

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAMES CONLIN and ROXANNE CONLIN,
Plaintiffs,
vs.
CITY OF DES MOINES,
Defendant.

No. 4:12-cv-00608 – JEG

O R D E R

This matter is before the Court on Defendant City of Des Moines’ (Defendant) Motion to Dismiss the Petition of Plaintiffs James Conlin and Roxanne Conlin (collectively, Plaintiffs) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs resist. A hearing was held on the matter on March 19, 2013. Attorneys Rebecca Brommel and Jonathan Gallagher represented Plaintiffs; Attorney Gary Goudelock Jr. represented Defendant. The matter is fully submitted and ready for disposition.

I. BACKGROUND¹

A. Factual Background

Plaintiffs are individuals and citizens of Iowa who own a steel-sided apartment building located at 826 18th Street, Des Moines, Iowa.² Defendant is an Iowa Municipal Corporation, and its acts and omissions giving rise to the cause of action occurred in Polk County, Iowa.

Plaintiffs operate the Structure as a rental property, so in accordance with their status as landlords of a Section 8 apartment complex, the Des Moines Municipal Housing Agency

¹ The facts are taken from the Petition. The Court must accept as true all facts alleged in the Petition for purposes of a Rule 12(b)(6) motion to dismiss. See Zutz v. Nelson, 601 F.3d 842, 848 (8th Cir. 2010).

² For purposes of this Order, the building at issue will be referred to as the “Structure” to remain consistent with the parties’ briefing.

(Housing Agency) conducted an inspection of the Structure on or about September 7, 2011. Based on its inspection, the Housing Agency found the windows on the Structure to be deficient and noted in its report that the windows must be repaired or replaced. According to the Housing Agency, any deficiencies must be fixed within 28 days of the original inspection, so Plaintiffs ordered and paid for ten replacement windows upon receiving the Housing Agency's report.³ Plaintiffs installed five of the ten new windows before receiving a "STOP WORK" order from the City of Des Moines. The "STOP WORK" order stated that the "work being performed at 826 - 18th Street is in violation of the zoning ordinance [and] historic district guidelines." Petition, ECF No. 1, ¶ 20 (alteration added by Plaintiffs). After receiving the "STOP WORK" order, Plaintiffs filed an application for a certificate of appropriateness with the Historic Preservation Commission.

The Commission held a meeting on November 30, 2011, wherein it reviewed Plaintiffs' application for a certificate of appropriateness and imposed three conditions on Plaintiffs as follows: "a. The windows shall be constructed of wood with no metal cladding; b. The windows shall be of the same general style, shape and dimensions as the existing windows; [and] c. Review and approval of the selected window product by staff prior to installation." *Id.* ¶¶ 40, 50. Thus, the Commission denied Plaintiffs' request to install vinyl windows on the Structure.

Plaintiffs appealed the Commission decision to the Des Moines City Council (Council), and after Plaintiffs continued the hearing multiple times, the Council heard their appeal on

³ It is undisputed by the parties that Plaintiffs failed to file an application for a certificate of appropriateness prior to purchasing windows and starting installation. *See* Petition, ECF No. 1, ¶¶ 16-21; Def. Br. Mot. to Dismiss, ECF No. 3-1, p. 2.

February 13, 2012. The Council remanded the issue to the Commission for further consideration, giving Plaintiffs an opportunity to provide more evidence to support their application.

Plaintiffs presented their case to the Commission for a second time on May 16, 2012, and again the Commission rejected Plaintiffs' proposal to use vinyl windows. Plaintiffs appealed the Commission's decision to the Council again, and the hearing process took place in September of 2012, where the Council affirmed the Commission's decision.

Plaintiffs assert "[t]he City of Des Moines has allowed, not required removal, or otherwise not taken action against other property owners in the Sherman Hill neighborhood who have installed vinyl windows and features." Petition, ECF No. 1, ¶ 68. No specific properties or circumstances are revealed in the current record.

B. Procedural Background

Plaintiffs filed suit against Defendant in the Iowa District Court for Polk County on November 21, 2012, appealing the decision of the Council and alleging claims under 42 U.S.C. § 1983, Iowa Code § 303.34(3), as well as writ of certiorari claims. Defendant filed a Notice of Removal to this Court on December 19, 2012, alleging jurisdiction and venue are proper under 28 U.S.C. §§ 1441(a) and (c) and 42 U.S.C. § 1443 due to Plaintiffs' claims brought against Defendant under 42 U.S.C. § 1983.

In their Petition, Plaintiffs alleged seven counts: (1) due process violation through a writ of certiorari avenue for relief; (2) due process violation under 42 U.S.C. § 1983; (3) equal protection violation through a writ of certiorari avenue for relief; (4) equal protection violation under 42 U.S.C. § 1983; (5) taking without just compensation through a writ of certiorari avenue for relief; (6) taking without just compensation under 42 U.S.C. § 1983; and (7) judicial review,

presumably as set forth in Iowa Code § 303.34(3).⁴ Plaintiffs then request several types of relief from this Court:

1. Issue a writ of certiorari holding that the City of Des Moines acted illegally, unreasonably, arbitrarily, capriciously and/or in excess of its authority in denying Plaintiffs' certificate of appropriateness[;]
2. Declare [Plaintiffs'] proposed windows are proper and Order that the windows may be installed or enter an order commanding the City of Des Moines, through either its City Council or Commission, to issue such certificate as [Plaintiffs] proposed;
3. Enjoin the City of Des Moines from enforcing the Ordinance and/or the Commission's decision denying the certificate of appropriateness and declare the proposed windows are proper and further order that the City of Des Moines, through either its City Council or Commission, issue the certificate as [Plaintiffs] proposed;
4. Require, in the alternative, that the City of Des Moines reconsider and approve [Plaintiffs'] certificate of appropriateness[; and]
5. For the costs of this action, attorneys' fees, and for any other relief the Court deems just.

Petition, ECF No. 1, pp. 20-21.

Defendant filed a Motion to Dismiss Plaintiffs' Petition on January 10, 2013, pursuant to both Rule 12(b)(1) and Rule 12(b)(6). Defendant asserts this Court lacks subject matter jurisdiction over the three writ of certiorari claims because Plaintiffs failed to file their Petition within 30 days of the Council's September 24, 2012, decision, which violates Iowa Rule of Civil Procedure 1.1402(3). See Iowa R. of Civ. Pro. 1.1402(3) (requiring that a petition for certiorari "be filed within 30 days from the time the tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally").

⁴ Although Plaintiffs do not expressly allege a statutory provision allowing for judicial review of the Council's decision in their Complaint, Defendant assumes in its briefing that this claim was likely brought under Iowa Code § 303.34(3), which allows for appeal from the Council's decision regarding the Commission's action "within sixty days of the [Council's] decision to the district court for the county in which the designated area is located." The Court also anticipates the Plaintiffs proceed under that statutory authority.

Defendant also contends this Court lacks jurisdiction over Plaintiffs' takings claim, as it is unripe for adjudication because Plaintiffs failed to seek a state remedy for the alleged "taking" of Plaintiffs' property prior to filing this lawsuit. Finally, Defendant argues that Plaintiffs have failed to state a claim upon which relief can be granted under Rule 12(b)(6) as to the other claims in its Petition. Defendant attached to its motion several exhibits, including Council documents pertaining to Plaintiffs' appeals as well as guidelines for historic building preservation, rehabilitation, and repair within Des Moines.

Plaintiffs resisted Defendant's Motion to Dismiss on January 28, 2013. In their resistance, Plaintiffs withdrew their writ of certiorari counts – Counts I, III, and V – and consent to this Court dismissing those claims. See Pl. Resist. to Def. Mot. to Dismiss, ECF No. 5, p.1 fn. 1. Thus, the only counts in contention are II, IV, VI, and VII – Plaintiffs' claims brought under 42 U.S.C. § 1983 and their judicial review claim under Iowa Code § 303.34(3). Defendant filed a reply in support of its Motion to Dismiss on February 8, 2013.

II. DISCUSSION

The Court must necessarily address the question of its jurisdiction initially. Thus, the Court begins with Count VI.

A. 12(b)(1)

1. Standard of Review

Federal district courts have subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A party may contest the Court's subject matter jurisdiction by bringing a motion under Rule 12(b)(1), as Defendant did in this case.

The moving party must bring their challenge based on the “face or on the factual truthfulness of [the claim’s] averments.” Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993). Facial challenges focus on the face of the complaint, and the Court must treat the motion under Rule 12(b)(1) similar to how it treats motions under Rule 12(b)(6) for failure to state a claim. Id. This means the Court must find the moving party “successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction.” Id. (citation omitted).

Conversely, a factual challenge allows the Court to go beyond the Petition with regard to what facts it can consider when deciding whether it has jurisdiction. See Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). If the moving party brings a factual challenge, “there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case,” which means that “no presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” Id. at 730 (internal quotation marks and quotation omitted).

In this case, Defendant has filed a factual challenge to this Court’s subject matter jurisdiction, as Defendant attached an Appendix to its Motion to Dismiss containing factual information not included in Plaintiffs’ Petition. “[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on [his or her] own,” but only if the court is not determining “an essential element of a claim for relief.” Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) (noting that if an essential element for plaintiff’s claim is at issue, the jury should determine whether the element is satisfied). This Court will therefore view all evidence provided by the parties to determine whether it has jurisdiction over Plaintiffs’ claims unless it appears an essential element of a claim should be

decided by a jury. Additionally, Plaintiffs “will have the burden of proof that jurisdiction does in fact exist.” Titus, 4 F.3d at 593, n. 1 (quoting Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977)). Plaintiffs must prove subject matter jurisdiction exists under the “preponderance of the evidence” standard. Thompson v. Deloitte & Touche LLP, 503 F. Supp. 2d 1118, 1121 (S.D. Iowa 2007).

As this is a factual challenge to this Court’s subject matter jurisdiction under Rule 12(b)(1), the Court will utilize the exhibits attached to Defendant’s Motion to Dismiss and other facts alleged by the parties to determine whether it has jurisdiction. See Arbaugh, 546 U.S. at 514; Osborn, 918 F.2d at 730.

2. Ripeness of Takings Claim

Plaintiffs have failed to exhaust their state remedies in this case, and their takings claim in Count VI is therefore unripe at this time. As set forth by the Supreme Court, “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 195 (1985). The state’s action in taking the property owner’s property interest without just compensation “is not ‘complete’ in the sense of causing a constitutional injury ‘unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.’” Id. (quoting Hudson v. Palmer, 468 U.S. 517, 532, n. 12 (1984)). The Supreme Court reasoned in Williamson that Tennessee offered property owners an inverse condemnation avenue for relief if their property was taken for public use, so only after a plaintiff had been denied a remedy under the state’s inverse condemnation proceedings could they assert a violation of their constitutional rights

under the Takings Clause of the Fifth Amendment. Id. at 195-97. The property owner in that case had “not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its takings claim is premature.” Id. at 197.

This rule was reiterated by the Eighth Circuit, when the court stated that a property owner’s “claim based on the Just Compensation Clause of the Fifth Amendment fails because the general rule is that a plaintiff must seek compensation through state procedures before filing a federal takings claim.” Carpenter Outdoor Adver. Co. v. City of Fenton, 251 F.3d 686, 690 (8th Cir. 2001) (quotation omitted). See also Koscielski v. City of Minneapolis, 435 F.3d 898, 903 (8th Cir. 2006) (holding that if a state has a procedure by which individuals may receive just compensation for the taking of their property for public use, any “[f]ailure to follow such a procedure or have the [state] courts rule an inverse condemnation action may not be brought makes a taking claim not ripe for review by the federal courts”).

The Iowa Supreme Court has also dealt with this failure-to-exhaust situation in takings cases. The court in Bakken v. City of Council Bluffs, 470 N.W.2d 34 (Iowa 1991), stated that “[t]he reason for an exhaustion requirement in taking cases is that the fifth amendment prohibits taking without ‘just compensation,’ and no constitutional violation occurs until just compensation has been denied by state proceedings.” Bakken, 470 N.W.2d at 37. “A plaintiff seeking compensation under a taking theory has the burden of establishing that State remedies are inadequate, and unless a claim is ripe for adjudication, a court has no jurisdiction to hear it.” Id. (citing Austin v. City & Cnty. of Honolulu, 840 F.2d 678, 680, 682 (9th Cir. 1988)). The Iowa Supreme Court reasoned that “Iowa recognizes a claim for inverse condemnation,” so the property owner’s “claim for a taking under section 1983 is not ripe for adjudication in this action

until the remedy of inverse condemnation, or an equivalent state remedy, is first pursued.” Id. (citing Williamson Cnty., 473 U.S. at 194-95).

With regard to the “equivalent state remedy” language, it is unclear what qualifies as equivalent to Iowa’s inverse condemnation process. However, the Iowa Supreme Court has held that “[i]n the absence of proof that a landowner has pursued all statutorily available avenues for challenging zoning decisions, a reviewing court is in no position to determine whether the landowner has, in fact, been denied just compensation based on an alleged regulatory taking.” City of Iowa City v. Hagen Electrs., 545 N.W.2d 530, 535 (Iowa 1996) (citing Bakken, 470 N.W.2d at 37). The court in Hagen was discussing administrative remedies, but it did refer more generally to “statutorily available remedies,” which seems to include judicial review of administrative decisions like that allowed in Iowa Code § 303.34. See id. Regardless, the plain language “equivalent state remedy” seems to explicitly require some sort of state action for relief, not relief from the federal courts.⁵

Further, the remedy sought in an inverse condemnation proceeding and the remedy sought in Count VII of this suit cannot reasonably be viewed as “equivalent” for purposes of satisfying the Bakken test. “Inverse condemnation is a generic description applicable to all actions in which a property owner, in the absence of a formal condemnation proceeding, seeks to recover

⁵ The court in J.D. Francis, Inc. v. Bremer Cnty., No. C09-2065, 2011 WL 978651, at **6-7 (N.D. Iowa March 17, 2011), discusses an exception to the exhaustion rule set forth in Williamson. If the alleged taking was for a private purpose rather than a public purpose, it is technically a violation of the property owner’s Constitutional rights, even if just compensation is paid. Thus, the exhaustion rule is inapplicable because just compensation is irrelevant if there is no public purpose for the alleged taking. Here, the Plaintiffs do not allege the Commission or Council had a private purpose for the alleged taking, though they do assert bias and other personal motives for the Commission’s decision. Since both parties concede any taking was for a public purpose, the exception to the exhaustion rule set forth in J.D. Francis is irrelevant in the present case.

from a governmental entity for the appropriation of his property interest.” Kingsway Cathedral v. Iowa Dep’t of Transp., 711 N.W.2d 6, 9 (Iowa 2006) (quotation omitted). “[A]n inverse condemnation claim is sought by a landowner when the government fails to seek a condemnation action in court.” Id. at 10 (quotation omitted). During such a procedure, the governmental entity can determine whether a taking has occurred and what damages are warranted – what “just compensation” must be provided to remedy the taking.

Under Iowa Code § 303.34(3), the remedy available to the property owner appealing the Commission and Council’s actions is for the district court to determine “whether the commission has exercised its powers and followed the guidelines established by the law and ordinance, and whether the commission’s action was patently arbitrary or capricious.” The district court reviewing the decision made by the Commission may only affirm or overturn the Commission’s decision under the standard of review set forth above. There is no determination of damages – i.e., just compensation. This review therefore cannot be equivalent to an inverse condemnation procedure.

Additionally, even if adjudication by this Court of the issues raised in Count VII constituted an “equivalent state remedy,” the timing is problematic. Plaintiffs’ takings claim in Count VI necessitates a decision against it by this Court in Count VII for Count VI to be ripe for review. The Court must determine whether it has subject matter jurisdiction throughout the life of a case, and it currently does not have subject matter jurisdiction over Count VI, as that count is not ripe. See Bueford v. Resolution Trust Corp., 991 F.2d 481, 485 (8th Cir. 1993) (stating that “[l]ack of subject matter jurisdiction, unlike many other objections to the jurisdiction of a particular court, cannot be waived. It may be raised at any time by a party to an action, or by the court *sua sponte*.”). Even if the takings claim may become ripe after the judicial review

claim is decided, it is not currently ripe. Count VI must be dismissed for lack of subject matter jurisdiction.

B. 12(b)(6)

1. Standard of Review

Rule 8(a)(2) requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” However, the “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 (1957)) (alteration in original) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). The complaint must be read as a whole, rather than “parsed piece by piece to determine whether each allegation, in isolation, is plausible.” Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) (citing Vila v. Inter-Am. Inv. Corp., 570 F.3d 274, 285 (D.C. Cir. 2009)).

When determining whether a complaint should be dismissed for failure to state a claim, the question before this Court is not whether Plaintiffs will ultimately prevail on their constitutional claims, but rather whether their Petition is sufficient to cross this required threshold. See Skinner v. Switzer, 131 S. Ct. 1289, 1296 (2011) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). “Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible ‘short and plain’ statement of the plaintiff’s claim, not an exposition of his legal argument.” Id. (citation omitted). Under the

current pleading standard, “[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.” Ashcroft, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555). Thus, the Court, in examining a motion to dismiss, must determine whether the plaintiff raises a plausible claim of entitlement to relief after assuming all factual allegations in the Complaint to be true. Id.; Twombly, 550 U.S. at 558.

2. Exhibits

In evaluating the sufficiency of a complaint under Rule 12(b)(6), a court must generally “ignore materials outside the pleadings, but it may consider . . . materials that are ‘necessarily embraced by the pleadings.’” Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999) (quoting Piper Jaffray Cos. v. Nat’l Union Fire Ins. Co., 967 F. Supp. 1148, 1152 (D. Minn. 1997)). The purpose of this rule “is to prevent a plaintiff from avoiding an otherwise proper motion to dismiss by failing to attach to the complaint documents upon which it relies.” Young v. Principal Fin. Grp., Inc., 547 F. Supp. 2d 965, 973-74 (S.D. Iowa 2008) (quotation omitted). “Documents necessarily embraced by the pleadings include ‘documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.’” Ashanti v. City of Golden Valley, 666 F.3d 1148, 1151 (8th Cir. 2012) (quoting Kushner v. Beverly Enters., Inc., 317 F.3d 820, 831 (8th Cir. 2003)).⁶

Defendant has attached ten exhibits to its Motion to Dismiss, nine of which are public documents from Council meetings and one of which is the guidelines for rehabilitating or constructing buildings in Des Moines’ historic districts. Plaintiffs refer to meetings with the Council

⁶ Notably this includes standards promulgated by the Secretary of the Interior regarding historic buildings. See Petition, ECF No. 1, ¶¶ 34-36. See also text infra at pp. 17-20.

and the opinions of Council members shared during those meetings in their Petition, and Plaintiffs also refer in their Petition to the contents of the guidelines Defendant attaches to its motion. The parties conceded at the hearing that almost all of the documents attached by Defendant to its motion should be included in this Court's analysis under Rule 12(b)(6) based on the standard set forth in Ashanti. The only documents Plaintiffs contested were an e-mail on page 00013 of the Appendix in Exhibit F, and pages 00055-00066 of the Appendix in Exhibit J. The first contested page was an e-mail that appears irrelevant to the issues in Defendant's motion, and the architectural guidelines set forth on pages 00055-00066 in Exhibit J are also irrelevant as they only apply to new construction in Des Moines' historic districts, not rehabilitation endeavors. The Court agrees with Plaintiffs' concerns about these few exhibits, and it will therefore decline to use them in deciding the sufficiency of Plaintiffs' Petition under Rule 12(b)(6). The rest of the exhibits will be used by the Court in deciding whether Plaintiffs' claims survive Defendant's motion.

3. Procedural Due Process

Plaintiffs fail to state a plausible procedural due process claim in Count II of their Petition. As set forth by the Supreme Court, "[p]roperty 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 that support claims of entitlement to those benefits." Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). The Supreme Court of Iowa, deciding a case under both the federal and state due process clauses, stated that it "will find a property interest only if there is a legitimate claim of entitlement," and that "[a] mere abstract desire or unilateral expectation of receiving a benefit are insufficient to establish an

entitlement.” Greenwood Manor v. Iowa Dep’t of Public Health, 641 N.W.2d 823, 837 (Iowa 2002) (citations omitted).

Plaintiffs’ interest is in making necessary repairs to their Structure in what they find is a cost-efficient, workmanlike manner, consistent with what has been allowed other property owners with like premises in the historic district. Although seemingly narrow under the facts of this case, on the current motion the Court finds Plaintiffs sufficiently allege a property interest though this interest is subject to the Commission’s discretion. As clarified at the hearing, Plaintiffs are alleging that their property interest included the receipt of a certificate of appropriateness to install vinyl windows on the Structure. However, the Commission has discretion to grant or deny an application for certificate of appropriateness, including the decision as to whether vinyl windows may be installed on buildings in the historic district. Although vinyl is not a prohibited material for historic buildings, the Commission is not required to approve Plaintiffs’ application. Plaintiffs purchased the Sherman Hill property after the area had been designated a historic district, so they had constructive notice the property was encumbered by a requirement that Plaintiffs receive permission from the Commission before altering the exterior of the Structure. Plaintiffs’ applications for certificates of appropriateness have always been subject to the Commission’s approval, and this application is no different. Thus, although Plaintiffs appear to have a protected property interest implicated in this case, that interest has always been encumbered by the requirement that Plaintiffs undergo the process of filing an application for certificate of appropriateness before the Commission for its discretionary review.

Plaintiffs fail to state a plausible claim that they have been denied procedural due process, even if they have a protected property interest implicated in this case. To determine whether Plaintiffs’ procedural due process rights have been violated, this Court must “decide what

process is constitutionally due by balancing three competing interests.” Bowers v. Polk Cnty. Bd. of Supervisors, 638 N.W.2d 682, 691 (Iowa 2002).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (citations omitted). “No particular procedure violates [due process] merely because another method may seem fairer or wiser.” Id. (quoting 16B Am.Jur.2d Constitutional Law § 909, at 500 (1998)) (alteration added by court).

The private interest at issue is Plaintiffs’ desire to use vinyl windows on the Structure instead of wood windows. The risk of erroneous deprivation of this interest through the procedures used in this case is quite low, as Plaintiffs were granted two hearings with the Commission, multiple hearings before the Council, and appellate review with this Court in Count VII of their Petition. Surely, even if the Commission was biased in some manner, the Council’s multiple opportunities for review and this Court’s review cure any deficiencies in the hearings before the Commission. Plaintiffs have failed to propose any additional or substitute procedures to more effectively protect their due process rights.

As for the Government’s interest, this was set forth in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), wherein the Supreme Court discussed the importance of regulations for historic districts and buildings. See Penn Central, 438 U.S. at 129 (holding that the objective of New York City’s historic preservation ordinance was to preserve “structures and areas with special historic, architectural, or cultural significance,” which is “an entirely permissible governmental goal”). Although the court in Penn Central was dealing specifically with a landmark preservation ordinance, it stated that “the New York City law embodies a

comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.” Id. at 132. Certainly, after Penn Central, historic preservation regulations are considered an important government interest.

Plaintiffs’ only real complaint with the procedure provided to them was the fact that the Commission was biased against them because they are “Conlins,” and Plaintiffs specifically contend the Commission’s decision was based on “Plaintiffs’ identity, stature, financial means, and the timing of Plaintiffs’ request for a certificate of appropriateness.” Petition, ECF No. 1, ¶¶ 102, 109. Based on the facts provided by Plaintiffs in their Complaint, it is evident that Plaintiffs were given numerous hearings before the Commission and the Council. Even if individual Commission members held negative views about Plaintiffs due to their identity, stature, financial means, or the timing of their request for a certificate of appropriateness, the Council re-heard Plaintiffs’ request multiple times and affirmed the Commission’s decision repeatedly. This Court finds that Plaintiffs fail to allege sufficient facts to state a procedural due process claim under Rule 12(b)(6).

4. Substantive Due Process

Plaintiffs fail to state a claim that their substantive due process rights have been violated by the Commission’s actions. As discussed by the Iowa Supreme Court in Bakken, “[i]n the face of due process challenges, considerable constitutional latitude is granted to zoning authorities.” Bakken, 470 N.W.2d at 38. The court went on to explain that “[w]here property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate

state concerns and does not deprive the owner of economically viable use of his property.” Id. (quoting Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 (1981)).

There is a heightened standard for owners alleging their substantive due process rights were violated in the zoning regulation context. The Eighth Circuit in Koscielski stated that “[d]ue process claims involving local land use decisions must demonstrate the ‘government action complained of is truly irrational, that is something more than . . . arbitrary, capricious, or in violation of state law.’” Koscielski, 435 F.3d at 902 (quoting Anderson v. Douglas Cnty., 4 F.3d 574, 577 (8th Cir. 1993) (internal quotation omitted)); see also Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992) (stating that a government entity “attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet” is an example of a “truly irrational” ordinance). The court went on to say that the government “action must therefore be so egregious or extraordinary as to shock the conscience.” Id. (citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998); Burton v. Richmond, 370 F.3d 723, 729 (8th Cir. 2004)).

Plaintiffs allege the Commission only denied their application because members of the Commission were biased against Plaintiffs because they are the “Conlins,” but there are ample provisions in the guidelines and regulations cited by Plaintiffs in their Petition that support the Commission’s decision, regardless of any personal biases held by individual members. See Petition, ECF No. 1, ¶¶ 30-36. The guidelines promulgated by the Secretary of the Interior that Plaintiffs cite explicitly state that it is recommended to install “compatible and energy-efficient replacement windows that match the appearance, size, design, proportion and profile of the existing historic windows and that are also durable, repairable and recyclable, when existing windows are too deteriorated to repair.” The Secretary of the Interior’s Standards for

Rehabilitation & Illustrated Guidelines on Sustainability for Rehabilitating Historic Buildings,

U.S. Dept. of the Interior, National Park Service, 2011, *available at* <http://www.nps.gov/tps/standards/rehabilitation/sustainability-guidelines.pdf>.

The U.S. Department of the Interior also sets forth “Preservation Briefs” to assist state and local preservation boards in their endeavors to protect historical buildings and districts from deterioration and detrimental alterations. In Preservation Brief 9, The Repair of Historic Wooden Windows, the author instructs that “[t]he decision process for selecting replacement windows should not begin with a survey of contemporary window products which are available as replacements, but should begin with a look at the windows which are being replaced.”

Preservation Brief No. 9, The Repair of Historic Wooden Windows, U.S. Dept. of the Interior, National Park Service, 1981, *available at* <http://www.nps.gov/tps/how-to-preserve/briefs/9-wooden-windows.htm>. The brief further instructs that “energy efficiency [should be considered] as one of the factors for replacements, but do not let it dominate the issue.” *Id.* This is because “[e]nergy conservation is no excuse for the wholesale destruction of historic windows which can be made thermally efficient by historically and aesthetically acceptable means.” *Id.*

Preservation Brief No. 16, The Use of Substitute Materials on Historic Building Exteriors, discusses the use of composite and other materials that are acceptable if the original material found on the historic building is not available. *See* Preservation Brief No. 16, The Use of Substitute Materials on Historic Building Exteriors, U.S. Dept. of the Interior, National Park Service, 1988, *available at* <http://www.nps.gov/tps/how-to-preserve/briefs/16-substitute-materials.htm>. The author summarizes that “[s]ubstitute materials – those products used to imitate historic materials – should be used only after all other options for repair and replacement in kind have been ruled out.” *Id.* For instance, “[s]ubstitute materials are normally used when

the historic materials or craftsmanship are no longer available, if the original materials are of a poor quality or are causing damage to adjacent materials, or if there are specific code requirements that preclude the use of historic materials.” Id.

As for the Des Moines-specific regulations, they are attached to Defendant’s Motion to Dismiss, and they were explicitly cited by Plaintiffs in their Petition as acceptable sources for the Commission to utilize in deciding whether to grant a certificate of appropriateness. See Petition, ECF No. 1, ¶ 31. The Des Moines regulations specifically state that “[a]ny replacement windows should duplicate the original window in type, size, and material.” Def. Mot. to Dismiss, Ex. J, ECF No. 3-12, p. 00038. With regard to storms and screens, the regulations state that “[i]f wooden storms and screens are unsalvageable, wood storms and screens should replace the original.” Id. at 00039. Although “vinyl storms and screen may be used as a substitute for wood,” there is no regulation requiring the Commission to accept vinyl windows, storms, or screens when there are wooden replacements available. Id.

In the introductory section of the Des Moines regulations, it states as follows:

Preservation and continued use of buildings with historic richness is the overall goal of these guidelines. This is ideally done by restoring a building using the same materials and techniques as those used originally. New building materials and technology, however, can achieve this same goal without detracting from the original design if done while keeping a few simple things in mind: 1) non-original, added-on elements or additions should be positioned at the back of the building or on the sides where they will not be visible from the street; 2) work should be done with materials historically used on similar buildings in the neighborhood; and 3) contemporary elements should be designed and finished to be subordinate to the existing building.

Id. at 00035.

If the regulations and guidelines are ignored for purposes of analyzing Plaintiffs’ Petition under Rule 12(b)(6), they may have a claim for relief, as they describe the regulations and guidelines very differently from how they are actually written. However, since Plaintiffs do discuss

the guidelines and regulations in their Petition, it seems reasonable for the Court to read through these cited materials to determine whether Plaintiffs state a claim for relief that survives Rule 12(b)(6). See Ashanti, 666 F.3d at 1151 (stating that it was appropriate to consider “[d]ocuments necessarily embraced by the pleadings includ[ing] ‘documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading’” (quoting Kushner, 317 F.3d at 831)).

Although the guidelines and regulations do not explicitly prevent the use of vinyl, they do strongly encourage the use of original materials, giving full support for the Commission’s decision to deny Plaintiffs’ request to use vinyl windows when wooden windows were readily available. The cost between the two types of windows at issue in this case differs, but “[c]ost may or may not be a determining factor in considering the use of substitute materials,” and “[d]epending on the area of the country, the amount of material needed, and the projected life of less durable substitute materials, it may be cheaper in the long run to use the original material, even though it may be harder to find.” Preservation Brief No. 16, supra.

Even if Commission members were biased against Plaintiffs because they were the “Conlins,” the Commission’s decision was fully supported by the guidelines and regulations provided by both the Secretary of the Interior and the City of Des Moines. Plaintiffs have therefore failed to state a plausible substantive due process claim, and Count II fails Rule 12(b)(6).

5. Equal Protection

“States shall not deprive any person of ‘life, liberty, or property, without due process of law,’ or of ‘the equal protection of the laws.’” Hawkeye Commodity Promotions v. Vilsack, 486 F.3d 430, 442 (8th Cir. 2007) (quoting U.S. Const. amend. XIV, § 1). “When an equal

protection claim is neither based on a suspect class or grounded in a fundamental right, it is subject to a rational basis review.” Id. (quotation omitted). In the context of a motion to dismiss, Plaintiffs have sufficiently alleged that they have a property interest in being able to repair the Structure subject to the guidelines set forth by Des Moines for historic districts, consistent with the manner in which those guidelines have been applied to other property owners. Plaintiffs must also show that they are “similarly situated to another group for purposes of the challenged government action. Id. at 442 (quotation omitted). Thus, Plaintiffs must show that other property owners in their historic district, with whom they are similarly situated, were treated differently by the Commission with regard to the use of vinyl on buildings in that district. Finally, Plaintiffs must “negate every conceivable basis which might support the classification.” Id. at 443 (quotation omitted).

“The Equal Protection Clause ‘does not demand for the purpose of rational-basis review that a legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification.’” Id. at 443 (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)). Additionally, such a decision-maker “is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” Id. (quoting FCC v. Beach Commc’ns., Inc., 508 U.S. 307, 315 (1993)).

Plaintiffs allege in their Petition that “[t]he City of Des Moines has allowed, not required removal, or otherwise not taken action against other property owners in the Sherman Hill neighborhood who have installed vinyl windows and features.” Petition, ECF No. 1, ¶ 68. They also allege that they have “been treated different than other property owners in the area and ha[ve] been singled out” by the Commission “basing its decision on whether to grant the certificate of

appropriateness upon Plaintiffs' identity, stature, financial means, and the timing of Plaintiffs' request for a certificate of appropriateness." Id. at ¶¶ 69, 109.

Taking these bare factual assertions as true, Plaintiffs claim they are similarly situated with other building owners in the Sherman Hill district who have allegedly been allowed to install vinyl windows with the Commission's explicit or implicit approval. They also claim they were treated differently from their neighbors because of an illegitimate reason: personal animus and bias held by the Commission members against Plaintiffs. However, Plaintiffs direct the Court to regulations and guidelines attached to their Petition that support a finding that the Commission had ample support to deny Plaintiffs' application for a certificate of appropriateness. Although the Commission's decision was likely supported by the regulations and guidelines before it, Plaintiffs do allege sufficient facts to support a claim that their equal protection rights were violated due to unequal treatment by the Commission of Plaintiffs and other property owners in the neighborhood. Count IV therefore survives Defendant's motion under Rule 12(b)(6).

6. Judicial Review Claim

Plaintiffs allege sufficient facts for Count VII of their Complaint to survive Rule 12(b)(6). Iowa Code § 303.34(3) provides Plaintiffs the opportunity of an appeal before this Court of the Council's decision affirming the Commission's actions to "consider whether the commission has exercised its powers and followed the guidelines established by the law and ordinance, and whether the commission's action was patently arbitrary or capricious." This Court must determine whether the Commission followed the law and also whether the Commission acted "patently arbitrary or capricious" – two separate inquiries. See Iowa Code § 303.34(3).

Rather than setting forth factual statements to support their claim for relief under this appellate review process, Plaintiffs simply re-state their legal arguments from other areas of the Petition in Count VII. They again insist the Commission was illegally constituted, that the Commission members were biased and discriminated against Plaintiffs based on unlawful factors, that the Commission misapplied the law because they erroneously thought vinyl windows were prohibited, and that the Commission's decision constituted a taking of Plaintiffs' property without just compensation.

Notably, Iowa Code § 303.34(3) only requires that this Court "shall consider" the two questions set forth to review the Commission's decision. This appears to be a mandatory appeal option for parties in Plaintiffs' position, regardless of the viability of Plaintiffs' underlying allegations. Plaintiffs have stated factual assertions in their Petition that the Commission denied their application for a certificate of appropriateness, that the Council has reviewed the Commission's decision and affirmed the Commission, and that Plaintiffs' Petition was filed within sixty days of the Council's September 24, 2012, decision.⁷ It appears that this is all that is required to set Plaintiffs' claim before this Court for review, though they will be required to prove reversal of the Commission's decision is warranted under the tests set forth in Iowa Code § 303.34(3) before they will receive any relief. Plaintiffs' claim for judicial review under Count VII therefore survives Rule 12(b)(6).

⁷ The Council rendered its final decision on September 24, 2012, and Plaintiffs filed their Petition in state court on November 21, 2012.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6), ECF No. 3, must be **granted as to Counts I, II, III, V, and VI**, and **denied as to Counts IV and VII**.

IT IS SO ORDERED.

Dated this 15th day of May, 2013.



JAMES E. GRITZNER, Chief Judge
U.S. DISTRICT COURT