IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KRISTY KAY MONEY and ROLF JACOB STRAUBHAAR *Plaintiffs*,	§	
v.	§	Civil Action No. 1:23-cv-00718-RP
CITY OF SAN MARCOS, AND DIRECTOR OF PLANNING AND DEVELOPMENT SERVICES AMANDA HERNANDEZ in her official capacity, *Defendants*.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Kristy Kay Money and Rolph Jacob Straubhaar file this response to Defendants, the City of San Marcos and Amanda Hernandez's (the "City") Motion to Dismiss. ECF No. 12.

INTRODUCTION

This case involves a constitutional challenge to a local ordinance that requires private property owners to keep unwanted objects attached to their homes to appease the aesthetic preferences of an unelected commission of local bureaucrats.

Plaintiffs own a home in San Marcos where they live with their five children. After purchasing the home, Plaintiffs discovered that a small metal decoration on the front of their house bears the initial of a former owner with historic ties to the Ku Klux Klan. Because this decoration is inconsistent with their family's values, Plaintiffs seek to remove it.

Unfortunately, under a local ordinance, Plaintiffs cannot remove the decoration or make any other change to the appearance of their home without first applying for and receiving a Certificate of Appropriateness ("Certificate") from a local

commission (the "Commission"). The criteria the Commission applies to determine whether to grant a Certificate turn wholly on aesthetics. As a result, requests to change an applicant's private property can be—and often are—denied solely based on the subjective aesthetic preferences of members of the Commission.

Plaintiffs believe this aesthetic-based restriction on property-rights is facially unconstitutional. Nevertheless, Plaintiffs applied for a Certificate to remove the decoration. That application was unanimously denied. As a result, Plaintiffs cannot remove the decoration without facing civil or criminal penalties.

In response, Plaintiffs filed this lawsuit arguing: (1) that the mandatory physical occupation of their property by the unwanted decoration is a *per se* taking in violation of the United States Constitution; and (2) that the Ordinance violates the Texas Constitution by regulating land-use for purely aesthetic purposes. ECF. No. 1. Plaintiffs' motion for summary judgment on these issues is currently pending in this Court. ECF No. 4.

The City now responds with this Motion to Dismiss, arguing that despite the pure legal nature of Plaintiffs' claims, and the existence of a final decision from the City, Plaintiffs' claims are not ripe because they did not file a (now time-barred) voluntary appeal with the Zoning Board of Adjustment before filing suit.

But it is black-letter law in both Federal and Texas courts that property owners need not exhaust state administrative remedies before bringing these sorts of constitutional claims. The City's Motion to Dismiss should therefore be denied.

FACTS

Background

Plaintiffs own a home in San Marcos, Texas. While the home is located in a so-called "historic district," it is not a designated historic home. ECF No. 1, ¶17. To the contrary, at the time of purchase, the home had long been vacant, needed repairs, and was considered of "low historical priority" by the City. ECF No. 1, ¶ 19; San

Marcos Historic Preservation Commission Agenda Packet, June 7, 2018, p. 7, available at https://tinyurl.com/5n7dshp2.

Under one of the windows on the front of the home is a small decorative grate—often referred to as a "Julliette balcony"—bearing the letter "Z." ECF No. 1, ¶ 35. As it turns out, the "Z" marks the initial of a previous owner with noted ties to the Ku Klux Klan. *Id*. at ¶ 36.

Like most Americans, Plaintiffs find association with the Klan distasteful, and would prefer to remove this bold association with the previous owner from the home where they raise their children. *Id*. at ¶ 38. Unfortunately, in order to do so, they must first receive permission from the City. ECF No. 12, p. 4.

The Challenged Ordinance

Under Section 2.5.5 of the San Marcos Development Code ("the Ordinance") it is generally unlawful for property owners in a historic district to make changes to visible portions of their homes. Dev. Code § 2.5.5.1(B). This restriction applies whether the home is historic or not, and without regard to whether the item to be changed has historic significance. *Id*. at § 2.5.5.1(D). The trigger for the Ordinance is whether the proposed change is visible. *Id*.

By way of example, a back porch swing built by Davy Crockett in 1830 would not receive protection, because it is not visible, but a tacky set of exterior blinds from 1985 on the front of a home would receive full protection under the ordinance. *Id*.

Individuals who seek to make changes to the visible portion of their home may circumvent this general prohibition by applying for a Certificate of Appropriateness ("Certificate") from the Commission. *Id*. at § 2.5.5.1(B). To apply for a permit, an applicant must attend a pre-development meeting with City staff, provide a detailed description of all proposed activities, provide a color photograph of the property showing existing conditions, provide a color photograph of the area of alteration, provide a scaled and dimensioned drawing illustrating all existing conditions, provide

a scaled and dimensioned drawing illustrating all proposed activities, and get approval and post notification signs on their property. San Marcos Certificate of Appropriateness Application (last updated March 2023), available at https://tinyurl.com/ycykv6uw. The applicant must also pay an application filing fee and a technology fee totaling $165. *Id.*

The Commission then reviews the application based on several criteria, all of which turn solely on aesthetics. Dev. Code at § 2.5.5.4. For example, the Commission must judge the "rhythm of solids to voids in front facades" or "relationship of materials, texture and color." Dev. Code §§ 4.5.2.1(I)(d), (g).

After reviewing the file and conducting a public hearing, the Commission issues its decision on the application. *Id.* at § 2.5.5.3(B)(2). If the application is approved, the property owner may proceed with the modifications. If the application is denied, then the applicant may not make any changes without suffering significant civil and criminal penalties. *Id.* at § 2.3.7.4. A denial by the Commission is referred to in the Ordinance as a "final decision." *Id.* At § 2.5.5.5(A).

An applicant "may appeal a final decision" to the Zoning Board of Adjustments (the Board). *Id.* However, such appeals must be filed within 10-days, and the Board has limited jurisdiction. *Id.* The Board may only review the record of the Commission's proceeding. *Id.* at § 2.5.5.5(B). It can only determine whether "the record reflects the lack of substantial evidence in support of the decision" of the Commission and it may not "substitute its judgment for the judgment of the Historic Preservation Commission on the weight of the evidence." *Id.* at § 2.5.5.5(C). Moreover, like other Texas administrative boards, the Board lacks authority to rule on constitutional objections to the Ordinance. ROA 12 at p. 5 FN 1. An application for such an appeal cost $765 and the process can take several months. San Marcos Appeal Application Form (last updated March 2023), available at https://tinyurl.com/ybuua4sc.

The City Denies Plaintiffs' Application

In March of 2023 Plaintiffs applied to the Commission for a Certificate to remove the unwanted decoration. ECF No. 1, ¶ 34. Plaintiffs did not contest that the removal would trigger review under the various factors. *Id*. Nor did Plaintiffs raise evidentiary disputes. Rather, Plaintiffs' sole objection was that the decoration was "inconsistent with our family's values" and "aesthetic sensibilities" and that they wanted to exercise their property rights by removing it. ECF No. 4-1, ¶ 10.

On May 4, 2023, the Commission held a hearing on Plaintiffs' application. ECF No. 1, ¶ 39. The application was unanimously denied in just under five minutes—the majority of that time was spent chastising Plaintiffs for even requesting removal. ECF No. 12-2. There was no suggestion that this was a close case, or that the application of the Ordinance to the property was unclear. As one Commission member put it "the whole point of a historic district is to retain character-defining features, and [the balcony] is a character-defining feature. . . I don't see a justification for removing it" *Id*. (statement of Commissioner Peter B Dedek.)

The next day later, the Commission sent Plaintiffs a formal letter confirming the denial of their application. ECF No. 12-3 p. 2. It is undisputed that this decision is now final. *Id*. (referring to Commission's decision as "final decision"); ECF No. 12, p. 4-5 (noting that any appeal would be time-barred). As a result, Plaintiffs cannot remove the offensive decoration from their home without risking civil and criminal penalties. ECF No. 1, ¶ 29; Dev. Code § 2.3.7.4.

Procedural Posture

On June 23, 2023, Plaintiffs filed this lawsuit alleging that the Ordinance, both on its face and as applied, violates the United States and Texas Constitutions by requiring the physical occupation of their property by unwanted objects for purely aesthetic purposes. ECF No. 1. Because these are largely facial claims and present

pure questions of law, Plaintiffs filed a motion for summary judgment five days later. ECF No. 4.

After multiple extensions, the City filed its current motion to dismiss, arguing that Plaintiffs claims are not ripe—and never will be—because they did not file a futile, and now time barred, voluntary appeal with the Board. ECF No. 12. As explained below, that motion to dismiss is contrary to binding precedent and should be denied.

STANDARD FOR REVIEW

The City invokes Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) in their Motion. Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. The party asserting jurisdiction bears the burden of proving jurisdiction exists. *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014). In a facial attack under Rule 12(b)(1), the court accepts all material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overruled on other grounds, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Ultimately, 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." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (emphasis added).

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim. It "concerns the formal sufficiency of the statement of the claim for relief, not a lawsuit's merits." *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 582 (5th Cir. 2020) (internal quotations omitted). The complaint need only be "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court assumes "that the facts the complaint alleges are true and view those facts in the light most favorable to the plaintiff." *Sewell*, 974 F.3d at 582. The Court must also "draw all

inferences in favor" of the plaintiff. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009). Plaintiff does "not need detailed factual allegations" to survive a Rule 12(b)(6) motion but must merely "provide the grounds" using "more than labels and conclusions." *Sullivan v. Leor Energy LLC*, 600 F.3d 542, 546 (5th Cir. 2010). A plaintiff need not show he will "ultimately prevail," merely "whether he is entitled to offer evidence to support his claims." *Id.*

ARGUMENT

Plaintiffs' claims in this case are straightforward. Plaintiffs argue that the Ordinance, both on its face and as applied to their property, mandates the physical occupation of private property by unwanted objects, purely to satisfy the aesthetic preferences of the City. ECF No. 1, p. 7-8. Plaintiffs argue that this violates the United States Constitution because it requires the mandatory physical occupation of private property without compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). And it violates the Texas Constitution because it restricts property for purely aesthetic purposes, which is flatly forbidden under Texas law. See *Lombardo v. Dallas*, 73 S.W.2d 475, 479 (1934).

Generally speaking, these sorts of claims are ripe for pre-enforcement review because they present pure questions of law. *Contender Farms, L.L.P. v. United States Dep't of Agric.*, 779 F.3d 258, 266-67 (5th Cir. 2015); *Zaatari v. City of Austin*, 615 S.W.3d 172, 184 (Tex. App.—Austin 2019, pet. denied). Here, Plaintiffs went further than necessary by applying for a permit to remove the unwanted object—which, as expected, was unanimously denied. ECF No 1, ¶¶ 38-42. That decision is now final and unappealable. *Id.*; see also Dev. Code § 2.5.5.5(A) (referring to Commission decision as "a final decision"); ECF No. 12, p. 4-5 (noting that any appeal would be time barred). As such, there is no longer any dispute—and the City raises none—regarding how the Ordinance applies to the property.

The City, nevertheless, moves to dismiss this case on ripeness grounds. The City does not argue that more facts are needed to decide this case, or that it intends to—or even could—remedy Plaintiffs' injuries. Instead, the City argues that Plaintiffs' claims are not ripe under Federal or State law because they did not exhaust voluntary administrative remedies by appealing the denial of their application to the Board by the Ordinance's ten-day deadline for voluntary appeals. ECF No. 12, p. 5, 7-8. Under the City's theory, Plaintiffs must now permanently endure this invasion of their property rights without judicial review. *Id*.

But, as explained below, Federal case law is clear that administrative exhaustion is not required for bringing a federal takings claim in federal court. *Pakdel v. City & Cty. of S.F.*, 141 S. Ct. 2226, 2228 (2021). And while state law sometimes requires exhaustion in some categories of cases, Plaintiffs' state law claims are not in one of those categories. See *White Deer Indep. Sch. Dist. v. Martin*, 596 S.W.3d 855, 861-62 (Tex. App.—Amarillo, 2019). The City's Motion to Dismiss should be denied.

I. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES BEFORE BRINGING FEDERAL CONSTITUTIONAL CLAIMS

Generally speaking, a party that is the "object of a regulation" has standing to challenge it and need not take further actions to ripen his claims. *Contender Farms*, 779 F.3d at 266-67. In *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) the Supreme Court created a narrow exception to this rule for certain as-applied takings claims. See *Crown Castle Fiber, L.L.C. v. City of Pasadena*, No. 22-20454, 2023 U.S. App. LEXIS 20364, at *15-18 (5th Cir. Aug. 4, 2023) (noting that the Fifth Circuit does not apply *Williamson County's* special "ripeness test outside [of] a takings claim.").

Under *Williamson County's* special ripeness test, a property owner will often—but not always—have to apply for a permit and have the permit denied before bringing certain as-applied takings claims in Federal court. The reasoning behind this rule is that the application of a land use ordinance to a particular property is often unclear. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 737, 117 S. Ct. 1659, 1666 (1997) (explaining *Williamson County*). And because many as-applied takings theories are based on the economic impact of the ordinance and its impact on other investment-backed expectations, it is difficult to determine the existence of a taking until the government has applied the ordinance to the property at issue. *Id.*

The Court has been clear, however, that this requirement is "relatively modest." *Pakdel*, 141 S. Ct. at 2230. It does not apply at all to facial challenges or to challenges where the application of the ordinance to the property is already reasonably clear. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 622 (2001) (only reasonable clarity required); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1042 n.4, 112 S. Ct. 2886, 2907 (1992) (*Williamson County* does not apply to facial challenges).

More importantly, *Williamson County's* finality requirement does not require the exhaustion of administrative appeals in order to ripen a claim. *Williamson County*, 473 U.S. at 193-94 (noting that the property owner would not "be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals" to ripen its claims.) Rather, a decision from the "initial decisionmaker" is enough. *Pakdel*, 141 S. Ct. at 2229.

That burden is met here. Plaintiffs filed a permit application with the City and that permit application was denied. ECF No 1, ¶¶ 38-42. That denial is a "final decision" from the Commission. *Id.*; see also Dev. Code § 2.5.5.5(A) (referring to Commission decision as "a final decision"). The deadline for any voluntary appeal has passed. ECF No. 12, p. 4-5. That is sufficient to meet the *Williamson County* test. See *Pakdel*, 141 S. Ct. at 2229.

The City nonetheless argues that Plaintiffs were required to pursue a (now time-barred) voluntary administrative appeal and therefore may never seek relief in this Court for the permanent physical occupation of their property. ECF No. 12, p. 7-8. But the Supreme Court *unanimously* rejected that exact argument less than two years ago. See *Pakdel*, 141 S. Ct. 2226.

In *Pakdel*, property owners challenged a local land-use regulation that required them to sign a lifetime lease with certain tenants, unless they applied for and received an exemption. Like this case, the property owners applied for an exemption and were denied. *Id*. at 228. Like this case, the property owners chose not to pursue the administrative appeal available under the ordinance for lifetime leases and the deadline for such appeals had passed. *Id*. And, like this case, the City argued that the property owners' failure to pursue an administrative appeal within the deadline meant that the claims were not ripe under *Williamson County*. *Id*. The Supreme Court rejected the City's argument, holding that it was at "odds with the settled rule that exhaustion of state remedies is *not* a prerequisite to an action under 42 U.S.C. §1983." *Id. at* 2228 (brackets and internal quotation marks omitted) (emphasis in original). Rather, the Court agreed with the dissenting judge from the panel below in that case that all that is required to ripen a takings claim is to have the "the initial decisionmaker" render its decision on the permit. *Id*. at 2229.

That is precisely what happened here. As in *Pakdel*, Plaintiffs applied for a permit and that permit was denied. The deadline for appeals has passed. The "initial decisionmaker" has thus made its decision and Plaintiffs' challenges are ripe.

None of the cases cited by the City (all of which pre-date *Pakdel's* clarification of *Williamson County's* ripeness standard) are to the contrary. In *Suitum,* 520 U.S. at 735, for example, the Court *rejected* the government's claims regarding ripeness. Nothing in that case suggests that property owners must exhaust administrative appeals before filing a takings claim.

Macdonald v. Cty. of Yolo, 477 U.S. 340 (1986), likewise did not turn on administrative exhaustion. In that case, the property owner applied for a permit for a very intensive residential development. *Id*. at 344. When that permit was denied, the property owner filed suit, alleging that denial of that particular permit had denied him all economically viable use of the property. *Id*. The Court did not address the propriety of pursuing administrative appeals. *Id.* at 346 (noting that the lower court "did not consider whether the complaint was barred by the failure to exhaust administrative remedies.") Instead, the Court held that the property owner's claim was not ripe, because the denial of a single permit for a single intensive development design was not sufficient to determine whether the Ordinance was a taking under the broad takings theory put forward in that case. As the Court explained, the Ordinance was broad enough to potentially allow other developments, and the Court could not determine the full economic impact of the ordinance without more evidence. *Id.* at 352, n. 8 (noting that "appellant's property was zoned residential and … valuable residential development was open to it" and that such a situation "cannot possibly be reconciled with the allegations in the complaint that 'any beneficial use' is precluded.") In other words, *Macdonald* was not a case about exhausting administrative appeals. It was a case about whether there was sufficient evidence of the effect of the ordinance on the use of the property to bring the plaintiff's particular fact-based takings claims.

That is not the case here. Plaintiffs do not bring an *ad hoc* takings claim under *Penn Central* or *Lucas* which would turn on whether alternative uses of the property exist that may lessen the economic impact of the Ordinance. Plaintiffs bring a *per se* takings claim for a physical occupation of property under *Loretto*. Under *Loretto*, the only question is whether the City has required the occupation of the property by an unwanted object. *Loretto*, 458 U.S. at 434-35. If it has, then the economic impact of the ordinance and the availability of alternative uses for the property are irrelevant.

Id. (when a regulation requires "a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.")

Here, the Ordinance is clear that Plaintiffs may not remove the decorative grate without a Certificate—full stop. ECF No. 1, ¶ 22; Dev. Code § 2.5.5.1(B). Plaintiffs applied for a Certificate and were denied. ECF No. 1, ¶¶ 38-42. As a result, Plaintiffs may not remove the decorative grate without being subject to civil and criminal penalties. ECF No. 1, ¶ 29;Dev. Code § 2.3.7.4. The City points to no ambiguity in the Ordinance or how it applies to the Plaintiffs' property that would preclude judicial review. It simply claims that Plaintiffs could have filed an appeal. ECF No. 12, p. 8. But that is just a demand for administrative exhaustion, which the Supreme Court has *repeatedly* rejected. *Pakdel*, 141 S. Ct. at 2228.

Finally, the City points to *DM Arbor Court, Ltd. v. City of Hous*., 988 F.3d 215 (5th Cir. 2021). But the court in *DM Arbor* ultimately held that the property owner's claims were ripe because the property owner received a final decision on his permit application while the case was pending. *Id*. at 220. To be sure, the court indicated that the property owner's claims were not ripe when the lawsuit was filed. *Id*. at 218. But that was because, unlike this case, the property owner had filed suit *before* the City had ruled on its *initial* permit application. *Id*. at 217. Moreover, unlike the ordinance in this case, an administrative appeal was still available to the property owner, and the body hearing that appeal had full discretion to grant the permit. *Id.* at 219.

Here, by contrast, Plaintiffs applied for a Certificate and were rejected *before* filing this lawsuit. ECF No. 1, ¶¶ 38-42. To the extent an appeal was available, it is now time-barred. ECF No. 12, p. 4-5. Moreover, unlike the ordinance at issue in *DM Arbor*, the Board here does not have discretion to simply overturn the Commission

and grant the Certificate. See Dev. Code § 2.5.5.5 (limiting the discretion of the Board). Its jurisdiction is largely limited to factual disputes. *Id*. The City does not—and cannot—explain how that process would provide relief when, as in this case, Plaintiffs do not contest the Board's application of the Ordinance, or the Board's consideration of the facts.

In any event, even if *DM Arbor* could be read broadly enough to apply here—and it cannot—such a broad reading is barred by the Supreme Court's subsequent decision in *Pakdel,* which is directly on point. Plaintiffs' federal takings claims are therefore ripe and the City's motion to dismiss should be denied.

II. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE BRINGING THEIR STATE CONSTITUTIONAL CLAIMS

The City next argues that Plaintiffs' claims under the Texas Constitution are barred because Plaintiffs did not exhaust administrative remedies.[1] But this argument fails.

As an initial matter, the City wrongly states that Plaintiffs' bring state law takings claims. ECF No. 12, p. 7. This is false. Unlike Plaintiffs' Federal claims, Plaintiffs' Texas claims arise under Article 1, Section 19 of the Texas Constitution. ECF No. 1, p 7-8. Under that provision, cities may not regulate private property for purely aesthetic purposes, regardless of whether compensation is paid. *Lombardo*, 73 S.W.2d at 479. Here, Plaintiffs allege that both on its face and as applied, the Ordinance unlawfully regulates their property for purely aesthetic reasons and therefore seek declaratory and injunctive relief to prevent this ongoing violation of their rights. ECF No. 1, p 7-10. These sorts of claims typically do not require any

[1] Of course, none of these arguments can be applied to Plaintiffs' federal takings claims, discussed *supra*, as the Supreme Court has recently made clear that, states may not "require plaintiffs to exhaust administrative remedies before bringing [federal] constitutional claims." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2173 (2019).

further action from a property owner in order to be ripe. See, *Zaatari*, 615 S.W.3d at 184 (claim that ordinance exceeded police power under Article 1, Section 19 was ripe upon enactment).

The City nevertheless points to several cases for the general proposition that, unlike federal law, Texas law sometimes requires exhaustion for state law claims. ECF No. 12, p 5-6. But Texas law has numerous clear exceptions to this general exhaustion requirement, any one of which, standing alone, would be sufficient to defeat a motion to dismiss in this case. *White Deer Indep. Sch. Dist.*, 596 S.W.3d at 861-62.

First, it is well established that exhaustion does not apply to facial challenges. *Zaatari*, 615 S.W.3d at 184 (a facial challenge to a land-use ordinance is "ripe upon enactment."). This makes sense. The purpose behind exhaustion requirements is to ensure that the agency charged with deciding these issues has an opportunity to resolve any factual disputes before the courts intervene. *White Deer Indep. Sch. Dist.*, 596 S.W.3d at 861-62. Those concerns are not present when a property owner challenges an ordinance on its face and therefore presents a pure question of law. *City of Richardson v. Bowman*, 555 S.W.3d 670, 686-87 (Tex. App.—Dallas, 2018). Here, Plaintiffs' primary Texas Constitutional claim is that the Ordinance is facially unconstitutional. Plaintiffs argue that the City lacks authority under the Texas Constitution to regulate property for purely aesthetic purposes, and that the Ordinance does precisely that on its face. ECF No. 1, ¶¶ 50-57. No additional factual development or exhaustion is necessary to hear such claims. Exhaustion therefore does not apply.

Second, exhaustion does not apply to as-applied claims presenting pure questions of law. *White Deer Indep. Sch. Dist.*, 596 S.W.3d at 861-62. Once again, that applies here. Plaintiffs' as-applied Texas claim is that their Certificate was denied for purely aesthetic reasons in violation of the Texas Constitution. ECF No.

1, ¶¶ 50-57. Like Plaintiffs' facial claim, this presents a pure question of law requiring no additional factual development. The City does not dispute that Plaintiffs' application was denied for aesthetic reasons. Nor could it—the Ordinance requires that the Commission consider aesthetic factors (Dev. Cod §§ 2.5.5.4, 4.5.2.1) and the Commission was clear both at the hearing and in its denial letter that the application was denied based on aesthetic criteria. ECF 12-3 p. 2. Whether such a denial is permissible is a pure question of law. Exhaustion does not apply.

Third, administrative exhaustion is not required when "an injunction is sought and irreparable harm would result" from its denial. *White Deer Indep. Sch. Dist.*, 596 S.W.3d at 861-62. Both of those things are true here. Plaintiffs seek prospective injunctive relief to prevent the ongoing violation of their constitutional rights. ECF No. 1 at ¶ 68. Even temporary deprivations of constitutional rights are *per se* irreparable harm. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("the loss of constitutional freedoms 'for even minimal periods of time . . . unquestionably constitutes irreparable injury.'"); *Operation Rescue-National v. Planned Parenthood*, 937 S.W.2d 60, 77 (Tex. App. 1996) ("Under Texas law, a violation of a constitutionally guaranteed right inflicts irreparable injury warranting injunctive relief.") That is particularly true when, as in this case, Plaintiffs will be barred by sovereign immunity from recovering damages for the temporary deprivation of their Texas Constitutional rights. *Clarke v. CFTC*, No. 22-51124, 2023 U.S. App. LEXIS 18644, at *27 (5th Cir. July 21, 2023) (irreparable harm is presumed when damages are unavailable due to sovereign immunity); *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin, 2018) (same). Exhaustion is therefore not required. *White Deer Indep. Sch. Dist.*, 596 S.W.3d at 861-62.

Fourth, administrative exhaustion is not required when "the administrative agency cannot grant the requested relief." *White Deer Indep. Sch. Dist.*, 596 S.W.3d at 861-62. That is certainly true here. Under the Ordinance, the Board's jurisdiction

is largely limited to factual disputes or the application of criteria. But Plaintiffs do not contend that the Commission failed to properly judge the facts or failed to apply the Ordinance's criteria. Rather, Plaintiffs argue that the criteria the Commission and the Board are bound to apply are unconstitutional, and seek an injunction preventing the City from enforcing those criteria. ECF No. 1, ¶¶ 50-57. Put another way, the injury under the Texas Constitution is not merely the denial of a permit, but being forced to come before a board with unbridled discretion to approve or deny permits based on purely subjective aesthetic factors. Plaintiffs seek injunctive relief from this arbitrary and unconstitutional process. ECF No. 1 at ¶ 68. Because the Board cannot grant that relief, exhaustion is not required.

In response, the City points to cases like *Garcia v. City of Willis*, 593 S.W.3d 201 (Tex. 2019), which held that plaintiffs bringing state law takings claims seeking compensation or the return of property typically must pursue state law remedies that might moot the case before bringing state law takings claims in state court. But those cases do not change the outcome here for at least four reasons.

First, neither *Garcia*, nor the prior state law takings cases cited by the City, disturbed the traditional exceptions to exhaustion noted above, any one of which would be sufficient to rule for Plaintiffs here. See *Garcia*, 593 S.W.3d at 212 (noting the limited scope of its ruling).

Second, as noted *supra*, Plaintiffs do not bring state law takings claims.

Third, it is unclear how much of the reasoning of *Garcia* and the City's other state-law takings cases survives after the United States Supreme Court's subsequent decision in *Knick*, 1 39 S. Ct. at 2170. Those cases were all based on *Williamson County's* now defunct presumption that a taking does not occur until compensation is denied under subsequent available state procedures. See, *Garcia*, 593 S.W.3d at 211 (quoting *City of Dall. v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011) (quoting *Williamson County*, 473 U.S. at 194)); *City of Dall. v. Stewart*, 361 S.W.3d 562, 579

(Tex. 2012) (same). But shortly after *Garcia* was decided, the Supreme Court overturned that portion of *Williamson County*, and held that a takings claim "arises at the time of the taking, *regardless of post-taking remedies that may be available to the property owner*." *Knick*, 139 S. Ct. at 2170 (emphasis added). We should not presume that those cases will withstand scrutiny post-*Knick*.

Finally, even if those cases survive, they do not apply to the facts in this case. In *Garcia*, for example, the plaintiffs brought a state law takings claim seeking reimbursement for money he paid due to tickets from a red light camera. The Court held that claim was not ripe because there were state law procedures available for potential reimbursement for red light fees that would have mooted the case, which the plaintiff did not avail himself of. *Garcia*, 593 S.W.3d at 211.

Here, by contrast, Plaintiffs do not bring a state-law takings claim, or any other state law claim that could be mooted by the mere payment of damages or the award of a permit. Plaintiffs' Texas claim is that the City lacks authority to regulate their property for purely aesthetic purposes and they seek *prospective* injunctive relief to prevent this *ongoing* violation of their rights. See *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006) (noting the important distinction for exhaustion purposes between a case seeking a particular decision from an agency and one challenging the validity of the statute the agency applies.). Even if the Board could have reversed the Commission's decision on removing the decoration—a proposition that Plaintiffs dispute—that would not moot this case. Plaintiffs would remain subject to the same ordinance and would have to go before the same unconstitutional board anytime they wanted to fix a window or replace a door. This ongoing unconstitutional burden on their property rights would be sufficient to keep this case alive. *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016) ("defendant's cessation of challenged conduct does not, in itself, deprive a court of the

power to hear or determine claims for *prospective* relief.") (emphasis added). *Garcia* and cases like it simply do not apply here.

III. PLAINTIFFS PROPERLY PLED CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

Finally, the City argues that Plaintiffs lack standing for their requests for declaratory and injunctive relief. This argument is meritless.

To establish standing, a plaintiff must allege: (1) a personal injury; (2) that is fairly traceable to the challenged regulation; and (3) likely to be redressed by the requested relief. *Contender Farms,* 779 F.3d at 264. When, as in this case, the plaintiff is the object of the regulation he challenges, these three criteria are easily met because "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id*.

Here, Plaintiffs are injured because they cannot remove unwanted objects from their property due to the subjective aesthetic preferences of the Commission. That injury is traceable to the Ordinance because it prohibits removal of such objects without approval. A declaration that the Ordinance is unconstitutional and an order enjoining its enforcement would remedy those injuries, because Plaintiffs would be able to make the desired changes to their property without risk of civil and criminal penalties. That is sufficient for standing.

Indeed, while the City recites the standing factors in its motion, it does not make any argument that those factors are not met here. ECF No. 12, p. 9. Instead, the City merely re-argues its claims that Plaintiffs' claims are not ripe because they did not exhaust administrative remedies. *Id*. at 9-10. But as explained above, that argument fails for at least two reasons.

First, it fails to account for Plaintiffs' facial claims. As noted *supra*, facial claims are ripe upon enactment. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1042

n.4, (1992); *Zaatari*, 615 S.W.3d at 184 (a facial challenge to a land-use ordinance is "ripe upon enactment."). The City presents no argument *at all* as to why Plaintiffs' facial claims are not ripe.

Second, as explained above, Plaintiffs' requests for declaratory and injunctive relief present pure issues of law and no further exhaustion of remedies is required beyond a decision from the "initial decision-maker," which Plaintiffs already received. *Pakdel*, 141 S. Ct. at 2229; *City of Richardson*, 555 S.W.3d at 686-87. The City's argument therefore fails.

CONCLUSION

When the City denied Plaintiffs' request for a Certificate, it had no doubt that the Ordinance's application to the property was clear. Indeed, the entire discussion of the application lasted less than five minutes and the denial was unanimous. The City gives no indication here that it does not stand by its decision. Nor does the City suggest that avenues remain outside of this Court for Plaintiffs to receive relief.

Nevertheless, the City claims that the legal issues in this case are not ripe—*and never will be*—because Plaintiffs did not pursue a now time-barred administrative appeal that could not provide the relief Plaintiffs seek here.

But the Supreme Court has repeatedly rejected this sort of disingenuous formalism. The law is clear: the exhaustion of administrative remedies is not required to bring these kinds of constitutional claims. The City's motion to dismiss should therefore be denied, and Plaintiffs should have the opportunity to defend their fundamental rights in this Court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on August 28, 2023, with the Clerk of the Court for the Western District of Texas using the CM/ECF system, which will serve a copy of same on all counsel of record.

/s/ Chance Weldon
CHANCE WELDON