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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

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

AMES OUTDOOR, INC.	*	
	*	4-98-CV-90499
Plaintiff,	*	
	*	
v.	*	
	*	
CITY OF DES MOINES, IOWA	*	MEMORANDUM OPINION
	*	AND ORDER
Defendant.	*	
	*	

Before the Court is Defendant's Suggestion to Dismiss for Lack of Jurisdiction. (Clerk's # 18). Defendant argues Plaintiff's inverse condemnation, vested rights, due process, writ of certiorari and writ of mandamus claims are not ripe and should be dismissed for lack of subject matter jurisdiction. Defendant also argues that, because the Court lacks original jurisdiction over those claims, it should dismiss Plaintiff's state law claims. For the following reasons, the Court will dismiss Plaintiff's inverse condemnation, vested rights, due process, writ of mandamus and writ of certiorari actions. The Court, however, maintains jurisdiction over Plaintiff's other state law claims (bad faith, tortious interference with a contract, and intentional interference with a prospective business advantage).

I. Background

Plaintiff, Ames Outdoor, Inc. ("Ames Outdoor") seeks relief from moratoriums and an ordinance instituted by Defendant, City of Des Moines, Iowa ("City"). Ames Outdoor is a corporation that builds and leases advertising billboards. In the spring of 1998, Ames Outdoor applied for seven permits for the construction of new billboards in Des Moines. On April 20, 1998, after the City issued the permits but before the permits had been released to Ames

Pleading # 32

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Outdoor, the City imposed a moratorium on the construction of new billboards. As of April 20, 1998, Ames Outdoor also had six permit applications before the City waiting for approval. On August 3, 1998, the City passed Ordinance 13.627 that codified the substance of the April 20, 1998 moratorium.

Ames Outdoor claims that they have a property interest in the billboard permits - both those that were issued and those permits pending approval before the City instituted the moratoriums and ordinance. The company alleges the City's ordinance amounts to a taking of those property interests in violation of the United States and Iowa Constitutions. *See* U.S. Const. amend. V; Iowa Const. art. I, § 18. The City's actions prompted Ames Outdoor to file a complaint consisting of eight causes of action. Count one (due process) alleges the City violated Ames Outdoor's substantive and due process rights when it issued moratoriums and an ordinance which changed the City's municipal code. Count two (writ of certiorari) asks the court to review the legality of the City's action. Count three (writ of mandamus) alleges the City's action constituted a taking and asks the Court to initiate condemnation proceedings. Counts four (inverse condemnation) and five (vested rights) allege the City's actions constituted a taking in violation of the Iowa and United States Constitutions. Ames Outdoor also alleges three related state law claims: count six (bad faith), count seven (tortious interference with a contract), and count eight (intentional interference with a prospective business advantage).

II. Discussion

Claims must be ripe for the Court to have subject matter jurisdiction under Article III, § 2 of the United States Constitution. *See Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1272 (8th Cir. 1994) (noting a plaintiff must demonstrate a case or controversy for its claim to be adjudicated in federal court). Ames Outdoor's due process, inverse condemnation,

vested rights, writ of certiorari and writ of mandamus claims are not ripe. The Court must therefore dismiss those actions for lack of subject matter jurisdiction. The Court maintains jurisdiction over Ames Outdoor's remaining state claims (tortious interference with a contract, bad faith action and intentional interference) though, pursuant to 28 U.S.C. § 1332.

A. Inverse Condemnation and Vested Rights Claims

There are two hurdles a party must negotiate before they can bring a takings action against the government. First, a party must obtain a final decision from the government entity. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 192 (1985); *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 434 (Iowa 1996). The government must have made a final decision as to how the action will apply to the specific property in question. A court presiding over a takings action must determine the economic impact of the challenged action and the action's affect upon a party's "reasonable investment-backed expectation." *See Williams*, 473 U.S. at 190-191. These factors cannot be assessed "until the [government] has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property] in question." *Id.* at 191.

Second, a party bringing a takings claim must exhaust all available procedures for seeking compensation from the governmental entity. *Id.* at 195 n.13. The Fifth Amendment only prohibits takings "without just compensation." The Constitution does not require a state to provide compensation or compensation procedures before it deprives an individual of property. A state has not run afoul of the Fifth Amendment "unless or until the state fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984).

1. The finality requirement

For a takings action to be ripe, the government action challenged in the complaint must be final. *See Williams*, 473 U.S. at 186; *Iowa Coal Mining*, 555 N.W.2d at 434. Ames Outdoor contends the City made a final decision when it issued the ordinance. The company argues that, by passing that ordinance, the City permanently nullified the seven issued permits and the six pending applications. The Court does not agree. Ames Outdoor could have sought relief from the Board of Adjustment.

City zoning decisions can be appealed to the Board of Adjustment. The Iowa Legislature requires that each city be overseen by a board of adjustment. *See* Iowa Code § 414.7 (West 2000). This Board has the power to grant waivers and variances from zoning ordinances. *See* Iowa Code § 414.12 (West 2000); Des Moines, Ia., Code § 134-64 (2000). The City's municipal code gives the Board sweeping authority to review City zoning actions. *See* Des Moines, Ia., Code §§ 134-63(a), 134-64, 134-65(a) (2000) (granting the Board of Adjustment all the powers of a zoning enforcement officer). Section 134-64 of the code allows the Board to grant a variance if the enforcement of the City's action "will result in unnecessary hardship" and the variance is not "contrary to the public interest." Des Moines, Ia., Code § 134-64(2). In determining whether a City action will result in an unnecessary hardship, the Board must consider three factors. *See* Des Moines, Ia. Code § 134-64(2)(a)-(c). The Board must decide whether the challenged action (a) deprives the landowner of all beneficial use of the land at issue, (b) imposes a burden on the owner which "is due to unique circumstances not of the owners own making," and (c) whether the variance will "alter the essential character of the locality of the land in question." *Id.*

In Iowa, a city's action is generally not final until the aggrieved party has appealed that action to a board of adjustment using the procedures outlined in the Iowa Code and the applicable municipal code. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981) (holding that an aggrieved party must seek a variance before bringing a takings action); *City of Iowa City v. Hagen Elecs.*, 545 N.W.2d 530, 534-35 (Iowa 1996) (holding that a takings claim was not ripe for adjudication because the party bringing the action failed to seek review from a board of adjustment). If the property holder "were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Id*; *see MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) (noting "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes"). Ames Outdoor failed to make use of the available municipal procedures. The company failed to seek redress from the Board empowered to oversee the zoning enforcement officer.

The company claims utilizing any additional procedures provided by the City would have been futile. Specifically, Ames Outdoor contends it would have been futile to appeal the City's action to the Board of Adjustment because that Board does not have the power to issue new permits. Federal courts agree that a party need not take futile actions to establish ripeness. *See South Dakota Mining Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005, 1009 (8th Cir. 1998); *Sammon v. New Jersey Bd. of Med. Examiners*, 66 F.3d 639, 643 (3rd Cir. 1995). However, Ames Outdoor has not established that an appeal to the Board of Adjustment would have been a futile exercise. The Board is empowered to grant waivers and variances. *See* Des Moines, Ia., Code § 134-64. Ames Outdoor presents no evidence or arguments why the Board could not

have considered the company's appeals. Therefore, the action Ames Outdoor complains of is not final.

2. Compensation using state procedures

A party bringing a § 1983 takings action premised on a taking in violation of the Fifth Amendment must have first sought compensation from the state. The Constitution only prohibits takings "without just compensation." U.S. Const. amend. V. Courts have long held that a party bringing a takings action must first attempt to be compensated using state procedures. *See Williams*, 473 U.S. at 192.

The State of Iowa has a sophisticated mechanism to compensate parties who have suffered a taking. The aggrieved party must seek a writ of mandamus from a court, which determines "whether a factual issue exists that would permit a condemnation commission or a jury on appeal of an award to find an intrusion that produced a measurable decrease in the property's market value." *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659, 663 (Iowa 1992). If the court finds this factual issue to exist, it must then order state condemnation proceedings. *See Phelps v. Board of Supervisors*, 211 N.W.2d 274, 276 (Iowa 1973).

Ames Outdoor's action is unripe because it has not sought compensation using the procedures provided by the state. Both parties agree Ames Outdoor did not ask a state court for a writ of mandamus ordering a compensation commission to value any lost property rights. Ames Outdoor cannot maintain a takings action without first seeking reimbursement from the State of Iowa. *See Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 379 (8th Cir. 1997) (holding a foreign national must first seek compensation from the state before filing a takings action).

To summarize, the inverse condemnation and vested rights claims before the Court must be dismissed on two independent grounds. First, the action challenged is not final. Second, the aggrieved party has failed to seek compensation from the City using the compensation procedures outlined in the state and municipal code.

B. Due Process Claim

Ames Outdoor also brings an action against the City of Des Moines alleging violations of the substantive and procedural due process rights guaranteed under the Fourteenth Amendment of the United States Constitution. U.S. Const. amend XIV, § 2. The company claims the City's actions were an invalid exercise of its police powers. However, the remedy for an action which violates the Fourteenth Amendment is not "just compensation," but judicial invalidation of the action and appropriate, actual damages. *See Williams*, 473 U.S. at 197.

Due process claims can only be maintained against final actions. *See Williams*, 473 U.S. at 196. Like the takings analysis above, the consequence of an official action cannot be evaluated by a court until the action has been applied to the property in question. *Id.* Ames Outdoor failed to seek redress from the Board of Adjustment. At this time, there is no evidence of exactly how the challenged actions will be applied to the Plaintiff's property interests. Ames Outdoor's due process action is not ripe for adjudication, and must therefore be dismissed.

C. Writ of Mandamus Claim

In its Complaint, Ames Outdoor asks the Court to issue a writ of mandamus ordering the State of Iowa to initiate condemnation proceedings. Chapter 6B of the Iowa Code gives a condemnation commission the power to value a party's loss and provide the appropriate compensation. *See* Iowa Code §§ 6B.1-.55 (West 2000). A party seeking a writ of mandamus to order a compensation proceeding must demonstrate that "a factual issue exists that would permit

a condemnation commission or a jury on appeal of an award to find an intrusion that produced a measurable decrease in the property's market value." *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659, 663 (Iowa 1992).

The Court has no jurisdiction to order condemnation commission proceedings. *See Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 578-89 (1954). In *Stude*, the plaintiff sought to have the condemnation commission's damage calculations reviewed. *Id.* at 576. The Supreme Court dismissed the plaintiff's claims, noting that they were not "civil actions" under 28 U.S.C. § 1332, because there were additional state compensation procedures that needed to be exercised before the claim could be properly adjudicated. *Id.* Ames Outdoor's claim does not rise to the level of "civil action" as defined by 28 U.S.C. § 1332. *See Stude*, 346 U.S. 574, 578 (noting condemnation proceedings are "administrative until the appeal has been taken to the district court of the county"); *McKart v. United States*, 395 U.S. 185, 193 (1969) (noting "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"). Ames Outdoor failed to obtain a final decision from the City, seek a writ of mandamus from a state court, obtain relief from the condemnation commission and appeal the commission's damage award. The *Stude* controversy did not amount to a ripe action. Likewise, the facts in this case do not amount to a ripe claim for writ of mandamus.

The Court is vested with the power to issue all writs necessary to effectuate its judgements. *See* 28 U.C.S. § 1651 (West 2000); *United States v Illinois Bell Tel. Co.*, 531 F.2d 809 (7th Cir. 1976). However, the power to issue writs does not supply a court with jurisdiction. *See Illinois Bell Tel. Co.*, 531 F.2d at 814. A Court must first have jurisdiction over the matter at hand. In the present case, the Court does not have subject matter jurisdiction over Ames

Outdoor's takings claim because, as explained above, the challenged action is not final. Therefore, the Court cannot initiate condemnation proceedings.

D. Writ of Certiorari Claim

Ames Outdoor also asks the Court to review the City's actions pursuant to a writ of certiorari. Section 414.15 of the Iowa Code allows parties to appeal decisions of the Board of Adjustment to a "court of record." (West 2000). The Court, with diversity jurisdiction, is empowered by that statute to review adjustment board actions. *See Linn County v. City of Hiawatha*, 311 N.W.2d at 98 (Iowa 1981) ("Even if [the state legislature] had not intended to include federal courts, [§ 414.15] could have no effect on a federal court's existing jurisdiction to review a board of adjustment decision when necessary to decide a case properly based on federal question or diversity jurisdiction." *Id.* at 98-99.). However, the statute only permits courts to review board of adjustment decisions. Ames Outdoor asks the Court to review the decision of the City Council. Neither state nor federal statutes permit such a review. Ames Outdoor's writ of certiorari action must therefore be dismissed.

E. Remaining State Law Claims

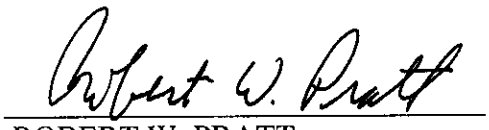
Ames Outdoor's remaining claims (bad faith, tortious interference with a contract and intentional interference with a prospective business advantage) are all grounded in state law. The Court will not dismiss these three claims. Ames Outdoor is incorporated under the laws of Illinois with its principal place of business in Illinois. The City of Des Moines is a municipality incorporated in Iowa. The Court thus has diversity jurisdiction over these claims, pursuant to 28 U.S.C. § 1332.

III. Conclusion

The City's motion to dismiss Ames Outdoor's claims for lack of subject matter jurisdiction (Clerk's # 18) is **granted** as to count one (due process), count two (writ of certiorari), count three (writ of mandamus), count four (inverse condemnation), and count five (vested rights). The City's motion is **denied** as to counts six (bad faith action), seven (tortious interference with a contract), and eight (intentional interference with a prospective business advantage).

IT IS SO ORDERED.

Dated this 30th day of October, 2000.



ROBERT W. PRATT,
U.S. DISTRICT JUDGE