According to Shipyard, Krauss also made granting the City an easement along Oregon Street a condition of the City's granting Shipyard a license for the Electric Shop's encroachment onto the Pennsylvania Street right-of-way. Krauss told Shipyard that the City would object to the license unless Shipyard granted the City an easement to the Park along a portion of Oregon Street. (PPFF 90–92.) Ultimately, Shipyard agreed to convey to the City the easement it requested as part of a land swap that also included a parking lot the City owned. Here, too, however, Shipyard contends that the City's conduct amounts to a denial of substantive due process. Shipyard contends that the City's decision to impose such a condition on it without prior notice and an opportunity to be heard also constitutes a violation of its right to procedural due process.

Next, Shipyard contends that the City delayed the Project by ordering a new hearing for approval of the PUD application for development of the two 4–family condominium units planned as part of the Boat Works Loft 2 phase of the Project after it had already been approved. Under City ordinances, PUD applications required preliminary and final approval from the City Plan Commission and the City Council. The Commission is required to hold a public hearing before giving final approval, and notice of the hearing must be given to all property owners whose property lies within 300 feet of the exterior boundary of the property that is the subject of the proposed zoning amendment. (PPFF 93.) The Commission held a public hearing on the Boat Works Lofts 2 phase of the Project on May 18, 2005, and approved the preliminary PUD without objection. (PPFF 96.) Krauss insisted that a second hearing be held because notice had been sent only to those who owned property within 300 feet of the condominium units, as opposed to those with property within 300 feet of the entire project. Shipyards contends that notice to the additional property owners was clearly unnecessary and that Krauss needlessly delayed the project by insisting on a second hearing. This phase of the Project was again delayed after Krauss insisted on another hearing to approve what Shipyard contends were minor changes in the design of the garages for each of the units. Shipyard contends that it did not learn of the order for a new notices and public hearings until after Krauss had made the decisions and that it was therefore denied its right to procedural due process.

***4** Finally, Shipyard contends its right to procedural due process was violated by the manner the City dealt with it in connection with the sale of a parking lot. Under the March 1, 2005 Development Agreement between the City and Shipyard, the City promised to sell a parcel of land at the corner of Third and Quincy Streets ("the Parking Lot Parcel"). The Agreement provided that both the City and Shipyard were to obtain appraisals for the Parking Lot Parcel, and if the appraisal values differed by more than 15%, the sales price would be determined by averaging both of the appraisals along with a third independent appraisal. (PPFF 106–107.) In August 2005 Shipyard's appraiser appraised the parcel at $26,000, and Shipyard promptly provided its report to the City. Undisclosed to Shipyard, the City's assessor estimated the value of the Parking Lot Parcel at $25,000. The City retained its own appraiser who failed to comply with basic standards of reasonableness and placed the value at $75,000. Krauss did not share the City's appraisal with Shipyard, however, despite several requests from Shipyard. The City finally turned over the appraisal in February 2006 after Shipyard brought the issue to the City Council's attention. (PPFF 107, 113.) Because the difference between the two appraisals exceeded 15%, a third appraiser was selected who appraised the Parking Lot Parcel at $38,000. (PPFF 122.) After the third appraisal was completed, Shipyard chose not to proceed with the purchase of the Parking Lot Parcel as laid out in the Development Agreement. Shipyard eventually received the Parking Lot Parcel in July 2007 as part of a land swap agreement between the City and Shipyard. (DPFF 39.) Shipyard argues, however, that the City violated its right to procedural due process by obtaining an appraisal it knew was flawed, repeatedly refusing to provide Shipyard a copy of its appraisal, and

making baseless accusations that Shipyard's appraisal was flawed.

Shipyard claims that this same conduct and other actions taken by the City over the course of the Project also support its state law breach of contract claims. The other actions include Krauss' unfavorable testimony at a hearing on Shipyard's application for a permit from the Wisconsin Department of Natural Resources to construct a marina, and the City's delay and withholding of TIF payments. Because Shipyard's constitutional claims fail as a matter of law, however, and because the court declines to exercise jurisdiction over the remaining state law claims, it is not necessary to provide further detail concerning them.

II. ANALYSIS

A. Constitutional Claims

42 U.S.C. § 1983 is the statutory vehicle for bringing actions in federal court for constitutional violations. It provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...

***5** In order to maintain a claim under § 1983, Shipyard must show that the City deprived it of a right secured by the Constitution and laws of the United States, and that the City acted under the color of state law. *Brown v. City of Lake Geneva,* 919 F.2d 1299 (7th Cir.1990). Shipyard claims that the City deprived it of its Fourteenth Amendment right to substantive due process by improperly conditioning TIF funding and/or City approval of certain phases of the Project upon Shipyard's withdrawing its objections to the price and boundary lines of the park parcels the City purchased from Peterson and Shipyard's agreement to convey an easement over its land to the City. Shipyard claims the City violated its right to procedural due process by failing to provide advance notice and an opportunity to be heard before it decided to require the easement and conduct further hearings on the Boatworks Loft 2 phase of the Project, and by delaying its purchase of the Parking Lot Parcel. None of these claims has merit.

The Seventh Circuit has held that the special ripeness doctrine for constitutional property rights claims announced by the Supreme Court in *Williamson County Reg. Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 193–94 (1985), applies to substantive and procedural due process claims brought by property developers against state or local officials over limitations on the use of their land. *River Park, Inc. v. City of Highland Park,* 23 F.3d 164, 167 (7th Cir.1994) ("[A] property owner may not avoid *Williamson* by applying the label 'substantive due process' to the claim. So too with the label 'procedural due process.' Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court."). Under this doctrine, federal courts are precluded from adjudicating land use disputes until: "(1) the regulatory agency has had an opportunity to make a considered definitive decision, and (2) the property owner exhausts available state remedies for compensation." *Forseth v. Village of Sussex,* 199 F.3d 363, 368 (7th Cir.2000). Where the landowner elects to forego the state remedies, his federal claims will be dismissed. *See River Park,* 23 F.3d at 165 ("Litigants who neglect or disdain their state remedies are out of court, period .").

Even aside from *Williamson's* ripeness doctrine, Shipyard's substantive due process claims are of doubtful merit. For example, although Shipyard claims that the City coerced it into dropping its objections to the City's purchase price and proposed boundary for the park parcels, it is undisputed that the City purchased the park parcels from Peterson, not Shipyard, and that it agreed with Peterson on the price the City would pay before Shipyard even signed the option to purchase the Property. (Aff. of Martin Olejniczak, Ex. 32–33.) If Shipyard didn't like the price the City agreed to pay Peterson, it could have declined to purchase the Property and walked away from the Project, or negotiated a different price for the remainder of the Property with Peterson. Shipyard's boundary dispute with the City was resolved by a compromise, as were also the disputes over the Oregon Street easement and the Parking Lot Parcel. If Shipyard was unhappy with the compromises, it should not have entered into them. This is hardly the stuff of substantive

due process claims. *See Palka v. Shelton,* 623 F.3d 447, 453–54 (7th Cir.2010) (noting that official misconduct will rise to the level of a substantive due process violation "only if it shocks the conscience") (citing *County of Sacramento v. Lewis,* 523 U.S. 833, 846–47 (1998)).

***6** Shipyard's procedural due process claims are even more dubious. "To state a Fourteenth Amendment claim for the deprivation of a property interest without due process, a plaintiff must demonstrate that (1) he had a constitutionally protected property interest, (2) he suffered a loss of that interest amounting to a deprivation, and (3) the deprivation occurred without due process of law." *LaBella Winnetka, Inc. v. Village of Winnetka,* 628 F.3d 937, 943–44 (7th Cir.2010) (citing *Moss v. Martin,* 473 F.3d 694 (7th Cir.2007)). It is unclear what property interests Shipyard claims were taken away. Shipyard states in its brief that "Shipyard has made procedural due process claims based on (a) BWL [Boat Works Loft] 1 Building and Wall, (b) the delays in approving the BWL 2 Condo PUD and (c) the delays in conveying the Parking Lot Parcel." (Br. in Opp. at 32.) Shipyard apparently believes that it was entitled under its contract with the City to prompt approval of its project plans and a prompt (or at least more prompt) determination of the price it would be required to pay for the Parking Lot Parcel. But even if this is true, it still falls short of establishing the existence of a constitutionally protected property interest.

Shipyard cites *Peninsula Properties, Inc. v. City of Sturgeon Bay,* No. 04–C–692, 2005 WL 2234000 at *6 (E.D.Wis. Aug. 17, 2005), as support for its argument that "a municipality's repeated refusal to respond to requests for action to which the requestor is entitled may be a violation of procedural due process even if the municipality ultimately takes action." (Opp. Br. at 28.) This principle is not what *Peninsula Properties* holds, however. Shipyard's read certainly can't be correct as it is so broad that it would constitutionalize every adverse zoning decision. Moreover, it is clear from its complaint that Shipyard is not seeking notice and a hearing on its right to a prompt determination. Shipyard wants money for the losses it claims to have sustained as a result of the delay. Shipyard's claims are not for a denial of procedural protections. *See Taake v. County of Monroe,* 530 F.3d 538, 543 (7th Cir.2008) ("Taake used the words "procedural due process" in his complaint, but the remedies he seeks belie any suggestion that Taake is interested in notice and a hearing on the County's decision not to sell him the land. The only remedies Taake desires are for the alleged breach of contract: damages, specific performance of the land sale, and an injunction prohibiting the County from transferring or disposing of the land in a manner that violates the purported contract.").

Notwithstanding, or in addition to, these difficulties, however, Shipyard's constitutional claims must be dismissed because Shipyard has adequate state law remedies to resolve their claims against the City. Indeed, perhaps the strongest indication that Shipyard has available state law remedies is the fact that it has asserted them in the same action in which it asserts its constitutional claims. Shipyard has sued the City for breach of contract based on essentially the same factual allegations on which its due process claims rest. (Br. in Opp. at 34.) *See Forseth,* 199 F.3d at 373 ("Indeed, they implicitly acknowledge their failure to pursue available state remedies at that juncture by filing a substantially similar complaint in Wisconsin state court alleging claims under Wisconsin law following the district court's dismissal of this case."). Shipyard's contractual remedies and the other statutory remedies Wisconsin provides to those who seek judicial review of, or to compel, municipal action, i.e., certiorari, mandamus, are or were available to provide Shipyard whatever relief to which it may have been entitled. Shipyard's decision to compromise with the City so that the project could move forward does not change the result. *See Covington Court, Ltd. v. Village of Oak Brook,* 77 F.3d 177, 179 (7th Cir.1996) ("Instead, Covington chose to negotiate with Bailes, and the two parties reached an agreement that enabled the Whitehall Park project to go forward. Covington's instant lawsuit is an attempt to circumvent that decision.").

***7** The Seventh Circuit has repeatedly "reminded litigants that federal courts are not boards of zoning appeals." *Covington Court,* 77 F.3d at 179 (citing *River Park,* 23 F.3d at 165). That warning should have been heeded here. Shipyard's disputes with the City over the Project do not amount to the violation of Shipyard's constitutional rights. Accordingly, the City's motion for summary judgment on Shipyard's § 1983 claims will be granted.

B. State Law Claims

Having disposed of Shipyard's federal claims, the court must now decide whether to retain jurisdiction over its

state law claims against the City. "[T]he general rule is that, when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits." *Wright v. Associated Ins. Companies Inc.,* 29 F.3d 1244, 1251 (7th Cir.1994). But this is not always so. "There are ... unusual cases in which the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness and comity-will point to federal decision of the state-law claims on the merits." *Id.* The case law has established three exceptions to the general rule that supplemental federal jurisdiction over state law claims should be relinquished when the federal claims are dismissed: "when the refiling of the state claims is barred by the statute of limitations; where substantial judicial resources have already been expended on the state claims; and when it is clearly apparent how the state claim is to be decided." *Williams v. Rodriguez,* 509 F.3d 392, 404 (7th Cir.2007) (citing *Wright,* 29 F.3d at 1251–52).

Shipyard argues that the court should retain jurisdiction over its state law claims even if the federal claims are dismissed because substantial resources have already been expended in the case. To send the case to state court at this point, Shipyard argues, would cause a substantial duplication of those efforts. The City, on the other, hand, notes that "relinquishing federal jurisdiction is the norm rather than the exception." (Br. In Supp. at 30) (citing *Contreras v. Suncast,* 237 F.3d 756, 766 (7th Cir.2001)).

The court declines to retain jurisdiction. Although the parties have completed discovery and fully briefed the issue, this is usually the case when the general rule comes into play. Federal claims, if dismissed before trial, are typically dismissed after discovery has been completed and motions for summary judgment have been decided. Presenting the issue in a state forum should not require duplicating counsel's work; it simply shifts it to another forum. More importantly, retaining jurisdiction would require the court to resolve novel or at least complex issues of state law. This is precisely what the general rule requiring district courts to relinquish jurisdiction under such circumstances is intended to avoid: "the general rule that we have cited is designed to minimize the occasions for federal judges to opine on matters of state law." *Van Harken v. City of Chicago,* 103 F.3d 1346, 1354 (7th Cir.1997). Under these circumstances, comity, that is, "respect for the state's interest in applying its own law, along with the state court's greater expertise in applying state law, become paramount concerns." *Huffman v. Hains,* 865 F.2d 920, 923 (7th Cir.1989).

***8** Retention of federal jurisdiction over Shipyard's state claims would require the Court to determine the requirements of section 893 .80, Wisconsin's notice of claim statute, and whether Shipyard complied sufficiently to allow its claims to go forward. The court would also have to determine whether under Wisconsin law the "preliminary agreement" that Shipyard alleges the parties entered into in 2003 created any contractual rights or obligations of the parties. Shipyard's claim that the City breached its duty of good faith would require the court to wade into an area of Wisconsin law that is less than clear. Even the claims based on the Development Agreement between the parties would require this court to construe the Agreement's various provisions in light of the municipal ordinance and zoning provisions to which it refers. All this in the kind of case that the Seventh Circuit has repeatedly emphasized has no business in federal court. Under these circumstances, the court concludes that the prudent course is to decline to exercise federal jurisdiction over the remaining state law claims.

III. CONCLUSION

For the above stated reasons the City's motion for summary judgment is **GRANTED.** Shipyard's federal claims are dismissed without prejudice because they are not ripe. Shipyard's state law claims are also dismissed without prejudice because the court declines to exercise supplemental jurisdiction over them.

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United States District Court,
E.D. Wisconsin.

PENINSULA PROPERTIES, INC., et. al., Plaintiffs,
v.
CITY OF STURGEON BAY, et. al., Defendants.

No. 04-C-692.
|
May 8, 2006.

Attorneys and Law Firms

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Richard J. Carlson, Silton Seifert Carlson & Gamble SC, Appleton, WI, for Defendants.

DECISION AND ORDER ON DEFENDANTS' MOTIONS AFTER VERDICT

AARON E. GOODSTEIN, Magistrate Judge.

***1** On January 24, 2006, the jury returned its special verdict in favor of the named plaintiffs ("Developers") and against the defendants ("City"). The jury awarded the plaintiffs the sum of $481,007.00 as damages on the causes of action relating to plaintiffs' claims involving withholding issuance of building permits and awarded plaintiffs the sum of $48,022.00 as damages on the causes of action relating to plaintiffs' claims involving withholding issuance of partial mortgage releases. Judgment was entered accordingly, and on February 1, 2006, the defendants filed their post verdict motions pursuant to Rules 50 and 59, Fed.R.Civ.P. The plaintiffs filed a motion for attorney fees and costs pursuant to 42 U.S.C. § 1988. All matters are now fully briefed and ready for resolution.

Rule 50 Motion

The defendants have moved the court, pursuant to Rule 50(b), Fed.R.Civ.P. for judgment as a matter of law, or a new trial. Six grounds are presented, four which refer to the withholding issuance of building permit claims, and two which refer to the withholding issuance of partial mortgages claims. More specifically, the defendants challenge the jury's answers to Special Verdict Questions 1, 3, 5, 7, 10 and 12.

The standard for granting a Rule 50 motion is to look to the record as a whole and decide "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, was sufficient to support the jury's verdict ..." *Davis v. Wisconsin Dept. of Corrections,* 445 F.3d 971, 2006 WL 1098183 at *4 (7th Cir.2006); see also *Harbor Motor Co., Inc. v. Arnell Chevrolet-Geo, Inc.,* 265 F.3d 638, 644 (7th Cir. *2001) (citing Lane v. Hardee's Food Sys. Inc.,* 184 F.3d 705, 707 (7th Cir.1999)). As stated by the Seventh Circuit, "[w]e will overturn a jury verdict for the plaintiff only if we conclude that no rational jury could have found for the plaintiff." *Collins v. Kibort,* 143 F.3d 331, 335 (7th Cir.1998). In deciding this question, the court may not substitute its view of contested evidence for the view of the jury. *Place v. Abbott Labs.,* 215 F.3d 803, 809 (7th Cir.2000).

Prior to trial, the defendants raised legal challenges to the building permit and partial mortgage release claims, and the court issued decisions on the defendants' motion for judgment on the pleadings and motion for reconsideration. Based on the pretrial motions and the six days spent in trial, the parties are well acquainted with the facts and legal issues. Thus, in looking to the record to determine whether or not the verdict of the jury should be overturned, it is not necessary to engage in an extensive discussion of the facts or the law.

Building Permit Claims

The foundation for the City's challenge on these claims starts with its contention that the Developers did not apply for a regular building permit. If the Developers failed to apply for a regular building permit, there would be no support for the jury to find that the City either breached its duty of good faith under the contract, or violated substantive due process, in withholding issuance in order to impose a compressed building schedule on the Developers.

***2** The City contends that the Developers failed to comply with the applicable provisions of Wisconsin law and therefore did not submit a proper application for a multifamily building permit. Specifically, the City contends that the Developers failed to use proper forms,

failed to supply required information, did not pay the permit fee and did not contemplate commencing construction within the 60 days required by the City Code. The City submits that, at best, the Developers only applied for an "early start" permit at the time in question. The defendants argue that the jury was not entitled to find in their answer to Special Verdict Question 1 that the Developers applied for a regular building permit in October, 1998.

In response, the plaintiffs point to what they submit is ample evidence in the record to provide support for the jury's finding. The court concurs with the plaintiffs on this issue. Richard Giesler, on behalf of the Developers, submitted a letter and other documents to the City on October 22, 1998. The letter specifically stated that the submission contained "the necessary information to obtain a Building Permit for the subject project. I am applying for a permit for all three buildings." Exhibit 45. Giesler testified that it was his intention to apply for a regular building permit and that it was the practice of the City to review a checklist submission from the builder and prepare the formal application based on the information presented. After the City had prepared the application, it would contact the applicant who would then sign the form and pay the permit fee. Giesler's testimony in this regard was not refuted by the defendants, and the evidence substantiates this practice. Exhibit 43 is the form application and permit prepared by the City on one day, and signed by Giesler on the following day. Thus, the evidence establishes that the City had its own procedure for complying with state law in regard to the issuance of a building permit.

The same is true for the 60 day commencement of construction requirement. Giesler testified that the Developers wanted to start construction of the first of the three residential buildings immediately, but that the construction of the other two would depend on sales of units. While that could have occurred within 60 days, if it did not, Giesler said that he would seek an extension. The City's Code authorizes an extension (Exhibit 80), and there is no evidence from the City that it expected the Developers to commence construction of all three buildings within the 60 day period, even after it issued the building permit.

The jury heard all of the evidence and answered the first question on the Special Verdict. The jury found that the Developers applied for a regular building permit, and the jury's finding is supported by the evidence.

The next question that the jury was required to answer was whether the City withheld issuance of the regular building permit for the purpose of unilaterally imposing a compressed construction schedule on the Developers. The jury answered this question in the affirmative and then proceeded to Question 3 which asked whether the City's actions breached the duty to act in good faith. The jury also answered this question in the affirmative, and the City contends that this answer is not supported by the evidence.

***3** Basically, the City contends that since the Developers had more than a reasonable amount of time within which to complete construction of the residential condominium units, the City did not breach the duty of good faith under the contract. The City's argument misses the point of the jury's findings. Based upon the evidence presented, the jury found that the City improperly withheld issuance of the building permits to force the Developers to agree to a compressed construction schedule. Regardless of the ultimate construction time, it was the City's use of the building permits to coerce the Developers to accede to the City's demands that constituted the breach of the duty to act in good faith. The jury then proceeded to find that such breach damaged the Developers. Sp.Verdict Question 4. The same evidence supporting the jury's findings in answering Questions 1 and 2, also support their findings on the question of good faith.

The next challenge by the defendants to the building permit claims is to Question 5, where the jury found that the City's actions in withholding issuance of the regular building permit for the purpose of unilaterally imposing a compressed construction schedule violated substantive due process. As the jurors were instructed by the court, in order to find a substantive due process violation from the facts, the jury must find that the City's conduct was arbitrary and irrational, such as to "shock the conscience." The jury was also cautioned in that instruction that simply causing harm or merely exercising poor judgment does not constitute action that shocks the conscience.

This court discussed the concept of substantive due process extensively in its decision on the defendants' motion for judgment on the pleadings. As stated in that decision,

[t]he scope of substantive due process is very limited and even more so when dealing with an alleged deprivation of property rights. As stated in *Coniston Corp. v. Village of Hoffman Estates,* "[n]o one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions." 844 F.2d at 466. Therefore, if a trier of facts found the defendants' version worthy of belief, it would appear that the defendants acted in the legitimate interests of the City and did not deprive the developers of their property rights by arbitrary or capricious action. Or, at the very worst, the defendants' conduct might be viewed as an exercise of poor judgment ...

This court believes that the plaintiffs have presented a viable case for a substantive due process violation. Under the factual scenario raised by the plaintiffs, it is simply not the refusal of the City to issue building permits, but the City's use of its authority in order to impose conditions upon the developers, conditions to which they did not want to agree and which harmed their financial and property interest in the project. In other words, this is not a situation where the government entity failed to act because it exercised poor judgment, but it refused to act as a means to coerce a citizen to take unwarranted action. As alleged in the plaintiffs' version of the facts, this constitutes an abuse of authority which does shock the conscience. The court finds that the plaintiffs have stated a § 1983 claim for a violation of substantive due process in regard to the failure to issue building permits, and it will deny the defendants' motion for summary judgment on this claim.

***4** (Decision and Order, Aug. 16, 2005 at 14-15).

In its earlier decision, this court was of the opinion that this was a matter for the jury. Now, having heard the evidence presented at trial, the court stands by that decision-this was a matter for the jury, and the jury has spoken. There is no dispute that it was in the City's financial interest to obtain revenue from the project as soon as possible. There is significant dispute concerning the construction schedule when comparing the testimony of Richard Giesler with the testimony of John Krauss, the City administrator at the time. Giesler testified that he had discussions with Krauss about the revised plans and the sequential construction of the residential units. Krauss denies any such conversations. He testified that, even though the City knew that the Developers would not meet the original 15 month deadline, there was never any oral waiver of that deadline; the only changes in the deadline were made subsequently when the contract was amended in writing. According to Giesler, these are the amendments that were forced upon the Developers. The evidence presented a classic case of credibility-who should the jury believe? From their verdict, it is obvious who they believed, and there is substantial evidence in the record to support their determination.

Finally, in regard to the building permit challenges, the defendants argue that the damage award in Question 7 is not supported by the evidence. Regarding the issue of damages, the plaintiffs opted to retain an expert who was asked to evaluate the financial loss suffered by the Developers as a result of the compressed construction schedule. William Rewolinski presented his report and attached schedules to the jury. The City chose not to engage its own expert and defendants' attorney only briefly cross-examined Rewolinski. Instead, the defendants now argue that plaintiffs are not able to recover damages to the extent awarded by the jury, because the time frame utilized by the expert to calculate damages was not foreseeable as a probable result of the breach. The expert based his calculations on the period of 1999-2004, and the City argues that it would have never granted the Developers such a lengthy period of time within which to complete construction of the three units.

The concept of "foreseeability" of damages is common to breach of contract cases, but it also applies to a case brought under 42 U.S.C. § 1983. So, for example, when an illegal arrest sets off a chain of events inflicted on the victim, that person is entitled to damages that are foreseeable consequences of the illegal conduct. See, *Herzog v. Village of Winnetka, Ill.,* 309 F.3d 1041 (7th Cir.2002). The question here is not the length of time the parties would have agreed upon for the completion of construction, absent the City's coercion, but what damages naturally flowed as a result of such improper conduct? Rewolinski answered this question.

The jury was specifically told that the Developers must prove their damages, and they could only return an award based on the evidence, and not on guesswork or speculation. The plaintiffs offered evidence to show why damages extended through 2004, all as a result of the compressed construction schedule. In fact, Rewolinski testified that he made gave credit to the defendants for

such items such as inflated costs had the Developers been allowed to proceed on their own schedule.

***5** The bottom line here is that the defendants, for whatever reasons, chose not to retain their own damage expert. Maybe the City felt that it was not worth the litigation costs to engage in a battle of experts on this issue and instead concentrated on liability. Unfortunately for the City, it lost the liability battle, and the evidence presented by the plaintiffs fully supports the damages awarded by the jury.

Partial Mortgages Claims

Questions 10 and 12 of the Special Verdict are challenged by the defendants. Question 10 again deals with the concept of the implied duty of good faith, but in regard to the City's failure to issue partial releases of the mortgage after Door County Investments ("DCI") filed for bankruptcy. Question 12 deals with another due process claim, but this one for violation of procedural due process regarding withholding issuance of the partial mortgage releases.

In answer to Special Verdict Question 8, the jury found that the contract between the parties did not require the City to issue partial mortgage releases as individual condominium units were sold. However, the jury found that the contractual implied duty of acting in good faith required the City to issue such partial releases. The evidence is clear that the sales of the individual residential units could not be completed without the City issuing partial mortgage releases. Further, the City did issue such releases as units were sold until the time that DCI, one of the several entities involved in the development, filed for bankruptcy in 2002. The position of the City is that after DCI declared bankruptcy, it was justified in refusing to continue issuing partial mortgage releases. The City contends that the bankruptcy threatened its financial security under the mortgage, because with the sale of each unit thereafter, its security in the mortgage would be eroded unless it received partial proceeds from the sale. The City also argues that the default of DCI on its primary loans operated as a cross default under the mortgage. Finally, the City presented the testimony of Timothy McCoy, its expert on real estate practice, who stated that the agreement between the parties did not require the City to issue partial mortgages, and that, even though an implied good faith obligation to do so exists, such an obligation ceased upon bankruptcy.

The Developers respond that the City never exercised the "cross default" provisions of the mortgage; they state that they were never in default on the mortgage itself, and the City never formally declared the mortgage in default. The Developers point out that at the time that DCI filed for bankruptcy, annual payments on the mortgage were current so the City was not in financial jeopardy. The Developers also point to the testimony of their real estate expert James Hammes, who stated that unless the contract so provides, the Developers were not required to make partial payments to the City upon the sale of each unit. As to any possible financial jeopardy, Hammes said that the City should have provided for such eventuality in the contract.

***6** Turning specifically to the jury's answer to Question 10, the court is of the opinion that the verdict is supported by the evidence. Based upon the testimony of both real estate experts, it was clear to the jury that an implied good faith duty to issue partial releases of the mortgage upon the sale of individual units existed. The question was whether the bankruptcy of DCI excused the City from its obligation. The City argued that it would be in financial jeopardy, despite the fact that the annual payments on the mortgage were current. There is sufficient evidence in the record for the jury to have concluded that the financial fears of the City were not realistic. For example, even if all of the residential units were sold prior to full payment on the mortgage, the City still maintained security in the Convention Center, which was worth several million dollars. There is also sufficient evidence for the jury to have concluded that since the City failed to protect itself by contract, it was an act of bad faith to use self-help by refusing to issue partial releases. Whether the jury proceeded down one road or the other, the record contains sufficient evidence to support their finding on the issue of good faith.

In regard to Question 12, the jury found that the City violated the Developer's procedural due process rights in the manner in which it dealt, or failed to deal, with the Developers. Here, the defendants first urge the court to reconsider its prior decisions regarding the existence of a claim for procedural due process. The defendants' legal arguments were fully considered, discussed and rejected in the court's decisions of August 16, 2005 and November 18, 2005 (Decision and Order on the Defendants' Motion for Reconsideration). This includes the application of

Wis. Stats. § 706.05(9), which was the subject of the defendants' reconsideration motion, and is again raised in their motions after verdict. There is no point going over the same ground.

Turning to the evidentiary support for the jury's verdict, the defendants submit that the City provided the Developers with a meaningful opportunity to be heard after it refused to issue any more partial releases. The City indicates that there were a variety of meetings and correspondence on this subject; the fact that the City rejected the Developers' proposals does not mean that the plaintiffs were not provided with an adequate post-deprivation remedy. The plaintiffs' disagree with the defendants' view of the evidence, basically stating that they were stonewalled by the City. In other words, there was no "meaningful" opportunity to be heard.

The court instructed the jury that the "key to procedural due process is that the deprived party has the opportunity to be heard at a meaningful time and in a meaningful manner." The jury was further told that they must look at the particular circumstances of each case, and they were given some specific guidelines to assist them in making their determination. Finally, the jury was told that a meaningful opportunity to be heard "does not require any particular level of formality; in other words, the process can be informal."

***7** The fact that an informal process is sufficient to satisfy the requirement for procedural due process is particularly applicable to the evidence presented in this case. The jury was able to consider the exact nature of the meetings and correspondence between the parties to determine whether the City did indeed provide the Developers with a meaningful opportunity to be heard. Simply rejecting the Developers' proposals would not be sufficient; the jury had to be convinced that the City was not really listening, and that the City did not really provide a forum within which the Developers could be heard. The evidence in the record is more than sufficient to support either party's version. The parties argued their contrary positions based on the same evidence, and the jury accepted the scenario presented by the plaintiffs. End of story.

For all of the foregoing reasons, the court will deny the defendants' Rule 50 motion. The defendants are not entitled to judgment as a matter of law or, in the alternative, a new trial.

Rule 59 Motion

The defendants present the same grounds for granting a new trial or amending the judgment pursuant to Rule 59 as they did under Rule 50. The standard for granting a Rule 59 motion is no less exacting. A new trial may be granted where the verdict is against the great weight of the evidence, where damages are excessive, or for some other reason that establishes that the trial was not fair to the moving party. *Mid-America Tablewares v. Mogi Trading Co.,* 100 F .3d 1353 (7th Cir.1996).

Nothing further need be said, since the court is of the opinion that the jury's verdict is fully supported by the evidence in all respects. This is not a verdict that "resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks the conscience." *Latino v. Kaizer,* 58 F.3d 310, 314 (7th Cir.1995).

In 1996, the City of Sturgeon Bay decided to substantially improve a neglected portion of its waterfront. What ultimately resulted was an outstanding development known as Stone Harbor, which houses a convention center and adjacent residential units. An unfortunate by product of this project was this contentious hard-fought litigation. The parties were unable to resolve their dispute and ultimately presented their respective accounts to a jury. The jury listened to all of the evidence and made its decision. That decision should be affirmed.

The defendants' Rule 59 motion will also be denied.

Plaintiffs' Motion for an Award of Attorney Fees and Costs

Following the conclusion of the jury trial, the plaintiffs filed their motion, pursuant to 42 U.S.C. § 1988 for an award of attorney fees and costs. The Developers request the sum of $246,917.02 in attorney fees and $28,552.52 in costs and disbursements, for a total of $275,469.54. In support of their motion, plaintiffs attach affidavits from attorneys Daniel Hildebrand and Joseph Ranney. Attached to Ranney's affidavit are copies of the law firm's invoices in this litigation, together with a summary description and explanation of the services rendered. Plaintiffs' attorneys Schoenfeld and Ranney are charging attorney fees at the rate of $230 .00 per hour.

***8** The defendants oppose the award of attorney fees in the amount requested. It is the position of the City that plaintiffs' counsel have over billed for their efforts. For example, defendants' counsel Richard Carlson states that while he participated in the same "hard fought" litigation, attended the same depositions and participated in the same trial, he billed his client only 598 hours, while the time billed by opposing counsel is double his number, and then some. The City believes that a close analysis of plaintiffs' invoices will disclose a redundancy of effort by plaintiffs' attorneys, together with time spent on tangential matters for the Developers. On this point, Carlson notes a foreclosure action filed in Door County Circuit Court, which was dismissed subsequent to the billing in this case. Carlson also notes litigation between the Developers and Keith Van Dyke and a subsequent criminal charge and conviction of Van Dyke, who was working for the City at the time. Finally, Carlson suggests that attorneys Schoenfeld and Ranney billed for a significant number of conferences between themselves. The City urges the Court to reduce the petition for fees by twenty percent.

The plaintiffs reply to the City's opposition by responding to each area challenged. In regard to tangential litigation, plaintiffs' counsel state that the fees requested include no work devoted to the other lawsuits. As an example, plaintiffs point out that references on the invoices to conferences with Stephen Glynn, a criminal defense attorney, were excluded in computing the fee request. Concerning conferences between the two attorneys, plaintiffs cite case law holding that such time is recoverable, as long as it is reasonable and necessary to effectively litigate the case. As far as the disparity in hours devoted to the case between opposing counsel, plaintiffs' counsel indicate that they had the burden of proof in the case and elected to obviously devote more time to its prosecution. Finally, plaintiffs contend that it is improper for the defendants to urge that the court arbitrarily reduce the request, and that it is incumbent upon the defendants to show why specific entries are improper.

Both parties agree that the plaintiffs were the prevailing party in this action and, as such, are entitled to attorney fees under § 1988. They also agree that reasonable attorney fees are to be determined using the lodestar approach, which involves a determination of the number of hours reasonably expended multiplied by a reasonable hourly rate. Thereafter, the court is able to increase or discount the lodestar based on a number of factors.

Starting with the second prong of the lodestar, the court finds the rate of $230.00 per hour reasonable. Even though defendants' counsel is a partner in his Appleton, Wisconsin law firm, and billed the City at the rate of $135.00, he does not really take issue with the higher rate. Further, the affidavit of Daniel Hildebrand, an experienced lawyer in his own regard and a past president of the Wisconsin State Bar, supports the reasonableness of the rate. Of course, Hildebrand is not unbiased, being a partner in the prevailing party's law firm, but this court concurs with his representations regarding the hourly rate charged. It is reasonable for this case.

***9** The defendants' main challenge attacks the first prong of the lodestar, the reasonableness of the time devoted to this matter. Here, the court has considered the specific items noted by the City and has very carefully reviewed the invoices submitted. This court has rarely seen such a comprehensive presentation in support of attorney fees. As Ranney represents in his supporting affidavit, items not related to the litigation have been excluded from the computation. However, thoroughness in presentation, by itself, is not sufficient. It is the content that matters. The court is persuaded by the plaintiffs' submission as to the reasonableness and necessity of the time counsel devoted to this litigation. While attorneys Schoenfeld and Ranney did confer with other, the time spent in such conferences does not appear excessive. More importantly, they split their duties during discovery and pretrial preparation without duplication of effort. In other words, only one attorney attended a deposition, prepared a witness or worked on a legal brief. During the trial, they also split their efforts.

Defendants ask the court to reduce the request by twenty percent to a total amount of $226, 086.13. But there is no support for the defendants' request. The court cannot reduce the plaintiffs' petition by an arbitrary amount, even if the end result is still a substantial sum. As the prevailing party on certain types of claims, the law permits plaintiffs to recover reasonable fees and costs. Their petition represents just that-fees and costs that were reasonable and necessary for the prosecution of this litigation. Therefore, the court will grant the plaintiffs' motion for attorneys' fees and costs in the amount requested.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. The defendants' motion pursuant to Rule 50 is **denied;**

2. The defendants' motion pursuant to Rule 59 is **denied;** and

3. The plaintiffs' motion for attorney fees and costs is **granted.** The judgment in this case shall be amended to provide that, pursuant to 42 U.S.C. § 1988, the plaintiffs recover the sum of $246,917.02 in attorney fees, $28,552.52 in costs and disbursements, for a total of $275,469.54.

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Barry DONOHOO, Plaintiff,
v.
Doug HANSON et al., Defendants.

No. 14–cv–309–wmc.
|
Signed Sept. 3, 2015.

Attorneys and Law Firms

Barry Richard Donohoo, Solon Springs, WI, for Plaintiff.

Andrew P. Smith, Phillips Borowski, S.C., Rhinelander, WI, for Defendants.

OPINION and ORDER

WILLIAM M. CONLEY, District Judge.

***1** This lawsuit arises out of a relatively common dispute in Wisconsin between county officials and a landowner seeking a land use permit to construct an addition to his lakefront home. The difference here being that the landowner, who was dissatisfied with the process afforded him in state court, now hopes to make a federal case out of it.

The Constitution does, of course, provide protection to property owners. However, any constitutional challenge to a local land use decision must be considered in light of the principle that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Green Valley Investments v. Winnebago Cnty., Wis.,* 794 F.3d 864 (7th Cir. July 27, 2015) (*quoting Warth v. Seldin,* 422 U.S. 490, 508 n. 18 (1975)). For this reason, property owners dissatisfied with a local land use decision generally must appeal to local land use agencies or state court for relief. "[F]ederal courts, as we have explained time and again, are not zoning boards of appeal." *Miller v. City of Monona,* 784 F.3d 1113, 1119 (7th Cir.2015) (*citing CEnergy—Glenmore Wind Farm # 1, LLC v. Town of Glenmore,* 769 F.3d 485, 487 (7th Cir.2014) (collecting cases)).

That being said, there are three constitutional protections frequently invoked by federal plaintiffs challenging land use decisions: the Fifth Amendment Takings Clause; the Fourteenth Amendment Equal Protection Clause; and the Fourteenth Amendment Due Process Clause. The Takings Clause, which applies to states via the Due Process Clause of the Fourteenth Amendment, says that private property may not be "taken for public use, without just compensation." U.S. Const. amend. V. The Due Process Clause, in turn, says that states may not "deprive any person of ... property, without due process of law." U.S. Const. amend. XIV. The Equal Protection clause prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." *Id. Pro se* plaintiff Barry Donohoo appears to invoke all three of these constitutional protections in his complaint.

Local officials in Douglas County, Wisconsin, denied Donohoo's permit request on the grounds that his proposal exceeded County zoning limitations on construction of shoreland property. Believing that the County's shoreland zoning ordinances conflicted with a recently enacted state law, Donohoo then appealed the denial of his permit to the County Board of Adjustment, and when the Board upheld the denial, he filed a petition for writ of certiorari in state circuit court. While his certiorari case was pending, however, the County amended its shoreland zoning ordinances and issued a land use permit to Donohoo. Nonetheless, he filed this federal lawsuit, contending that the initial denial of his permit request, as well as subsequent related actions taken by County officials, violated his constitutional rights.

***2** Now before the court is defendants' motion for summary judgment (dkt. # 27), as well as Donohoo's motion for leave to amend his complaint (dkt.# 61). After reviewing the parties' legal arguments, proposed findings of fact and evidence in the record, defendants' motion will be granted as a matter of law under Fed.R.Civ.P. 56(a), the undisputed facts and governing law confirming that Donohoo cannot prove any federal constitutional claim against the defendants. [1]

UNDISPUTED FACTS [2]

I. The Parties

Plaintiff Barry R. Donohoo lives on Lake of the Woods in the Town of Solon Springs, an unincorporated area in Douglas County, Wisconsin. Defendants are all county employees. Doug Hanson is the appointed Chair of the Douglas County Board of Adjustment; Roger Wilson, Dale Johnson and Larry Luostari are appointed members of the Board of Adjustment; Steven Rannenberg is the Douglas County Planning and Zoning Administrator; Carolyn Pierce is corporation counsel; and Susan T. Sandvick is the county clerk.

II. Donohoo Seeks a Building Permit to Expand His Home.

On May 25, 2015, Donohoo filed a land use permit application and mitigation plan with the Douglas County Planning and Zoning office to construct a small addition to his home.[3] Donohoo had intentionally limited his construction proposal in order to comply with the Douglas County shoreland zoning ordinances, which placed numerous restrictions on building and development located in the unincorporated shoreland areas of the County.

Shortly after filing his permit application, however, Donohoo learned that a state law, 2011 Wisconsin Act 170 ("Act 170"), had been passed on April 17, 2012, restricting local authorities from enacting shoreland zoning ordinances for "nonconforming structures" that were more restrictive than those passed by the Wisconsin Department of Natural Resources ("WDNR"). Believing that the new state law applied to his home and trumped the County's shoreland zoning ordinances, Donohoo notified the County Zoning and Planning office that he was withdrawing his permit application and mitigation plan. On May 30, 2012, he submitted a revised permit application in which he proposed a significantly greater addition to his home. In particular, he proposed to add a second story to the entire principal structure on his property, effectively increasing its area by 100%.

III. Rannenberg Denies Donohoo's Permit Request and the Board of Adjustment Rejects His Appeal.

As the County Planning and Zoning administrator, Rannenberg was responsible for reviewing and either approving or denying Donohoo's permit application. While Rannenberg was unsure how to respond given an apparent conflict between county ordinances and state law, the parties agree that at the time Donohoo filed his revised permit application, his proposal violated the existing County shoreland zoning ordinances. The ordinances limited expansion of a lakeshore home such as Donohoo's to 50% by area, as well as imposed specific mitigation requirements, unless preempted by then recently enacted Act 170, although even before its enactment, the most recent WDNR shoreland zoning regulations were less restrictive than those imposed by the County. *See* Wis. Admin. Code § NR 115. In short, at the time it was initially before him, Rannenberg was uncertain whether Donohoo's revised application violated any or all of the County's shoreland zoning ordinances, WDNR regulations or Act 170.

***3** Accordingly, Rannenberg reached out to the WDNR Shoreland Policy Coordinator, Heidi Kennedy, for guidance on how the WDNR interpreted the changes created by Act 170. *See* Rannenberg Aff., dkt. # 36, Exhs. E, G. Kennedy responded that WDNR legal counsel had opined that, although Act 170 no longer permitted Douglas County to have more restrictive shoreland zoning ordinances than those contained in WDNR regulations, Douglas County's limitation on area expansion was not prohibited by Act 170 and the County could maintain its requirement for a mitigation plan. Rannenberg subsequently denied Donohoo's land use permit application on the grounds that it did not comply with the County's shoreland zoning ordinance. *See* Rannenberg Aff., dkt. # 36, Exh. F (June 7, 2012 letter to Donohoo explaining reasons for permit denial).

On June 22, 2012, Donohoo appealed the denial to the Douglas County Board of Adjustment. The Board addressed Donohoo's appeal at a hearing on July 25, 2012. At the hearing, Rannenberg testified that he rejected Donohoo's permit because it was contrary to County shoreland zoning ordinances and that, based on Rannenberg's communications with WDNR, he did not believe that Act 170 trumped those ordinances. Donohoo then argued that Act 170 trumped the County's shoreland zoning ordinance.'[4] After hearing from Donohoo, the Board members asked questions of both Rannenberg and Donohoo. Ultimately, the Board upheld the denial of Donohoo's permit application.

IV. Donohoo Files a Petition for a Writ of Certiorari in State Court, Douglas County Amends Its Zoning Ordinances, and Donohoo Receives a Permit.

On August 24, 2012, Donohoo brought a certiorari action in Douglas County Circuit Court challenging the Board's decision to uphold the denial of his permit application. *Donohoo v. Douglas County Board of Adjustment,* 2012CV306 (Dougl.Cnty.Cir.Ct.). As the Douglas County clerk, Sandvick was responsible for submitting the record of the Board's decision to the circuit court for review. For reasons that are unclear from the record, Sandvick did not submit the record of the Board's decision to the circuit court until March 7, 2013. *See* Sandvick Dep. at 14–15, Dkt. # 43. That record consisted of the minutes, exhibits and agenda of the July 25 meeting. Additionally, although the Board's July 25 hearing had been recorded, Sandvick did not submit the audio recording to the circuit court on the ground that it had been compromised by a technical failure. [5]

On December 20, 2012, before the circuit court had addressed the merits of Donohoo's certiorari petition, the County amended its shoreland zoning ordinances to conform with Act 170 and WDNR's regulations. The following day, on December 21, Rannenberg notified Donohoo that, under the newly enacted ordinances, Rannenberg could issue Donohoo's requested land use permit, subject to approval of a mitigation plan by the County Land and Water Conservation Department and payment of a $250 fee in conjunction with the mitigation plan. Although it is not entirely clear from the record, disagreements about mitigation requirements seem to have further stalled the issuance of Donohoo's land use permit for several more months. The permit was, however, finally issued on May 31, 2013. [6]

***4** Neither side explains what happened with Donohoo's certiorari action between the time it was filed and the time Donohoo received his permit, but Wisconsin's online court records indicate that Donohoo's certiorari action was ultimately dismissed on January 23, 2014. Perhaps because Donohoo had received a permit from the County before the state circuit court was ready to issue a decision, it also appears that the merits of Donohoo's petition were never decided. The court did, however, issue a decision denying Donohoo's request for fees under Wis. Stat. § 59.694(14), concluding that Donohoo could only obtain fees by proving that the Board acted in "bad faith." Dkt. # 56 (circuit court decision on fees). The court further found that there was no evidence that the Board acted with "gross negligence, in bad faith or with malice" in denying Donohoo's administrative appeal. *Id.* Instead, the court held that although the record showed that the Board may have "misinterpreted the newly enacted state law when it relied upon the advice of its Zoning Administrator and the DNR," the Board did not act in bad faith. *Id.*

Donohoo did not appeal the circuit court's decision, nor did he file any further lawsuits in state court challenging the land use permit he eventually received.

V. Permits Issued to Other Landowners.

After the December 20, 2012, amendments to the Douglas County Zoning Code, two other landowners with property located on Lake of the Woods sought land use permits proposing vertical expansion of structures, similar to the project proposed by Donohoo. In both instances, mitigation plans were required of and implemented by the property owners. *See* Rannenberg Aff., dkt. # 36, at 111154–55.

OPINION

Donohoo alleges in his complaint that his constitutional rights to due process, equal protection and the use and enjoyment of his property were violated when: (a) Rannenberg denied his land use permit in June of 2012; (b) the Board upheld denial of the permit at the hearing on July 25, 2012; (c) the County failed to promptly provide the full record to the circuit court in response to his certiorari action; and (d) the County conditioned his eventual permit on mitigation requirements that were contrary to 2011 Wisconsin Act 170 and more onerous than those imposed on other landowners. Defendants have moved for summary judgment on all of Donohoo's claims, contending that none of the actions about which he complains amount to denial of a constitutional right. Because Donohoo has failed to make a viable legal argument or point the court to legitimate material factual disputes in this record, defendants' motion will be granted in its entirety.

I. Preliminary Matters

At the outset, it is worth noting that Donohoo's brief in opposition to defendants' motion (dkt.# 54), fails to

provide any meaningful response to the legal arguments defendants raised in their brief in support of summary judgment. To the contrary, his entire brief is less than four pages long and contains no discussion of the law applicable to his claims. Further, although he contends that there are factual disputes, he makes no attempt to explain how those purported disputes are *relevant* to any of the constitutional claims he has raised. Indeed, Donohoo fails to address the elements of his constitutional claims at all.

***5** Generally, the failure to provide any meaningfully opposition to an argument operates as waiver. *Wojitas v. Capital Guardian Trust Co.,* 477 F.3d 924, 926 (7th Cir.2014); *Cincinnati Insurance Co. v. Eastern Atlantic Insurance Co.,* 260 F.3d 742, 747 (7th Cir.2001). Moreover, although Donohoo is entitled to some leeway as a *pro se* litigant, he has demonstrated throughout this case that he is a capable litigator. He ably deposed several of the defendants, filed coherent responses to defendants' proposed findings of fact, and submitted numerous documents and other evidence. Donohoo also appears to have had the advice and assistance of his father, who is an attorney, throughout this litigation.

In light of all this, the most reasonable explanation for Donohoo's failure to respond to defendants' legal arguments is that he could find no legal authority that would support any counter-arguments. Indeed, although defendants' motion for summary judgment could be granted based solely on Donohoo's failure to respond to any of defendants' legal arguments, the court will briefly address the merits of his constitutional claims if for no other reason than to attempt to demonstrate to Donohoo's satisfaction that his claims are foreclosed by well-established law, fully realizing that this may prove a fool's errand.

II. Takings Claim.

The Takings Clause generally entitles a landowner to just compensation if a state or one of its subdivisions "takes" the owner's land, although a regulation (such as a zoning ordinance) or a land use decision (such as rejection of a building permit) that prevents the owner from deriving *any* economic value from the land is actionable as a taking. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). Accordingly, Donohoo cannot prove that any decisions by the Douglas County defendants amounted to a taking of his property. Certainly, Donohoo does not claim that the County actually took land from him, and a regulatory taking occurs only where "the challenged government action deprive[s] a landowner of all or substantially all practical uses of the property." *Bettendorf v. St. Croix Cnty.,* 631 F.3d 421, 424 (7th Cir.2011) (citation omitted). Since the record facts show that Donohoo has maintained a house on his property for years, he has not been deprived of "all or substantially all practical uses of the property."

Even if Donohoo could show that a "taking" had occurred as a result of the denial of his initial permit request or the restrictions placed on the permit, he could not maintain a takings claim. The right protected by the Takings Clause is merely to the market value of what was taken. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 190 n. 11, 194–95 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property without just compensation."). This means Donohoo cannot bring a claim that his constitutional right to compensation has been denied until he exhausts his remedies for obtaining a compensation award or equivalent relief from the County. *Id.* ("[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."). Until then, he cannot know whether he has suffered the type of harm for which the Takings Clause affords a remedy. *Flying J Inc. v. City of New Haven,* 549 F.3d 538, 543 (7th Cir.2008).

***6** Because Donohoo failed to pursue available state remedies, he cannot bring a takings claim in federal court. Donohoo sought judicial review of the decision by the Board of Adjustment, but he failed to appeal the circuit court's decision dismissing his certiorari action. Additionally, Donohoo could have brought a suit for inverse condemnation under Wisconsin statutory law or the state Constitution. *See* Wis. Stat. § 32.10; Wis. Const. art. I, § 13. Accordingly, his takings claim is not ripe and must be dismissed. *See Forseth v. Vill. of Sussex,* 199 F.3d 363, 373 (7th Cir.2000) (dismissing takings claim for plaintiff's failure to exhaust state court remedies); *River Park, Inc. v. City of Highland Park,* 23 F .3d 164, 165 (7th Cir.1994) ("Litigants who neglect or disdain their state remedies are out of court, period.").

III. Equal Protection Claim.

Donohoo next claims that the defendants' actions violated his equal protection rights. There are some limited situations in which a property owner may be able to raise a successful equal protection challenge to a local land use decision. *See, e.g., City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 448–50 (1985) (requirement that group home for persons with disabilities obtain a special permit violated equal protection clause). However, the Seventh Circuit has cautioned plaintiffs that they cannot dodge the exhaustion requirement of *Williamson County* by recasting a takings claim as a claim under the Equal Protection Clause. *Muscarello v. Ogle Cnty. Bd. of Comm'rs,* 610 F.3d 416, 423 (7th Cir.2010) ("Any equal protection claim based on a taking would be unripe and subject to all of the objections that we have just reviewed in connection with the takings claim."); *Patel v. City of Chicago,* 383 F.3d 569, 573–74 (7th Cir.2004) ("The Plaintiffs insist that [the *Williamson County* ripeness requirements] do not [apply] because theirs is an equal protection claim, not a takings claim .... [but] we conclude that the Plaintiffs' have merely re-labeled their takings claim as an equal protection claim, presumably to avoid *Williamson County's* ripeness requirement."); River Park, 23 F.3d at 167 ("Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court.").

Here, Donohoo's equal protection claim is essentially based on the same facts as his takings claim: he contends that defendants' improper denial of his land use permit deprived him of the use and enjoyment of his property and caused him to incur monetary damage. To the extent his equal protection claim is actually a takings claim, the claim is, therefore, barred for his failure to seek relief in state court.

Even assuming Donohoo *meant* to plead an equal protection claim that is factually distinct from a takings theory, his claim fails on the merits. His equal protection claim is not based on an allegation that defendants discriminated against him because of his race, religion or any other protected characteristic. Rather, Donohoo seems to be alleging a "class-of-one" equal protection claim, based on his allegations that defendants rejected his permit and later imposed unreasonable or unlawful mitigation requirements simply because they did not like him or his construction proposal. However, "unless the plaintiff is able to show that there was no rational basis for the officials' actions," a land-use decision does not support a class-of-one claim. *Miller,* 784 F.3d at 1120 (citation omitted). *See also Patel,* 383 F.3d at 573 ("Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the plaintiff must demonstrate 'governmental action wholly impossible to relate to legitimate governmental objectives.' ") (citation omitted). "Normally, a class-of-one plaintiff will show an absence of rational basis by identifying some comparator—that is, some similarly situated person who was treated differently." *Miller,* 784 F.3d at 1120 (citation omitted). To be similarly situated, a comparator must be " 'identical or directly comparable' " to the plaintiff " 'in all material respects.' " *Id.* (citation omitted).

***7** Here, Donohoo has identified no suitable comparator. He asserts vaguely in his brief that the County failed to "furnish on a timely basis a land use permit to [him] despite furnishing similar land use permits to others," but he does not expand upon this argument by identifying who those "others" are. Nor does he point to any specific facts about the approval of permits for these "others." Plt.s' Br., dkt. # 54, at 2. [7]

In fairness, the lack of a comparator does not necessarily doom Donohoo's claim. *See Thayer v. Chiczewski,* 705 F.3d 237, 254 (7th Cir.2012); *Del Marcelle v. Brown County Corp.,* 680 F.3d 887, 913 (7th Cir.2012). A plaintiff need not identify a similarly situated person to prove a class-of-one claim if the plaintiff can "exclude rational explanations for why local officials targeted them." *Miller,* 784 F.3d at 1120 (citing *Geinosky v. City of Chicago,* 675 F.3d 743, 748 n. 3 (7th Cir.2012); *Swanson v. City of Chetek,* 719 F.3d 780, 785 (7th Cir.2013)).

For example, in *Geinosky,* the plaintiff was allowed to proceed on a class-of-one claim against officers from a single police unit who issued 24 bogus tickets to him in the course of 14 months. *Geinosky,* 675 F.3d at 745–48. The Seventh Circuit reasoned that the "extraordinary pattern of baseless tickets" amounted to a plausible class-of-one claim, particularly since "[r]eason and common sense provide no answer to why he was targeted that could be considered a legitimate exercise of police discretion." *Id.* at 748.

Similarly, in *Swanson,* the Seventh Circuit reversed the grant of summary judgment against plaintiffs whose neighbor, the local mayor, apparently engaged in

prolonged harassment against them after they tried to build a fence between their property and his. *Swanson,* 719 F.3d at 784–85. The mayor's actions—which included entering the plaintiffs' home without permission, abusing his position to delay issuance of a fence permit, shouting at them during a meeting about the permit, telling the plaintiffs' contractors that they were drug dealers and unlikely to pay, and causing the initiation of baseless prosecution in municipal court—appeared "illegitimate on their face" and "demonstrate[d] overt hostility." *Id.* at 782, 785.

Obviously, Donohoo's situation is readily distinguishable from the outrageous conduct considered in *Geinosky* and *Swanson.* The undisputed facts of record reveal a rational basis for Rannenberg's and the Board's denial of Donohoo's initial permit request. At the time Donohoo filed his initial permit application, the law regarding shoreland zoning was in flux. After contacting WDNR officials for guidance, Rannenberg had reason to believe that certain Douglas County shoreland zoning ordinances continued to apply and the Board in turn had reason to accept his explanation. Moreover, the day after the County ordinances were amended, Rannenberg contacted Donohoo regarding his permit application. Whether or not Rannenberg and the Board interpreted the law correctly, their decisions to deny his permit were not irrational and do not permit any inference of vindictiveness or hostility toward Donohoo. Nor has Donohoo shown that any other actions by Rannenberg or the Board were irrational. *Cf. Indiana Land Co., LLC v. City of Greenwood,* 378 F.3d 705, 712 (7th Cir.2004) (no inference of vindictiveness when council member "dredg [ed] up what may have been the largely forgotten or ignored two-thirds ordinance" that resulted in denial of the plaintiff's permit request). Accordingly, Donohoo has not shown that defendants violated his right to equal protection.

III. Due Process Claim.

***8** This leaves Donohoo's due process claim. All too often due process is invoked because a party feels wronged, rather than because they have been denied due process. This is just such a claim. The Due Process Clause prohibits the government from depriving any person of his or her property "without due process of law." This phrase has been interpreted to mean both that persons are entitled to process before their property is taken (procedural due process) and that they are free from arbitrary and capricious governmental actions (substantive due process). *Bettendorf,* 631 F.3d at 426; *Hudson v. Palmer,* 468 U.S. 517, 539 (1984).

The nature of Donohoo's due process claim is not entirely clear from either his complaint or the materials he filed in opposition to defendants' motion for summary judgment. If his due process claim is based on a takings theory—i.e., that the County's land use restrictions or permit decisions deprived him of use and enjoyment of his property—it must be dismissed for his failure to seek recourse in state court. *See CEnergy–Glenmore,* 769 F.3d at 489 ("[R]egardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court."); *Greenfield Mills, Inc. v. Macklin,* 361 F .3d 934, 961–62 (7th Cir.2004) (when a plaintiff's claim of violation of due process asks a federal court to review the same conduct that resulted in an alleged taking, the "exhaustion requirement applies with full force").

To the extent Donohoo is raising a due process claim distinct from a takings theory, he would first have to show that he was deprived of a "protectable property interest." *Muscarello,* 610 F.3d at 423. Assuming, without deciding, that Donohoo's requested use permit constituted a property interest that implicated due process, the next question is whether Donohoo has shown that he was deprived of that interest without the due process required by the Constitution.

With respect to procedural due process, "the process due in a zoning case is minimal and normally must be pursued in state courts." *Id. See also River Park,* 23 F.3d at 167 ("scant process is all that is 'due' in zoning cases"). For example, there is "no obligation to provide hearings" in a zoning case. *River Park,* 23 F.3d at 167. "[S]o far as the Constitution is concerned, state and local governments are not required to respect property owners' rights.... State and local governments may regulate and even take property," so long as they provide just compensation for taken property. *Id.* Thus, so long as there are adequate local or state means for obtaining review of a zoning decision, procedural due process is satisfied. *Id.*

Here, Donohoo received an abundance of process beyond what he was "due," beginning with a hearing before the Board of Adjustment. He also exercised his right

to certiorari review in state court. Moreover, he could have appealed the state court decision dismissing the certiorari action and chose not to do so. After he received his permit in May of 2013, he also could have filed a state certiorari action or an inverse condemnation action challenging the conditions of his permit, but again chose not to. Additionally, if Donohoo believed that the Board or the defendants failed to follow any local or state rules, or failed to properly respond to the state certiorari action, Donohoo's recourse was to seek relief in state court. *Id.* ("the only procedural rules at stake [in zoning cases] are those local law provides, and these rules must be vindicated in local courts"). In sum, the numerous means by which Donohoo could have sought, and did seek, review of defendants' actions more than satisfy the constitutional requirements of procedural due process.

***9** To prevail on a claim that defendants deprived him of substantive due process, Donohoo's burden is even greater, requiring a showing that defendants' actions were "arbitrary and capricious," "random and irrational" and "shocked the conscience." *CEnergy–Glenmore,* 769 F.3d at 488. Additionally, this circuit has emphasized that in order to state a substantive due process claim, a plaintiff must also allege that some other substantive constitutional right has been violated or that state remedies are inadequate. *Id.* at 489. Although a local land-use decision could "theoretically" violate this high standard, neither the Supreme Court nor the Seventh Circuit have ever "definitively concluded that any land-use decision actually amounted to a deprivation of property without substantive due process." *Id.* at 488.

Obviously, Donohoo does not come close to meeting this high standard. Donohoo has not identified any substantive constitutional right that defendants violated. The focus of his claim actually seems to be that defendants failed to apply the new state law, Act 170, despite knowing that it trumped local shoreland zoning ordinances. Plt.s' Br., dkt. # 54, at 2. Even assuming that Rannenberg and the Board violated state law by rejecting his initial permit request, however, "an error of state law is not a violation of due process." *Indiana Land Co., LLC v. City of Greenwoo* d, 378 F.3d 705, 711 (7th Cir.2004). Nor would a failure to apply this new state law implicate any other substantive constitutional right.

Donohoo also does not allege that state law remedies are inadequate. Moreover, such an allegation would be groundless. In this very case, Donohoo pursued a certiorari action. He subsequently obtained a land use permit. Although the state court rejected Donohoo's request for fees, Donohoo did not avail himself of his right to appeal. He also did not challenge the terms of the permit he received in state court. Under these circumstances, Donohoo could not establish that the state remedial scheme was inadequate. *CEnergy–Glenmore,* 769 F.3d at 489 (affirming dismissal of due process claim where plaintiff "had options under state law for obtaining the building permits that it did not use").

Finally, Donohoo identifies no actions by Rannenberg or the Board that would constitute "arbitrary and capricious" or "random and irrational" decisions. Their decisions were made in the context of confusion regarding a newly enacted state law and after consultation with WDNR officials. Within a few months, the County amended its shoreland zoning ordinances and took the initiative to contact Donohoo personally about his requested permit. No reasonable jury could conclude that these actions "shocked the conscience." Accordingly, defendants are entitled to summary judgment on Donohoo's due process claim as well.

ORDER

IT IS ORDERED that:

(1) Plaintiff Barry R. Donohoo's Motion for Leave to Amend Complaint, dkt. # 61, is DENIED.

***10** (2) The Motion for Summary Judgment, dkt. # 27, filed by defendants Doug Hanson, Roger Wilson, Dale Johnson, Larry Luostari, Steven Rannenberg, Carolyn Pierce and Susan T. Sandvick is GRANTED.

(3) The clerk of court is directed to enter judgment for defendants and close this case.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5177968

Footnotes

1 Donohoo's request for leave to amend his complaint to add additional factual allegations and legal assertions will be denied as futile. (Dkt. # 61 at 1 (plaintiff explaining that his proposed amended complaint "maintains the counts and allegations against the same defendants from the original complaint," but merely adds additional facts learned during discovery to further support his claims).) At this stage, the additional allegations in the proposed pleading will not help Donohoo. In order to survive summary judgment, Donohoo was required to come forward with evidence sufficient to prove each element of his claims-the so-called "put up or shut up" stage in a lawsuit. *Olendzki v. Rossi,* 765 F.3d 742, 749 (7th Cir.2014). Donohoo failed to do so.

2 The court finds the following facts material and undisputed unless otherwise noted. The facts are drawn from the defendants' proposed findings of fact, as well as Donohoo's evidentiary submissions and responses to defendants' proposed findings.

3 Property within the Town of Solon Springs is subject to Douglas County's zoning ordinances.

4 The parties dispute the extent to which Donohoo was allowed to present evidence and argument at the hearing. Defendants say that Donohoo had the opportunity to present his arguments as to why Act 170 required the Board to grant his permit, while Donohoo says that the Board refused to allow him to present some evidentiary exhibits and refused to allow his father, who is an attorney, to present his interpretation of the relevant law. These disputes are immaterial for the purposes of summary judgment because, even under Donohoo's version of events, he has not shown that his constitutional rights were violated even if his right to speak was somewhat truncated. *See* discussion on page 16–18, *infra.*

5 The parties dispute the extent to which the audio recording was actually compromised or whether the County made sufficient effort to repair it. This dispute is also ultimately irrelevant for purposes of summary judgment. As discussed on page 17, *infra,* any complaint plaintiff had regarding the adequacy of defendants' production or their responsiveness to the certiorari action could and should have been raised in that action. Defendants' alleged failure to properly respond to an order from the state court does not provide the basis for a federal constitutional claim.

6 Even after the permit was issued, Donohoo apparently continued to object to conditions imposed on his project. At some point in September or October 2013, Rannenberg gave Donohoo a copy of the permit without any conditions included, although Rannenberg insists that he simply made a copy of the original permit with the conditions covered in order to placate Donohoo, even though both he and Donohoo understood that the original permit imposed various mitigation requirements. *See* Rannenberg Aff., dkt. # 36, ¶ 53. Donohoo maintains that Rannenberg's action was intended to and did confuse him, causing him to believe that all of the conditions had been removed from his permit. *See* Donohoo Aff., dkt. # 59, at ¶ 10. the basis for a federal constitutional claim.

7 Donohoo might be referring to two land use permits issued by the County in 2013 and 2014 for construction to homes located on Lake of the Woods. He submitted with his summary judgment materials copies of two permits: (1) a June 11, 2013 permit issued to "Ruth Erdmann–Sluka" granting permission to construct a basement under her existing home, (dkt.# 57); and (2) an October 16, 2014 permit issued to Michael J. and Darla Higgins, granting permission to construct a second-story on their home, (dkt.# 58). But Donohoo does not explain why these permit-seekers should be considered to be "similarly-situated" to him. On the contrary, even on the face of these permits, these landowners obviously received land use permits *after* the County had already amended its shoreland zoning ordinances in December of2012 and *after* Rannenberg told Donohoo that his own permit application would be approved, subject to an acceptable mitigation plan. And even if these permit holders were similarly situated to Donohoo, he has not explained why he believes they were treated more favorably than he was. Indeed, their permits show that they, like Donohoo, were required to submit mitigation plans.

2013 WL 3354511
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

CENERGY–GLENMORE WIND FARM # 1, LLC, Plaintiff,
v.
TOWN OF GLENMORE, Defendant.

No. 12–C–1166.
|
July 3, 2013.

Attorneys and Law Firms

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DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

WILLIAM C. GRIESBACH, Chief Judge.

***1** Plaintiff CEnergy–Glenmore Wind Farm # 1, LLC (CEnergy) filed this action against Defendant Town of Glenmore under 42 U.S.C. § 1983 alleging that the Town violated its right to substantive due process when it unreasonably delayed issuance of the building permits CEnergy needed to construct seven wind turbines. As a result of the delay, CEnergy lost a lucrative longterm contract with the power company that was going to purchase the energy its wind turbines would have generated. CEnergy's complaint also asserts a state law claim against the Town for a breach of duty of good faith and fair dealing. The case is before the court on the Town's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. More specifically, the Town contends that CEnergy's due process claim is not ripe for review because CEnergy either has or had state law remedies which it failed to exhaust. At the court's invitation, the parties also addressed the question of whether the complaint states a substantive due process claim. For the reasons stated in this opinion, the Town's motion will be granted.

FACTS

The allegations of the complaint, which are accepted as true for purposes of deciding a motion to dismiss, *Transit Express, Inc. v. Ettinger,* 246 F.3d 1018, 1023 (7th Cir.2001), provide the factual basis for the court's analysis. According to the complaint, a company called Prelude, LLC, the assets of which CEnergy later purchased, contracted with Dennis and Mary Zirbel and Michael and Sandra Zirbel (the Zirbels) to build wind turbines on land they own in the Town of Glenmore, located south of Green Bay. The Zirbels assigned Prelude the property rights it needed for the purpose of developing the project. (Compl.¶ 11.) Prelude obtained a conditional use permit (CUP) from the Town on September 10, 2007, which allowed for the development of seven wind turbines on the Zirbels' property. (¶ 12.) After obtaining the CUP, Prelude executed a Power Purchase Agreement (PPA) with Wisconsin Public Service Corp (WPS) on August 5, 2009. Under the PPA, WPS was obligated to purchase power generated by Prelude's wind turbines at a predetermined rate for a 20 year period. As a condition of the PPA, Prelude was required to obtain all required local permits to build the turbines on the Zirbels' property by March 1, 2011. (¶¶ 12, 17, 18.) It wasn't until August 2010, however, that Prelude was informed that the Town required separate building permits for each of the wind turbines authorized under the CUP. (¶ 20.) By that time or shortly thereafter, significant community opposition to the project had apparently developed, and the Town decided to stall issuance of the required building permits. (¶¶ 23–25.)

The complaint details Prelude's efforts to obtain the required building permits for the project. Prelude first attempted to apply for a building permit in September 2010; however, representatives from the Town advised Prelude that an application could not be accepted until the Town received more information about the development project. Prelude attempted to comply with Town's request for additional information, but between September and December 2010, the Town continuously refused to accept or consider Prelude's application for a building permit. On December 14, 2010, Town Clerk Lana Ossman sent a letter to Prelude at the direction of Town Attorney Robert Gagan requesting additional information from Prelude. CEnergy, which by that time was in the process of

purchasing Prelude's assets, including its rights in the wind turbine project, responded to Ossman's letter supplying the additional requested information and addressing other issues the Town had raised by December 31, 2010. According to the complaint, by the end of December, the Town had all the information it needed to issue the building permits. (¶ 24–35.)

***2** Also by December 2010, CEnergy and Prelude had informed the Town that it was essential that the permits be issued before March 1, 2011, or the PPA with WPS would become unenforceable. Mark Dick, a representative of CEnergy, explained to Town Board Chair Don Kittel, Attorney Gagan, and Ossman that the building permits were needed by March 1, 2011, in order for its PPA to be enforceable. Dick also explained that without the PPA, under which WPS agreed to pay for the energy generated by the turbines at set rates, the wind farm project would not be feasible in light of changes in the energy market. In other words, the Town knew that if the building permits were not granted by March 1, 2011, the project would very likely founder. (¶¶ 29–31.)

CEnergy contacted the Town to ensure that the consideration of its application for the building permits would be considered at its next Board meeting in January 2011. At the January 2011 meeting, Attorney Gagan advised the Board and first disclosed to CEnergy that he could not comment on the information supplied by CEnergy and would need additional time to review it. Members of the town also attended the meeting and "created a clamor and loudly opposed the project." (*Id.* ¶ 39.) Representatives from CEnergy and Prelude contacted the Town's representatives in order to inquire how the building permits could be obtained within the necessary time frame. CEnergy and Prelude also requested that Glenmore hold a special meeting, but these requests were denied. The Town reassured CEnergy that the issue of the building permits would be taken up in January or February. In addition, the Town did not request any additional information concerning the permits. (¶¶ 44–47.)

The issue of the building permits was not put on the agenda for the Town's February meeting. Instead, the Town informed CEnergy that Attorney Gagan still had not had time to review the information submitted. Again, members of the town appeared at the February meeting and loudly voiced their opposition to the wind farm project. The complaint describes the citizens who appeared at the Town meetings as "a mob" and alleges that they instilled a climate of concern and fear within the members of the Board and other town officials. (*Id.* ¶ 46.) Also during this period, Don Kittel received numerous threats to his physical safety should he approve the wind farm project. Neither CEnergy nor Prelude knew about these threats. Although the issue of the building permits was not raised in February, CEnergy continued to request special meetings before the March 1st deadline. These requests were also rebuffed. CEnergy alleges that at "this point in February 2011 there was no decision by the Town on the issue or the building permits and thus no legal claims to enforce the building permits, or force the grant or issuance of those permits, were available to CEnergy and were not ripe at that time." (*Id.* ¶ 47.)

On March 1, 2011, the Town finally allowed CEnergy to submit its application for the building permits and held a public meeting on March 7 to take up the issue of the permits. The Board stated that CEnergy had supplied all the necessary information to obtain a permit. The Board initially voted to grant CEnergy's permit and adjourned the meeting. After its vote the town citizens in attendance became visibly angry and threatening, necessitating security to be contacted to control the crowd. The Board then re-opened the meeting, engaged in further discussion about the permits, and voted to rescind its decision granting the permits. (¶¶ 49–54.) Later a special meeting was held on March 16, 2011, where the Board voted to retract its earlier rescission of its decision to grant the permits. The end result was that CEnergy was granted the necessary building permits it needed to develop the wind farm project, but it was too late. WPS sent a letter to CEnergy on March 4, 2011, terminating the PPA due to CEnergy's failure to obtain the necessary building permits by the March 1st deadline. (¶¶ 58–60.)

***3** CEnergy attempted to sell its rights in the wind farm project to another power company and, together with that company, attempted to convince WPS to honor the PPA in spite of the failure of the condition precedent or to renegotiate a new PPA. These efforts were not fruitful. (¶¶ 66–67.) In addition, even after the building permits were granted, the Town's building inspector informed CEnergy that he was forbidden from issuing the permits by Attorney Gagan. Attorney Gagan sent a letter to CEnergy that it was required to satisfy additional criteria before the permits could be issued. According to the complaint, Board Chair Kittel later stated to CEnergy

representative Dick that the Town acted "improperly and without a basis to thwart CEnergy's project and that he was manipulated by the Town attorney and clerk to take actions to intentionally delay and deny consideration and issuance of building permits to CEnergy knowing that doing so would cause CEnergy to lose the project." (*Id.* ¶ 71.) CEnergy asserts that as a result of the Town's actions, it lost approximately $7,000,000 in profit that it would have generated under its contract with WPS. (*Id.* ¶ 17.)

DISCUSSION

As noted above, the Town's motion seeks dismissal of CEnergy's substantive due process claim for lack of subject matter jurisdiction pursuant Rule 12(b)(1) on the ground that CEnergy's federal claim is not ripe for review. The Town's argument is predicated on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* which held that a claim by a landowner that a local government has either directly or indirectly taken his property without paying just compensation is not ripe until the landowner has first used the available state procedures for seeking just compensation. 473 U.S. 172, 195 (1985); *see also Gamble v. Eau Claire County,* 5 F.3d 285, 286 (7th Cir.1993) ("[A] landowner cannot complain that his constitutional right [to just compensation for a taking] has been denied until he exhausts his remedies for obtaining a compensation award or equivalent relief from the state."). Here, the Town argues, CEnergy's constitutional claim is not ripe because it failed to exhaust available state court remedies. The fact that CEnergy has labeled its claim as a substantive due process claim makes no difference, the Town contends, because "[l]abels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court." *River Park v. City of Highland Park,* 23 F.3d 164,167 (7th Cir.1994); *see also Forseth v. Village of Sussex,* 199 F.3d 363, 370 (7th Cir.2000) (affirming district court's dismissal of landowner's substantive due process claim against Village for lack of jurisdiction for failure to pursue state court remedies). Based on *Williamson,* the Town contends, CEnergy's due process claim is not ripe and must therefore be dismissed.

It seems doubtful that lack of ripeness is the problem with CEnergy's claim. Ripeness, as the name implies, addresses "whether a dispute has yet matured to the point that warrants decision." 13B Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3532, at 365 (2008). "Ripeness concerns may arise when a case involves uncertain or contingent events that may not occur as anticipated, or not occur at all." *Wisconsin Right to Life State Political Action Committee v. Barland,* 664 F.3d 139, 148 (7th Cir.2011). "The basic rationale of the ripeness doctrine 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 200 (1983) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967)). "[T]he question of ripeness turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 201 (internal quotations omitted). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States,* 523 U.S. 296, 300 (1998) (internal quotations omitted).

***4** In this case it is clear that CEnergy's substantive due process claim does not rest upon contingent future events that may not occur as anticipated or at all. As a result of the Town's delay in issuing building permits for the wind turbines, CEnergy's lucrative contract with WPS, has been terminated. CEnergy's rights in the agreement have been lost. There is no state or local remedy available to CEnergy that it can use to recover its investment in the project or the profits it anticipated it would have received had the building permits been granted before March 1, 2011. CEnergy's claim is as ripe as it will ever be. What remains is the broader question the court asked the parties to address: namely, has CEnergy stated a substantive due process claim in the first place?

The law governing substantive due process remains confused. *See Tun v. Whitticker,* 398 F.3d 899, 900 (7th Cir.2005) ("This case requires that we once again wade into the murky waters of that most amorphous of constitutional doctrines, substantive due process.). Though on its face, the Due Process Clause would seem to apply only to the "process," in particular the procedural protections, that a person must be afforded before government can deprive him or her of "life, liberty or property," U.S. Const., Amdt. XIV, § 1, the

Supreme Court has long held that the Clause "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.' " *County of Sacramento v. Lewis,* 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams,* 474 U.S. 327, 331 (1986)). However, substantive due process claims are "limited to violations of fundamental rights." *Palka v. Shelton,* 623 F.3d 447, 453 (7th Cir.2010). This is because, "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992).

In *County of Sacramento v. Lewis,* the Court held that "the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.' " 523 U.S. at 847. Although the Seventh Circuit has described *Lewis's* "shocks the conscience" standard as "not a very illuminating expression," *Slade v. Board of School Directors of City of Milwaukee,* 702 F.3d 1027, 1033 (7th Cir.2012), it has applied the test to land use disputes such as this.

In *Bettendorf v. St. Croix County,* the court applied the shocks-the-conscience test in affirming the district court's dismissal of a landowner's substantive due process claim against the County for rescinding the commercial zoning designation of a portion of his property. 631 F.3d 421 (7th Cir.2011). In that case, the County had previously passed an ordinance re-zoning the property from agricultural-residential to commercial. The ordinance contained a condition, however, that upon the transfer of the property by the owner, or his death, the classification would revert to agricultural-residential. *Id.* at 423. The landowner sued in state court seeking a declaration that the condition was void. The circuit court found in the landowner's favor, but the Wisconsin Court of Appeals reversed, holding that the entire ordinance was void which caused the classification to revert to agricultural-residential. When the County rescinded the zoning ordinance in compliance with the court's judgment, the landowner commenced a federal action alleging an unconstitutional taking and violation of procedural and substantive due process. In affirming the district court's summary judgment dismissing the landowner's substantive due process claim, the court noted that "[a] government entity must have exercised its power without reasonable justification in a manner that 'shocks the conscience' in order for a plaintiff to recover on substantive due process grounds." *Id.* at 426 (citing *Tun,* 398 F.3d at 902). It concluded that, given the state court of appeals ruling, the "County's decision to revoke the commercial designation [could] hardly be considered conscious-shocking or arbitrary." *Id.*

***5** The Third Circuit reached a similar conclusion applying the shocks-the-conscience test to a land used dispute in *Eichenlaub v. Township of Indiana,* 385 F.3d 274 (3d Cir.2004). There officials were alleged to have applied subdivision requirements to the plaintiffs' property that were not applied to other parcels, pursued unannounced and unnecessary inspection and enforcement actions, delayed certain permits and approvals, improperly increased tax assessments, and maligned and muzzled the plaintiffs. *Id.* at 286. Noting that the complaints were typical of the kind of disagreement that is frequent in planning disputes and that there was no allegation of corruption or self-dealing, the court affirmed the district court's conclusion that the "misconduct alleged here does not rise sufficiently above that at issue in a normal zoning dispute to pass the 'shocks the conscience test.' " *Id.*

Applying the shocks-the-conscience test here, CEnergy's claim fails. As in *Eichenlaub,* there is no allegation of corruption or self-dealing by the members of the Town Board. There is no allegation that the Board was bribed or that the members had a financial interest in killing CEnergy's contract. The Town's failure to act, according to the complaint, was motivated by community opposition to the wind farm development. It is hardly surprising, or shocking, that an elected Town Board would be responsive to its more vocal constituents. If inaction and delay on the part of government officers and representatives is enough to shock the judicial conscience, the sea of substantive due process claims would flood the courts beyond what even the most vociferous proponents of substantive due process could imagine.

The Seventh Circuit has also held in land use disputes that substantive due process violations may arise where a substantive constitutional right has been violated and state remedies are inadequate. *See Centres, Inc. v. Town of Brookfield,* 148 F.3d 699, 704 (7th Cir.1998) ("The case law of this circuit makes clear that, in order to state a substantive due process claim, a plaintiff must also allege that some other substantive constitutional right has been violated or that state remedies are inadequate." (citing

New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1481 (7th Cir.1990); *Polenz v. Parrott,* 883 F.2d 551, 558–59 (7th Cir.1989); *Kauth v. Hartford Ins. Co.,* 852 F.2d 951, 958 (7th Cir.1988)). Though it seems more akin to procedural due process, this standard, like the shocks-the-conscience test, is also intended to "impose substantial burdens on the plaintiff" so as to prevent federal courts from becoming "zoning boards of appeal." *Id.* (quoting *Polenz,* 883 F.2d at 558); *see also United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392, 402 (3d Cir.2003) (noting that "[a]pplication of the 'shocks the conscience' standard in this context also prevents us from being cast in the role of a 'zoning board of appeals.' " (citing *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822, 833 (1st Cir.1982)).

***6** CEnergy argues under this test that the Town's motion to dismiss should be denied because it has "no state law remedies available to it that would come close to achieving recovery of the several million dollars it lost in upfront investment and future profits." (ECF No. 14, at 8.) If the Town were a private actor, CEnergy contends, it would be able to sue in state court for tortious interference with its contract with WPS. CEnergy notes, however, that the Town is immune from such liability under state statute. (ECF No. 14 at 9 (citing Wis. Stat. § 893.80(4)).) *Certiorari* review pursuant to state law would not provide an adequate remedy, CEnergy contends, because at best it could only result in an order granting it a new hearing. And since the Town ultimately granted its application for the building permits, CEnergy contends, it has no basis for seeking *certiorari.* More importantly, CEnergy notes, it could not recover damages in an action for *certiorari.* The same is true of *mandamus.* Quoting *Menzel v. City of Milwaukee,* 32 Wis.2d 266, 277, 145 N.W.2d 198 (1966), CEnergy notes that mandamus cannot be used to compel action "when the officer's duty is not clear and unequivocal and requires the exercise of the officer's discretion." (ECF No. 14 at 13.) And like *certiorari,* mandamus is not a remedy for recovery of damages. Despite the blunt language of *River Park,* CEnergy notes, no Seventh Circuit case holds that a landowner may not bring his claim to federal court if he has no adequate state law remedies "for compensation or equivalent relief." (*Id.* at 9.) Because it has no available remedy here, CEnergy argues that this case is similar to *Polenz v. Parrott.*

In *Polenz,* the plaintiffs successfully sued an alderman and electrical inspector under § 1983 for allegedly depriving them of their right to a fair hearing on their applications for a tavern license and causing them to be arbitrarily and unreasonably denied an occupancy permit for their property. On appeal, the Seventh Circuit held that the plaintiffs had no constitutionally protected liberty or property interest in a liquor license and reversed that portion of the trial court's judgment awarding damages attributable to that part of the claim. 883 F.3d at 554–56. As to the balance of their claim, the court found that the plaintiffs did have a property interest in an occupancy permit based on their undisputed claim that they were unable to occupy their premises for any purpose for a period of almost two years as a result of the defendants' conduct. *Id.* at 557. Moreover, the defendants had not appealed the jury's finding that the denial of the occupancy permit was arbitrary and unreasonable. *Id.* at 558. But that was not enough to establish a violation of substantive due process. To prevail on a substantive due process claim in the context of land use regulations, the court held, "in addition to showing that the decision was arbitrary and irrational, the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies." *Id.* at 558–59 (citing *Kauth v. Hartford Insurance Co.,* 852 F.2d 951, 956–58 (7th Cir.1988)). Because there had been no determination by the trial court as to the adequacy of the state remedies, the court remanded this aspect of the case for further proceedings. *Id.* at 559. Thus, as CEnergy views the law, its substantive due process claim survives. A jury could find that the actions of the Town Board in delaying issuance of a building permit were arbitrary and capricious and, because there is no state law remedy that it could use to recover its investment and lost profits, it may sue the Town for a violation of its right to substantive due process.

***7** But the question is not whether CEnergy *now* has available state remedies that would allow it to recover the value of its investment and the profits it lost as a result of the cancellation of its contract. The question is whether there were state remedies that were available before CEnergy suffered its loss:

> The cases hold that the federal claim is unripe until state remedies are exhausted. But a claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open.

> As recognized in other areas where exhaustion of remedies is required, an unexcused failure to exhaust forfeits the plaintiff's rights, with various exceptions not applicable here.

Gamble, 5 F.3d at 286.

Here, it is clear that there were state remedies available to CEnergy before the deadline expired under its contract with WPS. Under the Town's Zoning Ordinance, applications for building permits were required to be made in writing to the Town Zoning Administrator. Town of Glenmore Zoning Ordinance, § 24, ¶ E(2). (ECF No. 20–1, at 8.) The provision states: "The Zoning Administrator shall issue the building permit if the proposed building complies with all of the provisions of this ordinance." *Id.* In an apparent attempt to avoid unreasonable delays, the ordinance further states:

> The building permit shall be granted or denied within a ten (10) day period from the date the application is received by the Zoning Administrator. The failure of the Zoning Administrator to issue a permit within said ten day period shall be construed as a denial of the building permit, thereby beginning the tolling [sic] of the thirty (30) day period in which the applicant can appeal to the Board of Appeals for the issuance of said building permit.

Id.

Prelude, CEnergy's predecessor, obtained the CUP allowing it to develop the wind farm on September 10, 2007, and it entered into the PPA with WPS requiring that it obtain all necessary permits by March 1, 2011, on August 5, 2009. At any time thereafter, CEnergy could have simply filed its application for a building permit with the Zoning Administrator and, if the Zoning Administrator failed to issue it within ten days, appeal the deemed denial to the Board of Appeals. Under the Zoning Ordinance, the failure of the Board of Appeals to issue a decision within sixty days was also deemed a denial. *Id.* ¶ C(10) (ECF No. 20–1 at 7.) At that point, assuming neither the Zoning Administrator nor the Board of Appeals had acted, CEnergy could have filed an action for a writ of mandamus in state court. *See Lake Bluff Housing Partners v. City of South Milwaukee,* 197 Wis.2d 157, 540 N.W.2d 189 (1995) (noting that mandamus is available to compel municipality to issue building permit where proposed construction and application for permit are in full compliance with zoning and building code).

CEnergy alleges in its complaint that it was not advised it would need a building permit until August of 2010. (Compl.¶ 20.) Of course, ignorance of the law does not excuse a failure to comply with procedural requirements. *Albino v. Baca,* 697 F.3d 1023, 1036–37 (9th Cir.2012); *see also Fisher v. Johnson,* 174 F.3d 710, 714 (5th Cir.1999) ("[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing."). But even if the fact that CEnergy, or its predecessor, did not know it needed a building permit was an excuse, there was still sufficient time for recourse to state law remedies when Prelude learned of the requirement for a building permit in August 2010.

***8** CEnergy also alleges in conclusory fashion that the Town refused to allow Prelude to apply for a building permit. (Compl.¶¶ 21–24.) But the Town's Zoning Ordinance does not require an applicant to get the Town's approval before applying for a building permit. It simply says that applications for building permits are to be made in writing to the Zoning Administrator by the landowner or his/her authorized agent. (ECF No. 20–1 at 8.) CEnergy does not claim that it attempted to file an application with the Zoning Administrator and he refused to accept it. At oral argument, counsel conceded that in fact CEnergy had adopted a cooperative approach with the Town in the belief that this offered it the best opportunity to meet its deadline. The decision to adopt such an approach may have been reasonable, but the fact that it failed does not mean CEnergy had no state law remedy available to obtain the relief to which it claims it was entitled.

If CEnergy, or Prelude, had forced the issue and applied for a permit immediately after it received the CUP, or at least when it became apparent that the political winds were changing direction, it may have gotten a state court to compel the Town to issue its permits and avoided the loss for which it now seeks compensation. The fact that it might not have succeeded in time for CEnergy to meet its contractual deadline anyhow is of no moment.

Due process requires only a state court remedy, not a guaranteed win by the applicant's contractual deadline. The Court's conclusion in *River Park* is equally applicable here:

> Illinois provided River Park with ample means to contest the runaround it was receiving at the hands of Highland Park. If because the City refused to make a formal decision the standard means were cut off, the common law writ of certiorari remained. The opportunity to apply for that writ is enough, we have held, even when rights under the first amendment are at stake. *Graff v. Chicago,* 9 F.3d 1309, 1323–25 (7th Cir.1993) (en banc). It is assuredly enough in a zoning case. River Park insists that state law entitled it to an R4 zoning; if that is so, state litigation would have fully protected its rights. Instead of asking for relief from the state courts, River Park went along with the political process until it was too late. It lost the political fight. Federal litigation is not a repêchage round for losers of earlier contests, or for those who overslept and missed the starters' gun.

23 F.3d at 167. It thus follows that the Town's motion to dismiss should be granted. CEnergy lost whatever rights it may have had in this matter by failing to pursue its state judicial remedies. *Gamble,* 5 F.3d at 288. It has no substantive due process claim.

CONCLUSION

In sum, whether one applies *Lewis*' shocks-the-conscience test or *Polenz*' absence-of-state-remedies test, the result is the same. CEnergy's complaint fails to state a substantive due process claim. Absent a federal claim, the usual and preferred course is to dismiss the supplemental state law claims without prejudice, especially when there has been almost no discovery or pretrial proceedings. *Van Harken v. City of Chicago,* 103 F.3d 1346, 1354 (7th Cir.1997). Accordingly and for the reasons set forth above, the Town's motion to dismiss is granted. CEnergy's substantive due process claim is dismissed with prejudice, and the state law claims are dismissed without prejudice. The Clerk is directed to enter judgment in favor of the Town and against CEnergy forthwith.

***9 SO ORDERED.**

All Citations

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