

United States District Court,
W.D. Texas, San Antonio Division.
Floyd MACKENZIE and Danis Mackenzie,
Plaintiffs,
v.
CITY OF SAN MARCOS, et al., Defendants.

No. SA 03 CA 0250
March 2, 2005

Teresa Kathleen Polo Valentic, Law Office of Teresa
K. Valentic, San Antonio, TX, James S. Burling,
Andrew Lloyd, Pacific Legal Foundation,
Sacramento, CA, Kathleen A. Cassidy Goodman,
Law Office of Kathleen Cassidy Goodman, Boerne,
TX, for Plaintiffs.

William M. McKamie, Law Offices of William M.
McKamie, P.C., San Antonio, TX, for Defendants.

**ORDER ADOPTING REPORT AND
RECOMMENDATION OF THE UNITED
STATES MAGISTRATE JUDGE**

Furgeson, J.:

BEFORE THE COURT is the Memorandum and Recommendation of the United States Magistrate Judge, filed in the above-styled and numbered cause on December 7, 2004. The Magistrate Judge recommended: (1) the City of San Marcos's (the "City") Second Amended Motion to Dismiss (Docket No. 86) be GRANTED and Plaintiffs' causes of action brought under § 1983 alleging violations of the Fifth Amendment Takings Clause and Fourteenth Amendment substantive due process, procedural due process, and equal protection rights be DISMISSED WITHOUT PREJUDICE as unripe for consideration; (2) the City's Motion for Summary Judgment (Docket No. 88) be DENIED as Moot; (3) Plaintiffs' Cross-motion for Partial Summary Judgment (Docket No. 135) be DENIED as Moot; and (4) any other relief not expressly granted by DENIED. Plaintiffs filed their objections to the Memorandum and Recommendation on December 17, 2004. After due consideration, the Court is of the opinion that the Magistrate Judge's Memorandum and Recommendation should be ADOPTED AS MODIFIED. In contrast to the Memorandum and Recommendation's findings, the Court holds that Plaintiffs did not concede that the analysis of their Fifth Amendment takings claim was equally applicable to their due process and equal protection claims and therefore assesses the claims

separately.¹ The Court assesses the due process and equal protection claims separately from the takings claims, and after due consideration, the Court GRANTS Defendant's Motions for Summary Judgment as to those claims.

BACKGROUND

Floyd and Danis MacKenzie filed their original complaint on March 28, 2003 against Defendants the City, former City Director of Planning Ron Patterson, and City acting City Director of Planning Ed Theriot. Plaintiffs brought claims under 42 U.S.C. § 1983 alleging that Defendants violated their constitutional rights under the Privileges and Immunities Clause of Article IV, the Fourteenth Amendment's guarantees of due process and equal protection, and the Fifth Amendment Takings Clause due to Defendants alleged refusal to "untable" a zoning request to allow the construction of multifamily housing on Plaintiffs' property. Plaintiffs also allege that Defendants conspired "under the color of law" to deny Plaintiffs' rights secured by the Constitution. Plaintiffs also sued Defendant Patterson and Defendant Theriot in their official and individual capacities.

As a result of this Court's February 10, 2004 Order granting in part and denying in part Defendants' motions to dismiss, only Plaintiffs' claims against the City under § 1983 for violations of the Fourteenth Amendment and Fifth Amendment Takings Clause remained pending before the U.S. Magistrate Judge for disposition. On July 12, 2004, Plaintiffs filed their Fourth Amended Complaint, which no longer named Defendants Patterson and Theriot as parties and did not allege a claim against the City for violating the Privileges and Immunities Clause of Article IV. The Fourth Amended Complaint re-alleged the remaining causes of action: (1) violation of Plaintiffs' procedural due process rights in violation of the Fourteenth Amendment, (2) violation of Plaintiffs' substantive due process rights under the Fourteenth Amendment, (3) violation of Plaintiffs' equal protection rights under the Fourteenth Amendment, and (4) violation of the Fifth Amendment for committing an unconstitutional taking without just compensation.

The property at issue is located at 433 W. San Antonio Street, San Marcos, Texas ("the Property"). According to the Magistrate Judge's Report and the evidence submitted, the property was zoned "M" for mixed use

¹ Memorandum and Recommendation, at 47.

when Plaintiffs purchased it in 1982. On September 29, 1980, the City adopted Ordinance 1980-42 which allowed for the property to be used for multi-family dwellings.

On May 9, 1983, the City adopted a Master Plan by Ordinance 1983-22, which included a Thoroughfare Plan that proposed the extension of Ranch Road 12 and 100-foot right-of-way through Plaintiffs' Property. The Master Plan also included a Future Land Use Map that indicated the City's intention to zone the Property for commercial use. The Master Plan Committee presented the Master Plan to the San Marcos City Council on August 12, 1982 and explained the following amendment procedures: "Any amendment or modification of this Master Plan shall be reviewed by the Planning Commission and Zoning Commission, and then forwarded to the City Council for official recognition and adoption." This explanation was consistent with City Charter provisions that required the Planning Commission to "submit recommendations and observations to the council and zoning commission on all proposals including a determination of compliance with the master plan" and called for the Commission to provide the City Council with recommendations for changes to the Master Plan.

In December 1983, Plaintiffs filed a building permit application to build a multifamily development on the property. While the application was pending, the City issued a sixty-five day moratorium barring the issuance of building permits for applications such as the one submitted by Plaintiffs, which proposed multi-family dwellings for twenty or more residents. On June 12, 1984, Plaintiffs wrote a letter to Bill Thomas in the City Planning and Permit Department inquiring about the status of their 1983 building permit application.

On June 13, 1984, the City passed two ordinances that affected Plaintiffs' building permit application. Ordinance 1984-70 barred the issuance of all building permits for any type of construction that did not comply with the land use specifications set forth in the 1983 Master Plan. Ordinance 1984-71 repealed Ordinance 1980-42 and established a new general zoning ordinance which stated in part that building permits had to comply with the City Master Plan and subsequent amendments, that applications for changes to the City Master Plan had to be submitted on a form provided by the City, and that the mixed-use land use classification was to be phased out. Ordinance 1984-71 also set forth appeal procedures. As a result of Ordinance 1984-71, decisions by the zoning commission are appealable to

the City Council; decisions of the director of planning in the enforcement of the ordinance are appealable to the Zoning Board of Adjustments ("ZBOA"); alleged errors in any order, requirement, decision, or determination made by an administrative official or body in the enforcement of Ordinance 1984-71 is appealable to the ZBOA; and parties aggrieved by a decision of the ZBOA are appealable to the City Council.

On June 22, 1984, Plaintiffs filed an application to have their Property rezoned from "M" to the newly-established zone classification, "MF-4." A Staff Report issued on August 6, 1984 by the City Planning and Building Inspections Department concerning Plaintiffs' requested zoning change indicated that the Staff would support the concept of a high density residential use between a medium density and commercial use provided that the plan included adequate buffering. The Staff Report also stated, "Since the proposed thoroughfare plan has not been definitely determined, the Staff recommends tabling [Plaintiffs'] application pending consideration of the needed Master Plan amendment."

The City's Zoning Commission held a public hearing on August 7, 1984 to consider Plaintiffs' zoning change application. Minutes from the hearing reflect discussion concerning "a major thoroughfare planned for the area ... requiring a 100' right of way which cuts directly through Mr. MacKenzie's property reducing the size of the property to a great extent." The record reflects that the uncertainty concerning the planned thoroughfare caused Plaintiffs' application to be tabled pending its consideration at a future joint meeting with the Planning and Zoning Commissions.

On December 26, 1984, Plaintiffs wrote a letter to City Manager A.C. Gonzales that expressed frustration with the delay in the decisionmaking process on their application. Plaintiffs' letter provided a chronology of events that included the above events as well as phone calls made to the City in September, October, and November 1984. In his response to the letter, the City Manager apologized for Plaintiffs' frustration and explained that the City was obligated under the Master Plan to investigate and implement the planned thoroughfare through the Property if possible. City Manager Gonzales explained that a decision would take time, "[n]ot because I arbitrarily want it to, but because of the special circumstances involved and our need to see that the City's Master Plan is implemented."

On January 14, 1985, Plaintiffs received a letter from Frank H. Robbins, Director of Planning, advising them on the City's position regarding the Property. Director Robbins indicated that Plaintiffs may not have to dedicate their land to the City for the thoroughfare depending on how the law was interpreted by courts. Director Robbins also stated that the Planning Commission would decide whether to seek a dedication during platting of the property.

Director Robbins's letter advised Plaintiffs that three actions were required before the Property could be developed for high-density residential use: (1) the land use map would need to be amended from commercial to high-density; (2) the City Council would have to approve of the zoning change from "M" to some form of multi-family use; and (3) the Property would have to be platted. Director Robbins also informed Plaintiffs that they could seek input for their proposal from the Planning Commission. Director Robbins wrote that a broad range of design proposals existed that would permit Plaintiffs to profit from the Property and would accommodate the City's potential need to build a street. Plaintiffs were advised, "[U]ntil the road through the property is removed from the Thoroughfare Plan, an action that must be taken by the City Council, it will be the Staff's position that the roadway must be acquired, either through platting or purchase."

Plaintiffs wrote another letter to the City regarding the Property on May 3, 1985, and City Attorney Lamar W. Hankins responded in a letter dated July 2, 1985. City Attorney Hankins explained that the City Council and Planning Commission had not reached a decision concerning the implementation or financial aspects of the plan. He reiterated that the best course for Plaintiffs to follow was the three-step recommendation contained in Director Robbins's letter dated January 14, 1985. The City Attorney explained, "By taking the suggested action, you will either accomplish you[r] development goals or you will succeed in getting a definitive answer from the City on its implementation of the thoroughfare plan and you will then be able to revise your plans, if necessary."

During the summer of 1985, the topic of the City's acquisition of the Property was placed on the City's Development Task Force's agenda at least three times.

On September 15, 1986, Director Robbins wrote a memorandum to the City Manager concerning Plaintiffs' request that the City acquire all of the Property. Director Robbins explained that Plaintiffs

needed to dedicate the right-of-way property in order to plat and receive a building permit even though the Property technically was not being subdivided. Director Robbins recommended that the City enter into a contract with Plaintiffs to pay \$10,000 per year "for eight years beginning in 1987 after it's put on the road bond issue we need to approve in April, 1997."

In October 1987, Plaintiffs filed a lawsuit in Texas state court against the City for inverse condemnation due to the City's refusal to act on Plaintiffs' December 1983 application for a building permit and their June 1984 application for zoning change. On November 4, 1994, the state court granted the City's plea to the jurisdiction and dismissed the case.

In 1997 the City Planning and Development Services set forth the City's goals for future land use in the "Section One Plan." The Plan proposed amending the City's Master Plan, reflected an intent that Plaintiff's property be used for low density residential dwellings, and did not show a proposed street through the Property.

In January 2001, Plaintiffs filed an application to change the Property's zoning classification from "M" to "MF-1." In March 2001, Plaintiffs filed another application for a zoning classification change that stated the application sought to untable the zoning change requested on August 7, 1984.

Plaintiffs received a response letter from Planning Director Theriot dated March 28, 2001, to which was attached City Attorney Mark B. Taylor's March 26, 2001 memorandum regarding Plaintiffs' application to untable the 1984 application. The City Attorney memorandum stated that the 1984 application should not be untabled because the January 2001 application effectively waived Plaintiffs' rights to have the 1984 application reconsidered and because too much time and too many changes had occurred since the 1984 application. Among other changes, the City Attorney observed that new property owners had moved into the area and new zoning regulations and a Master Plan were had taken effect.

In 2001 and 2002, the City issued permits to Plaintiffs that allowed them to build a swimming pool, a three-car garage, a storage building, and roof over the pool. In addition, Plaintiffs received authorization to enclose a carport and remodel a storage area above the garages into nurse's quarters. On July 2, 2002, the ZBOA upheld the denial of Plaintiffs' application for a building

permit for a 1,500 square-foot addition to the Property, and on November 12, 2002, the ZBOA upheld the denial of Plaintiffs' application for building permits for accessory buildings on the Property.

Plaintiffs filed two state court cases challenging the ZBOA's 2002 decisions. The City and Plaintiffs filed cross-motions for summary judgment, and on December 7, 2004 the Magistrate Judge Mathy recommended that the City's Second Amended Motion to Dismiss be Granted and Plaintiffs § 1983 claims against the City under the Fifth and Fourteenth Amendments be Dismissed Without Prejudice.

STANDARD OF REVIEW

The Court reviews *de novo* a Magistrate Judge's Report and Recommendation if a party files specific objections within ten days of service.² The Court need not consider objections that are frivolous, conclusive, or general in nature.³ If there are no specific objections to a Magistrate Judge's Report and Recommendation, the District Court is to review it for findings and conclusions that are either clearly erroneous or contrary to law.⁴ In the instant case, Plaintiff timely filed specific objections to the Magistrate Judge's Report and Recommendation, thus warranting *de novo* review by this Court.

1. Fed. R. Civ. P. 12(b)(1) Motion to Dismiss

A motion to dismiss for lack of subject matter jurisdiction should be granted "only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief."⁵ To assess whether subject matter jurisdiction exists, this Court may look to the complaint and the undisputed facts in the record. When analyzing the complaint, the Court treats the allegations in the complaint as true.⁶ Ultimately, a motion to dismiss for

lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff can prove no set of facts in support of his or her claim that would entitle plaintiff to relief.⁷ Fundamental to this standard is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged.⁸

2. Fed. R. Civ. P. 56 Summary Judgment Motion

Summary judgment is appropriate if, after adequate time for discovery, no genuine issue as to any material facts exists, and the moving party is entitled to judgment as a matter of law.⁹ Where the issue is one for which the nonmoving party bears the burden of proof at trial, it is sufficient for the moving party to identify those portions of the record which reveal the absence of a genuine issue of material fact as to one or more essential elements of the nonmoving party's claim.¹⁰ The nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial."¹¹ To prevail on summary judgment, the moving party need only demonstrate that "there is an absence of evidence to support the nonmoving party's case."¹² Upon viewing the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court, in order to grant summary judgment, must be satisfied that no rational trier of fact could find for the nonmoving

² 28 U.S.C. § 636(b)(1).

³ *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir.1987).

⁴ *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.1989).

⁵ *Id.*

⁶ *Sawar Partnership v. United States*, 67 F.3d 567, 569 (5th Cir.1995).

⁷ *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir.1998); *Conley v. Gibson*, 355 U.S. 41, 45- 46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

⁸ *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir.1989).

⁹ Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

¹⁰ *Celotex*, 477 U.S. at 323-24.

¹¹ *Id.* at 324.

¹² *Id.* at 325.

party as to each element of his case.¹³

ANALYSIS

Plaintiffs claim that the Magistrate Judge's Report and Recommendation contains many egregious errors and misrepresentations concerning the nature of Plaintiffs' claims and arguments. Plaintiffs contend that the Magistrate Report directly contradicts the previous Order entered by this Court that held that Plaintiffs' claims were ripe for adjudication. In addition, Plaintiffs contend that the Report ignored substantial evidence establishing the ripeness of Plaintiffs' claims and that it imposed ripeness barriers that have no reasonable application under the law to Plaintiffs' takings claims.

I. TAKINGS CLAIMS

Plaintiffs object to the Magistrate's recommendation that Plaintiffs' takings claims be dismissed for lack of ripeness due to Plaintiffs' failure to show that it was futile for them to obtain a final agency decision. The U.S. Supreme Court ruled in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City* that a takings claim is not ripe until (1) "the government entity charged with implementing the regulations has reached a final decision,"¹⁴ and (2) the plaintiff "seeks compensation through the procedures the State has provided for doing so."¹⁵ After *de novo* review of the record, the Court concurs with the Magistrate Judge's recommendation that Plaintiffs did not fulfill the first prong of the ripeness test. The Court finds that Plaintiffs did not "diligently and properly pursue a decision on their tabled 1984 application for zoning change before they filed the 1987 state lawsuit for inverse condemnation or after the lawsuit was dismissed in 1994 on a plea to the jurisdiction."¹⁶

In addition, the Court finds that Plaintiffs did not meet the second prong of the ripeness test. The Fifth Circuit recently held in *Liberty Mutual Insurance Co. v. Brown* that a plaintiff's failure to present its inverse condemnation action to the state court in a posture such

¹³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

¹⁴ 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

¹⁵ 473 U.S. at 194.

¹⁶ Memorandum and Recommendation, at 35.

that the state court could rule on the merits of plaintiff's claim constituted a failure to utilize the available state procedures for obtaining compensation as required under *Williamson County's* second ripeness prerequisite.¹⁷ In the case at hand, Plaintiffs brought an inverse condemnation claim against Defendant in state district court in 1987. In 1994, the state court granted Defendant's plea to the jurisdiction and dismissed the case due to Plaintiffs' failure to exhaust administrative remedies and failure to obtain a final decision from the City Council on the tabled application. The state court action was dismissed without an examination of the merits. Plaintiffs have not subsequently returned to state court to receive an adjudication on the merits. Therefore, the Court holds that Plaintiffs have not adequately sought compensation through state procedures and their federal court claim fails to meet the second prong of the ripeness test. Due to Plaintiffs' failure to meet both prongs of the *Williamson County* ripeness test, the Court ADOPTS the Magistrate Judge's recommendation to dismiss Plaintiffs' takings claims for lack of subject matter jurisdiction.

II. DUE PROCESS AND EQUAL PROTECTION CLAIMS

Plaintiffs object to the Magistrate's recommendation that Plaintiffs' due process and equal protection claims be dismissed for lack of ripeness under the same analysis applied to their takings claims. Plaintiffs contend that the Magistrate's recommendation is "patently false" in concluding, "Plaintiffs do not challenge the contention that their due process and equal protection claims are framed as takings claims." Plaintiffs point to the following pleadings to demonstrate that they did not concede that their 14th Amendment claims were framed as taking claims: Plaintiffs' Response to Defendants' Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim (Docket No. 7), Plaintiffs' Response to Defendants' First Amended Motions to Dismiss for Lack of Jurisdiction, Failure to to State a Claim, For Qualified Immunity and for Other Reasons, and First Amended Answer (Docket No. 39), and Plaintiffs' Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment (Docket No. 135).

Plaintiffs' pleadings demonstrate that they did not explicitly concede that their due process claims were

¹⁷ 380 F.3d 793, 797-98 (2004).

framed as takings claims, and the Fifth Circuit has recognized that "individuals may look to several constitutional provisions for protection against state action that results in a deprivation of their property."¹⁸ Accordingly, the Court reviews Plaintiffs' due process claims and equal protection claims independently from their takings claims.

A. Substantive Due Process Claim

The Fourteenth Amendment protects individuals from being deprived of their property without due process of law by guaranteeing substantive due process and procedural due process. By barring certain government actions regardless of the fairness of the procedures used to implement them, substantive due process serves to prevent governmental power from being used for purposes of oppression.¹⁹ Plaintiffs assert that their substantive due process rights were violated because the City suppressed Plaintiffs' ability to develop their property to make it less burdensome for the City to later acquire the property for use in conjunction with a planned road. Substantive Due Process claims are guided by the deferential "rational basis" test.²⁰ "A violation of substantive due process ... occurs only when the government deprives someone of liberty or property; or, to use the current jargon, only when the government works a deprivation of a constitutionally protected interest."²¹ Plaintiffs must first establish that they held a constitutionally protected property right to which the Fourteenth Amendment's due process protection applies.²² Therefore, the nature of the property interest must be determined by Texas law. Plaintiffs assert that they possessed a constitutionally protected interest in ownership of the land they sought to develop. The Court finds that Plaintiffs did not possess a constitutionally protected right to develop the

¹⁸ *John Corp. v. City of Houston*, 214 F.3d 573, 577 (5th Cir.2000); see also *Simi Investment Co. v. Harris County, Texas*, 236 F.3d 240, 247-48 (5th Cir.2000).

¹⁹ *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

²⁰ *Simi Investment Co.*, 236 F.3d at 249.

²¹ *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir.1988); *Simi Investment Co.* at 249.

²² *Simi Investment Co.* at 249-50.

property in violation of the zoning laws and other land use regulations that existed at the time.

Moreover, even if a property right were constitutionally cognizable in this matter, the Court finds that the City's interference with Plaintiffs property interests were rationally related to the City's legitimate government interests to retain the zoning classifications and to build a major thoroughfare near the property. Even after the 1997 Section One Future Plan reflected an intent not to build a street through the Property, the City's decision not to untable Plaintiffs 1984 application was rationally related to legitimate objectives such as honoring the new zoning regulations and the new Master Plan. As the Fifth Circuit has reiterated on multiple occasions, "The question is only whether a rational relationship exists between the [policy] and a conceivable legitimate objective. If the question is at least debatable, there is no substantive due process violation."²³ The Court holds that Defendant did not violate Plaintiffs' rights to Substantive Due Process and GRANTS Defendant's Motion for Summary Judgment on this issue.

B. Procedural Due Process Claim

In contrast to substantive due process, procedural due process requires the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property."²⁴ Plaintiffs contend that Defendant City denied Plaintiffs constitutionally adequate notice and hearing opportunities due to its efforts to stall approval of Plaintiffs' building application and its decision to table Plaintiffs' zoning application indefinitely. The Court follows 5th Circuit precedent on this issue and holds, "The takings claim is not yet ripe, and it will only be when a court may assess the takings claim that it will also be able to examine whether [Plaintiffs] were afforded less procedure than is constitutionally required."²⁵ This Court cannot address the procedural due process claim without a full understanding of the relevant and ripened facts. The Court, therefore, GRANTS Defendant's Motion for Summary Judgment as to Plaintiffs' Procedural Due Process claim.

²³ *Id.* at 251; *FM Prop. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir.1996).

²⁴ *Daniels*, 474 U.S. at 327.

²⁵ *John Corp.*, 214 F.3d at 585.

C. Equal Protection Claim

Finally, the Court turns to Plaintiffs' contention that they have been denied equal protection under the 14th Amendment to the United States Constitution. Plaintiffs assert that Defendant's refusal to untable their zoning request for years despite its enactments of other similar zoning changes violated their right to equal protection of the law. Under prevailing law, the challenged official action is "presumed to be valid and must be sustained if the classification drawn by the action is rationally related to a legitimate state interest."²⁶ As part of the Court's analysis, the Court considers "whether the state could rationally determine that by distinguishing among persons as it has, the state could accomplish its legitimate purpose."²⁷

Plaintiffs have not demonstrated particular instances in which Defendant has acted differently with respect to similarly situated zoning requests, but assuming that different classifications have been made, the Court finds that Defendant's actions have been rationally related to a legitimate state interest. The initial decision to table the request was made to allow the City the opportunity to assess the Thoroughfare Plan that indicated a future street across the Property. Evidence also indicates that Plaintiffs' requested changes may have violated provisions in the City Ordinance that require zoning changes to be consistent with the City's Master Plan. The proposed changes ran counter to the City's efforts in 1984 to encourage commercial uses in that area. The record further demonstrates that legal counsel advised Defendant not to untable the request because circumstances had changed and too much time had expired from the initial application. Based on this analysis and *de novo* review of the record before the Court, the Court GRANTS Defendant's Motion for Summary Judgment as to Plaintiffs' Equal Protection claim.

CONCLUSION

Having considered Plaintiffs' objections and having reviewed *de novo* the controlling law and the specific facts of this case, the Court ORDERS that the Memorandum and Recommendation be ADOPTED AS MODIFIED.

²⁶ *Mahone v. Addicks Utility District of Harris County*, 836 F.2d 921, 933 (5th Cir.1988).

²⁷ *Id.*

Accordingly, the Court ORDERS that the City of San Marcos's (the "City") Second Amended Motion to Dismiss (Docket No. 86) be GRANTED and Plaintiffs' causes of action brought under § 1983 alleging violations of the Fifth Amendment Takings Clause be DISMISSED WITHOUT PREJUDICE as unripe for consideration.

The Court ORDERS that the City's Motion for Summary Judgment (Docket No. 88) be GRANTED as to Plaintiffs' causes of action brought under § 1983 alleging violations of Fourteenth Amendment substantive due process, procedural due process, and equal protection rights. The Court ORDERS that these claims be DISMISSED WITHOUT PREJUDICE and the remaining issues in the City's Motion for Summary Judgment be DENIED as Moot.

The Court ORDERS that Plaintiffs' Cross-motion for Partial Summary Judgment (Docket No. 135) be DENIED as Moot.

The Court ORDERS that any other relief not expressly granted be DENIED.

It is SO ORDERED.

FINAL JUDGMENT

On this day the Court entered an order adopting as modified the Memorandum and Recommendation of the United States Magistrate Judge and dismissing Plaintiff's Complaint. The Court now enters its Final Judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

It is ORDERED that the Memorandum and Recommendation of the Magistrate Judge be ADOPTED AS MODIFIED.

It is ORDERED that the City of San Marcos's (the "City") Second Amended Motion to Dismiss (Docket No. 86) be GRANTED and Plaintiffs' causes of action brought under § 1983 alleging violations of the Fifth Amendment Takings Clause be DISMISSED WITHOUT PREJUDICE as unripe for consideration.

It is ORDERED that the City's Motion for Summary Judgment (Docket No. 88) be GRANTED as to Plaintiffs' causes of action brought under § 1983 alleging violations of Fourteenth Amendment substantive due process, procedural due process, and equal protection rights. It is ORDERED that these claims be DISMISSED WITHOUT PREJUDICE and

the remaining issues in the City's Motion for Summary Judgment be DENIED as Moot.

It is ORDERED that Plaintiffs' Cross-motion for Partial Summary Judgment (Docket No. 135) be DENIED as Moot.

It is ORDERED that any other relief not expressly granted be DENIED.

It is ORDERED that each party bear its own costs.