

THE RIPENESS DOCTRINE OF THE TAKING CLAUSE: A SURVEY OF DECISIONS SHOWING JUST HOW FAR FEDERAL COURTS WILL GO TO AVOID ADJUDICATING LAND USE CASES

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I. INTRODUCTION

The ripeness doctrine of the Taking Clause is the most important legal principle in federal land use litigation. If a taking¹ claim arising from a land use agency's decision does not meet the rigid standards of the ripeness doctrine², and almost every one does not,³ a federal court

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¹. The scope of this article is limited to regulatory taking claims under the Taking Clause of the Fifth Amendment.

Often, property owners allege violations of the procedural and substantive Due Process and Equal Protection Clauses in addition to the Taking Clause of the Fifth Amendment. See generally *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.) (describing the four most common constitutional claims in a refusal to rezone case), *cert. denied*, 112 S. Ct. 55 (1991). For a discussion of the ripeness issues involved in a substantive due process claim, see Stuart Minor Benjamin, Note, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 YALE L.J. 2667 (1991).

Some due process and equal protection claims are subject to different ripeness standards than Fifth Amendment taking claims. For an excellent explanation of how the various circuits treat non-Fifth Amendment land use cases, see *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). Most federal courts do not apply the ripeness doctrine to non-Fifth Amendment land use claims. See, e.g., *Picard v. Bay Area Transit Dist.*, 823 F. Supp. 1519, 1523 (N.D. Cal. 1993) ("Unlike plaintiffs' taking claims, their remaining federal claims [substantive and procedural due process and equal protection] are not barred" by the ripeness doctrine). But see *Taylor Inv. Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3rd Cir.) (applying ripeness doctrine to substantive and procedural due process and equal protection claims), *cert. denied*, 114 S. Ct. 304 (1993). The application of the ripeness doctrine to non-Fifth Amendment claims is directly counter to the Supreme Court's rationale that the ripeness doctrine is applicable uniquely to taking claims because of the nature of that constitutional right. See *infra* note 2.

². The ripeness doctrine of the Taking Clause is different than the broader ripeness doctrine having to do with Article III justiciability. For a discussion of Article III justiciability, see *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

The ripeness doctrine of the Taking Clause "is a special ripeness doctrine applicable only to constitutional property rights claims." *Timothy V. Kassouni, The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992). Accordingly, references to the "ripeness doctrine" in this article are to the ripeness doctrine of the Taking Clause.

The ripeness doctrine of the Taking Clause applies only to taking claims because the "nature of the constitutional right" involved is different than other constitutional rights. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 n.13 (1985). "[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no

will not hear the case. The effect of the ripeness doctrine is to "close the federal court house door"⁴ on almost all land use taking cases.⁵

The primary rationale behind the ripeness doctrine is that federal courts cannot decide land use cases until the existence of a taking can be determined. The existence of a taking, in turn, can be determined only after a final decision has been rendered on the permissible uses of the property and after a state inverse condemnation action has been completed in state court. In effect, the ripeness doctrine excludes land use cases from federal court and requires a property owner to litigate a taking case in state court. Significantly, once a land use case is in state court, the same federal ripeness doctrine has been used increasingly by state courts to dismiss it.⁶ Thus, the ripeness doctrine has been used first by federal courts, and then by state courts, to deny property owners just compensation.

A taking claim alleges a serious constitutional violation. Federal courts routinely devote vast resources to protect citizens from other constitutional violations by adjudicating thousands of section 1983 suits.⁷ Inexplicably, however, federal courts seem to consider land use taking cases unimportant.⁸ Some federal courts have declared that protecting citizens from unconstitutional takings in land use cases is simply too burdensome.⁹

It is extremely important that property owners have access to federal courts.¹⁰ In the typical taking case, a property owner is alleging wrongful conduct by a local or state government. An almost

constitutional violation occurs until just compensation has been denied." *Id.* (emphasis in original). Therefore, the existence of a taking cannot be determined until a final decision has been found to exist and state compensation is found to be inadequate.

^{3.} See Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 91 (1988) (showing that from the years 1983-1988 only 5.6% of land use cases were found to be ripe).

^{4.} See generally *id.*

^{5.} This article discusses taking claims made in the context of land use cases.

^{6.} See *infra* text accompanying notes 195-206.

^{7.} 42 U.S.C. § 1983 (1988) creates a cause of action to enforce constitutional rights. Now it is recognized that "[t]he rights of property are fundamental civil rights deserving of protection under 42 U.S.C. § 1983 . . ." Blaesser, *supra* note 3, at 74-75. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963). Currently, the majority of taking cases are brought under section 1983.

^{8.} For example, in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) the Seventh Circuit found alleged violations of the Fifth and Fourteenth Amendments, to "represent[] a garden-variety zoning dispute dressed up in the trappings of constitutional law."

^{9.} In *Scudder v. Town of Glendale*, 704 F.2d 999, 1003 (7th Cir. 1983), the Seventh Circuit held the "availability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system."

^{10.} See Blaesser, *supra* note 3 at 74 (discussing the reasons that federal courts are much better equipped to protect property rights).

certain prejudice is created by having an elected or appointed state judge, sitting in the same local area as the alleged taking, decide the case. In contrast, federal judges who enjoy life-tenure are far more likely to be removed from local biases. Even though plenty of reasons exist why federal courts are better able to protect property rights, a more fundamental point must be made: property rights are protected by the federal constitution and should be enforced in federal courts.

In addition to having their unpopular claims against local government heard by state courts, property owners are unfairly burdened by the ripeness doctrine in numerous practical ways.¹¹ First, requiring developers to have a final decision from land use agencies gives those agencies an incentive to delay decisionmaking, which adds to the risk and expense of property development. Second, the cost of seeking just compensation is greatly increased by the ripeness doctrine since two lawsuits are necessary: one in state court and a second in federal court. Third, the odds of conforming to ripeness requirements and actually winning a taking case are staggering, thus discouraging potential litigants with valid claims. Finally, litigating a taking claim is unpredictable because ripeness relates to subject matter jurisdiction,¹² and can therefore be raised at any time during the judicial process, wiping out years of litigation and thousands of dollars of legal fees at the last minute.

Are federal courts merely "too busy" to compensate property owners when perhaps millions of dollars of property have been taken away from innocent citizens?¹³ As the following decisions illustrate, federal courts go to great lengths to find land use cases unripe because, as they openly admit, they simply do not like to hear them.

A pattern of nearly unobtainable two-step requirements emerges from the federal judiciary's disinterest in protecting the rights of property owners. First, the final decision prong must be satisfied, and, if it is, the state compensation requirement is heaped upon the property owner. Then, if these Article III case or controversy re-

¹¹. See Blaesser, *supra* note 3 at 120-21 (discussing obstacles and pitfalls bestowed upon property owners as a result of the ripeness doctrine).

¹². See *infra* notes 61-63.

¹³. The most common reason for dismissing land use cases is that federal courts believe that land use cases are better handled at the state level. In an ideal world, states would adjudicate these cases—unfortunately, this is not a reality. See *infra* text accompanying notes 195-206. However, if a land use agency's decision violates the federal constitution why do federal courts resist providing a remedy? The problem seems to be that so many governmental decisions result in compensable takings. The Seventh Circuit was mistaken when it bemoaned that the land use case at issue was "dressed in the trappings of constitutional law." *Supra* note 9. Land use cases are *indeed* constitutional law because they allege violations of the Fifth or Fourteenth Amendments of the United States Constitution. See *supra* note 8.

quirements are found to exist, federal courts can use the abstention doctrine to dismiss a taking claim.¹⁴

II. DEVELOPMENT OF THE RIPENESS DOCTRINE

A. Williamson County Regional Planning Commission v. Hamilton Bank

The United States Supreme Court introduced the ripeness doctrine in *Williamson County Regional Planning Commission v. Hamilton Bank*.¹⁵ This case is discussed extensively in several other treatises and articles.¹⁶ The following brief description of *Williamson* highlights the rationales and tests that have emerged.

In *Williamson*, a land use agency rejected a property owner's proposal to expand a subdivision. The property owner then filed a sec-

¹⁴ Article III, section 2, of the United States Constitution provides that "Judicial Power shall extend" to enumerated "cases" and "controversies." Along with standards arising from the ripeness doctrine, parties bringing constitutional claims must answer issues of advisory opinions, mootness, and standing, before their case is justiciable.

The Article III "case or controversy" requirement has these important policy justifications: it 1) limits the "occasions for judicial intervention into legislative or executive processes, [which] reduces the friction between the branches produced by/judicial review"; 2) helps to ensure that "constitutional issues will be resolved only in the context of concrete disputes, rather than in response to problems that may be hypothetical, abstract, or speculative"; and 3) promotes "individual autonomy and self-determination by ensuring that constitutional decisions are rendered at the behest of those actually injured." G EOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 84-85 (2d ed. 1991).

Abstention is another doctrine that limits federal adjudication of land use cases. Abstention is *not* an Article III requirement, but rather a court-created prudential requirement. Under this doctrine, federal courts abstain from deciding state law issues. See generally Blaesser, *supra* note 3, at 83-89 (describing how the abstention doctrine is used to dismiss land use cases in federal court). Blaesser correctly points out that the ripeness and abstention doctrines "intersect" and are "similar in that they both provide ground rules for the exercise of federal court jurisdiction." *Id.* at 89. See *infra* note 157.

¹⁵ 473 U.S. 172 (1985). One commentator argues that the "analytical framework" for the ripeness doctrine emerged five years earlier in *Agins v. City of Tiburon*, 477 U.S. 255 (1989). R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases From Hamilton Bank To Lucas*, 9 J. LAND USE & ENVTL. LAW 101, 110 (1993). However, the details of the present ripeness doctrine were formulated by *Williamson*.

¹⁶ See generally DANIEL R. MANDELKER, FEDERAL LAND USE LAW, § 4A.02[2] (1986); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court converted Federal Judges into Fruit Peddlers*, INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN (1991); Michael M. Berger, "Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions Is An Exercise in Futility, 11 ZONING & PLAN. L. REP. 57 (1988); Kassouni, *supra* note 2; Lyman, *supra* note 15.

Williamson has been the subject of two student notes: James D. Smith, Note, *Ripeness for the Taking Clause: Finality and Exhaustion in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 13 E COLOGY L.Q. 625 (1986); Junji Shimazaki, Note, *Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases*, 1 B.Y.U. J. PUB. L. 375 (1987).

tion 1983 action in federal district court alleging a regulatory taking¹⁷ in violation of the Fifth Amendment.¹⁸ Before filing the federal suit, the property owner did not pursue a variance, an appeal to the County Council, an amendment to the general plan, or a state inverse condemnation suit, all of which were available.¹⁹

When it reached the United States Supreme Court, the Court decided that the existence of a taking could not be determined because there had been no "final decision" from the Planning Commission and because the property owner had not sought "state compensation."²⁰ Therefore, the claim was unripe, requiring its dismissal from federal court.²¹ The resulting *Williamson* ripeness test centers on the two prongs "final decision" and "state compensation."

The Court began its decision by analyzing the final decision prong. The following test emerged: "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue."²²

After examining other taking cases, the Court found that its earlier decisions expressed a "reluctance to examine taking claims until . . . a final decision has been made."²³ The first rationale for requiring a final decision was the long-standing principle that cases should be decided on non-constitutional grounds whenever possible.²⁴ Therefore, administrative procedures and remedies should first be

17. The difficult question of what constitutes a taking was not at issue in *Williamson*, 473 U.S. at 185, and is not discussed in this article. In fact, in almost every ripeness case discussed *infra*, the issue of whether a regulation constitutes a taking is not reached because the claim is found to be unripe (and hence nonjusticiable) before the court reaches the merits of case.

18. The property owner also alleged a violation of substantive and procedural due process and equal protection. The district court granted a directed verdict against the property owner's claim and the jury found no denial of procedural due process. *Williamson*, 473 U.S. at 182 n.4. The Supreme Court discussed the property owner's due process claim. *Id.* at 197. For a discussion of the different constitutional claims available in a land use taking case, see *supra* note 1.

19. See *Williamson*, 473 U.S. at 196-97.

20. *Id.* at 185. The Court did not use the term "state compensation" in its opinion; however, the term is used in this article because it succinctly describes the requirements of the prong. See *infra* n.157.

21. *Id.* at 183.

22. *Id.* at 186.

23. *Id.* at 190.

24. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905))).

sought, thereby reducing the need to decide a case on taking grounds.²⁵

The second, and more important, rationale for this prong is that a final decision is necessary before the crucial issue of whether a taking has occurred can be determined. Because the test for the existence of a regulatory taking includes determining the extent that economically viable use of property has been denied,²⁶ a court cannot determine whether a taking has occurred until the regulating agency declares exactly how limited the owner is in using his or her property.²⁷

Similarly, the third²⁸ rationale given in *Williamson* for the final decision requirement is that in order for a property owner to be deprived of all economically viable use of his or her property, the regulation must actually be applied to the property.²⁹ If a property owner never pursues a variance, appeal, or amendment, a court cannot know exactly how the regulation (or a modification of it) would have affected the potential uses of the property. Consequently, the existence of a taking remains unknown until the land use agency

²⁵ As the Court stated, "If [the property owners] were to seek administrative relief under these [administrative] procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Williamson*, 473 U.S. at 187 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981)).

²⁶ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992) (holding that land use regulations that deny the property owner of all economically viable use are *per se* total takings unless "logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with"). This "denial of economic viable use" test is only one of at least three kinds of takings. Under the "denial of economic viable use" test for a taking, the issue of whether a decision is final arguably does affect the determination of whether a taking has occurred because a non-final decision leaves open the possibility for some economically viable use.

However, the ripeness doctrine from *Williamson* should not similarly apply to the other two kinds of takings. They are: 1) failure of a regulation to "substantially advance a legitimate state interest," see *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); and 2) frustration of "reasonable investment-backed expectations," see *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1980). The finality of a land use agency's decision has nothing to do with these two kinds of takings. The finality or non-finality of a decision cannot advance a legitimate state interest or frustrate investment-backed expectations. This has led one commentator to argue that the rationale behind the ripeness doctrine only applies to takings from a deprivation of economically viable use, and that therefore, the doctrine should not be applied to the other two types of takings. See *Kassouni*, *supra* note 2, at 20.

²⁷ *Williamson*, 473 U.S. at 187.

²⁸ Lower courts have subsequently identified two additional rationales for the ripeness doctrine. The first is federalism, the belief being that state courts should resolve local matters such as land use cases. See, e.g., *City of Oak Creek v. Milwaukee Metro. Sewerage Dist.*, 576 F. Supp. 482, 487 (E.D. Wis. 1983) ("Section 1983 was never intended as a vehicle for federal supervision of land use policy"); *Golemis v. Kirby*, 632 F. Supp. 159, 162-63 (D.R.I. 1985).

The second rationale is the dislike by federal courts of adjudicating land use cases documented and discussed throughout this article. See *supra* text accompanying notes 8 & 9.

²⁹ *Williamson*, 473 U.S. at 190.

renders a final decision as to how the regulations at issue will be applied to "the particular land in question."³⁰

Next, the Court in *Williamson* applied these principles to the property owner's taking claim. The property owner's failure to seek a variance led the Court to conclude that the owner "hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision . . ."³¹ This, in turn, led to the conclusion that no "final decision" had been rendered, and therefore that the property owner's claim was not ripe.³²

The Court in *Williamson* went on to analyze "state compensation," the second prong³³ of its ripeness inquiry. The following test emerged: "if the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."³⁴ The Court explained that "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before [seeking] a section 1983 action."³⁵

³⁰ *Id.* at 191.

³¹ *Id.* at 190. Note that because the property owner's proposed use was *inconsistent* with the applicable land use regulations, a variance could have actually been useful because an ordinance was being violated. This is because "a variance is an authority to a property owner to use property in a manner forbidden by the ordinance . . ." *North Shore Steak House, Inc. v. Board of Appelas*, 282 N.E.2d 606, 609 (N.Y. 1972) (discussed in *D ANIEL R. MANDELKER, LAND USE LAW* § 6.39 (3d ed. 1993)). In contrast, when a proposed use *conforms* with applicable regulations, a variance is useless because no ordinance is being violated. See *infra* note 110.

³² *Williamson*, 473 U.S. at 194.

It is important to note that the Court distinguished the *Williamson* final decision prong applicable only to taking claims from the "exhaustion of remedies" doctrine that applies to other § 1983 claims. The exhaustion of remedies doctrine holds that there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. See *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982). At first glance, the final decision rule from *Williamson* seems impermissibly to require a property owner in a taking case to exhaust administrative remedies by seeking a variance and appeal. The *Williamson* Court distinguished the ripeness doctrine by explaining that the exhaustion of remedies doctrine presupposes that a wrong has occurred, while the final decision requirement is concerned with whether a wrong has occurred at all. *Williamson*, 473 U.S. at 192. Thus, an "exhaustion of remedies" argument would not be a successful defense to the final decision prong. *But see* *Blaesser, supra* note 3, at 73-76 (criticizing this view).

³³ Significantly, the two prongs are not dependent on each other—failure to meet either one means the claim is unripe. See, e.g., *Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990) ("Ripeness . . . involves two independent prerequisites . . ."), *cert. denied*, 112 S. Ct. 382 (1991); *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992) (characterizing the *Williamson* prongs as "two distinct" requirements).

³⁴ *Williamson*, 473 U.S. at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 & 1018 n.21 (1984)).

³⁵ *Williamson*, 473 U.S. at 194 n.13 (emphasis in original).

The scope of the state compensation prong depends on what constitutes an "adequate process" for obtaining compensation. The obvious avenue for compensation in a land use case is state³⁶ inverse condemnation law. The *Williamson* Court pointed to this state remedy as an "adequate process" for obtaining compensation.³⁷ The Court concluded that until a claimant shows that a state inverse condemnation procedure is "unavailable or inadequate," the claim is not ripe.³⁸ In other words, the burden is on the property owner either to seek compensation first in state court or to make the difficult showing that no such remedy is available.³⁹

B. MacDonald, Sommer & Frates v. County of Yolo

Another Supreme Court case, *MacDonald, Sommer & Frates v. County of Yolo*,⁴⁰ expanded upon the ripeness doctrine by adding the "meaningful application" and the "reapplication" requirements and introducing⁴¹ the futility exception. In *MacDonald*, property owners submitted plans to develop agricultural acreage into single-family and multi-family lots. The plans were rejected by the County land use agency. Significantly, there were no direct ways to appeal the County's decision, but merely indirect remedies such as mandamus

Justiciability is another reason why state remedies must be sought because "the State's action 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.* at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

Yet another reason, but one that is rarely articulated, for the requirement that state remedies be sought is the abstention doctrine discussed *supra* note 14. The abstention doctrine holds that federal courts should abstain from deciding state law issues; whether state law would compensate a property owner in a given case would be just such an issue a federal court would likely abstain from deciding. See generally *Lockary v. Fetz*, 974 F.2d 1166, 1174 (9th Cir. 1992) (holding that an abstention challenge during a taking proceeding is not frivolous).

³⁶. Compensation must be sought at the state level in the typical case because the vast majority of land use decisions are from state or local agencies. In the rare instance that the land use decision was made by the federal government or an Indian nation, compensation would naturally be sought in federal or tribal court, not from a state court. Since most land use decisions are made at the state level the compensation prong will be discussed throughout this article as it applies to seeking relief in state courts.

³⁷. *Williamson*, 473 U.S. at 196-97.

³⁸. *Id.* at 194-95.

³⁹. After *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which held that a temporary regulatory taking is compensable under the federal constitution, federal courts may conclude that an adequate state remedy automatically exists as a result of *First English*. In reality, this remedy is not "adequate" because the landowner still is often denied access to federal court. See *infra* text accompanying notes 180-86.

⁴⁰. 477 U.S. 340 (1986).

⁴¹. The "futility exception" was not discussed in the majority opinion. Justice White's dissent, however, contained language that was used by the Ninth Circuit to create the exception. See *infra* notes 137-38.

and declaratory judgment actions.⁴² The property owners first filed an action in state court alleging a taking and seeking monetary and declaratory relief. After losing in state court, they sought relief in the United States Supreme Court.

Given that the property owners in *MacDonald* could not obtain a variance and actually sought state compensation, under the rationales of *Williamson* the case should have been ripe for federal adjudication. However, the Court in *MacDonald* came to the opposite conclusion. The Court in its holding emphasized the importance of variances and appeals to the ripeness doctrine by observing that "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with one hand they may give back with the other."⁴³ The Court in *MacDonald* added even more hurdles to having a land use taking case heard in federal court.

First, *MacDonald* required that the decision of a land use agency must not only be "final and authoritative," as in *Williamson*, but also the decision must now describe the "type and intensity" of development legally permitted.⁴⁴ One commentator has described this as going a "giant step further" than *Williamson*.⁴⁵ Lower courts have interpreted the "type and intensity" language to require a "meaningful application" and a "reapplication" before a final decision can exist.⁴⁶

Second, *MacDonald* articulated the "futility exception" to the ripeness doctrine. Note that the Court never held that the exception exists or attempted to define it. Instead, Justice White explained in his dissent that "[n]othing in our cases . . . suggests that the [government] decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position."⁴⁷ Therefore, to Justice White, a final decision⁴⁸ could be established upon a showing of futility.

⁴². *MacDonald*, 477 U.S. at 344. See *Agins v. City of Tiburon*, 447 U.S. 255, 259 (1980) (commenting that in California the "sole remedies for such a taking . . . are mandamus and declaratory judgment").

⁴³. *MacDonald*, 477 U.S. at 350. In *MacDonald*, a variance could have led to a final decision because the proposed use was inconsistent with the applicable regulations. See *infra* note 110.

⁴⁴. The Court stated that as a "prerequisite" to a taking claim, there must be a "final and authoritative determination of the *type and intensity* of development legally permitted on the subject property." *MacDonald*, 477 U.S. at 348 (emphasis added).

⁴⁵. Kassouni, *supra* note 2, at 24.

⁴⁶. The rationale is that a meaningful application detailing the proposed uses must be made before the type and intensity of the permitted uses are known. See *generally*, *Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) (discussing the meaningful application requirement).

⁴⁷. *MacDonald*, 477 U.S. at 359 (White, J., dissenting).

C. Lucas v. South Carolina Coastal Council

The Supreme Court's decision in *Lucas v. South Carolina Coastal Council*⁴⁹ adds little or nothing to the ripeness doctrine. Some commentators claim that *Lucas* put an end to the futility exception,⁵⁰ and that *Lucas* makes ripeness discretionary rather than a matter of subject matter jurisdiction.⁵¹ Another commentator even claims that *Lucas* "modified existing [ripeness] doctrine significantly."⁵²

In contrast to these claims, *Lucas* has not changed the ripeness doctrine. First, *Lucas* hardly mentioned ripeness; rather, the Court analyzed at length the issue of whether a taking had occurred.⁵³ Second, *Lucas* cited *Williamson* and *MacDonald* with seeming approval, and merely applied their holdings to the facts of Mr. Lucas' case.⁵⁴ Third, in a footnote the *Lucas* majority states merely that a "pointless" application need not be made to satisfy the ripeness doctrine.⁵⁵ The footnote simply rebuts one of Justice Blackmun's dissenting arguments, and in no way constitutes a holding. It is unlikely that the Supreme Court would announce a substantial change to an important doctrine by burying it in a footnote.

The *de minimis* effect of *Lucas* on the ripeness doctrine is further evidenced by the way it was applied to the facts in the case. *Lucas* was

Previous lower court decisions had never found a final decision based on the futility exception, but some had discussed the possibility. See Kassouni, *supra* note 2, at 47 n.283.

⁴⁸. Does the futility exception apply only to the final decision prong, or to the entire ripeness doctrine? Justice White described futility as one way to show the existence of a "final decision." See *MacDonald*, 477 U.S. at 359 (White, J., dissenting) ("Moreover, I see no reason for importing [the requirement that repeated applications and denials are necessary to pinpoint the decisionmaker's position on development] into the 'final decision' analysis") (emphasis added).

Most commentators, however, describe futility as an exception to the ripeness doctrine as a whole and not just the final decision prong. See, e.g., Kassouni, *supra* note 2, at 48 ("In Justice White's view, the 'ripeness' requirements of both *Williamson County* and *MacDonald* could be satisfied upon a showing of futility") (emphasis added). To further cloud the issue, some courts have applied the futility exception to the state compensation prong. See *infra* note 134. This article analyzes the futility exception as a component of the final decision prong.

⁴⁹. 112 S. Ct. 2886 (1992).

⁵⁰. See *infra* note 135.

⁵¹. See Richard M. Frank, *Inverse Condemnation Litigation in the 1990s—The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 103 (1993).

⁵². Lyman, *supra* note 15, at 124.

⁵³. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (ripeness discussed only on p. 2886; existence of a taking discussed from pp. 2892-2926).

⁵⁴. See *Lucas*, 112 S. Ct. at 2886 n.3.

⁵⁵. *Id.* at 2891 n.3 ("Justice Blackmun insists that this aspect of Lucas's [sic] claim is 'not justiciable,' . . . because Lucas never fulfilled his obligation under [*Hamilton Bank*] to 'submi[t] a plan for development of [his] property' to the proper state authorities . . . [b]ut such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application.").

a rare example of a ripe claim: the land use agency stipulated that no use was allowed under the regulations at issue. In the Court's words, "as the [land use agency] stipulated below[,] . . . no building permit would have been issued under the [regulations], application, or no application."⁵⁶ This is no different than the situation in *Carpenter v. Tahoe Regional Planning Agency*,⁵⁷ where a land use agency unambiguously told a property owner in a letter that no development was allowed. This land use agency admission satisfied the ripeness doctrine in *Carpenter* because a court could determine exactly how much use was allowed—none. Similarly, in *Lucas* the land use agency admitted by stipulation that no use was allowable. *Lucas* stands for nothing new under the ripeness doctrine other than the surprising proposition that the Supreme Court finally found a taking claim to be ripe.

Finally, perhaps the most practical reason why *Lucas* did not change the ripeness doctrine is that lower federal courts have not followed any kind of "new" *Lucas* ripeness doctrine. In fact, after *Lucas*, federal courts continue to apply the *Williamson* ripeness doctrine.⁵⁸ Therefore, even if it could be said that *Lucas* changed the ripeness doctrine on an intellectual level, it cannot be said that any practical changes have been reflected in the real cases litigated everyday in lower courts. Turning now to those cases, the following is an analysis of the ripeness case law created by the lower courts.

III. CURRENT RIPENESS DOCTRINE

A. Preliminary Ripeness Issues

The two prongs of the ripeness doctrine are independent.⁵⁹ Hence, the failure to meet one prong of the ripeness doctrine is fatal to a taking claim. Ripeness is a question of subject matter jurisdiction. "If a [taking] claim is not ripe for review, the federal courts lack subject matter jurisdiction and they must dismiss the claim."⁶⁰ Thus,

⁵⁶ *Lucas*, 112 S. Ct. at 2886 n.3.

⁵⁷ 804 F. Supp. 1316 (D. Nev. 1992).

⁵⁸ See, e.g., *Cory v. Thompson*, 996 F.2d 310, WL 220599 (10th Cir. 1993); *Kerr-McGee Chemical Corp. v. Edgar*, 837 F. Supp. 927, 937 (N.D. Ill. 1993).

⁵⁹ See *supra* note 33.

⁶⁰ *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 621 (9th Cir. 1992). See also *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.) ("Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of Article III of the federal Constitution"), *cert. denied*, 493 U.S. 993 (1989).

One commentator argues that the ripeness doctrine is not a matter of subject matter jurisdiction, but rather is discretionary after the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). See Frank, *supra* note 51, at 101-02 ("It appears

ripeness is a "threshold issue"⁶¹ in a federal land use case. An unripe claim can therefore be disposed of by a motion to dismiss for lack of subject matter jurisdiction.⁶²

Ripeness is a question of law⁶³ and therefore is reviewed *de novo*.⁶⁴ Additionally, "[d]ecisions on ripeness issues are fact-sensitive,"⁶⁵ and "to prove that a final decision was indeed reached, the facts of the case must be clear, complete, and unambiguous."⁶⁶

Whether the challenge to a land use regulation is facial or as applied generally⁶⁷ determines if the ripeness doctrine is triggered. If the challenge is as applied, the doctrine controls; if the challenge is facial, it does not.⁶⁸

that a majority of the Court no longer views the ripeness doctrine as a necessary prerequisite to the courts' subject matter jurisdiction, but rather as a jurisprudential standard to be invoked if and when the facts warrant."). No case, however, has echoed this proposition.

⁶¹. Schnuck v. City of Santa Monica, 935 F.2d 171, 173 (9th Cir. 1991); Riverdale Realty Co. v. Town of Orangetown, 816 F. Supp. 937, 942 (S.D.N.Y. 1993).

⁶². The proper motion is one under FED. R. CIV. P. 12(b)(1), and not a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *St. Clair*, 880 F.2d at 201. Additionally, a motion to dismiss, and not a motion for summary judgment, has been held to be the proper way to challenge ripeness because "ripeness affects judiability." *Taylor Investments Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1290 (3rd Cir. 1993).

⁶³. *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1988).

Because it is an issue of subject matter jurisdiction, a motion to dismiss on ripeness grounds can be made at any time including on appeal or *sua sponte* by the court. *Reahard v. Lee County*, 978 F.2d 1212, 1213 (11th Cir. 1992) ("ripeness is a matter of subject matter jurisdiction . . . We always must investigate questions of subject matter jurisdiction, whether or not they are raised by the parties to the case . . .").

⁶⁴. See *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 888 F.2d 1573, 1575 (11th Cir. 1989) ("The district court's application of *Williamson* constitutes a question of law which we review *de novo*"). See also *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 163 (9th Cir. 1993).

⁶⁵. *Eide v. Sarasota County*, 908 F.2d 716, 727 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991).

⁶⁶. *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989).

⁶⁷. However, in the Ninth Circuit facial challenges are apparently also subject to the ripeness doctrine. See *Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 505-06, (describing the "ample confusion in this area" and citing cases holding both ways).

⁶⁸. Compare *Hoehne*, 870 F.2d at 529 (applying *Williamson* ripeness doctrine in as applied challenge) with *Triple G Landfills, Inc. v. Board of Comm'rs of Fountain County*, 977 F.2d 287 (7th Cir. 1992) (not applying *Williamson* ripeness doctrine in facial challenge).

The Fourth Circuit explained this distinction by noting, "The theme of the [Supreme] Court's decisions reflects a reluctance to render opinions on the constitutionality of land use ordinances as applied prior to their actual application to a specific piece of land." *Beacon Hill Farm Associates II, Ltd. Partnership v. Loudoun County Bd. of Supervisors*, 875 F.2d 1081, 1083 (4th Cir. 1989) (emphasis in original).

The rationale of the ripeness doctrine compels that it be used only in as applied challenges. The ripeness doctrine is supposed to allow a court to determine if any development is possible. However, a facial challenge alleges that an ordinance prohibits all development of any type, no matter how it is applied. Therefore, a facial challenge answers the question of how much development is allowed by alleging that none is.

A final and very significant aspect of the ripeness doctrine is that federal courts strongly dislike adjudicating land use cases and attempt to dismiss them whenever possible. As the Ninth Circuit stated, in order to "guard against the federal courts becoming the Grand Mufti of local zoning boards, . . . ruling case law makes it very difficult to open the federal courthouse door for relief from state and local land-use decisions."⁶⁹ Implying that it was too busy to hear land use cases, the Seventh Circuit stated that the "[a]vailability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system."⁷⁰ Also, federal courts seem to view land use cases as not terribly important⁷¹ and somewhat beneath them. For instance, the Eleventh Circuit stated, "we stress that federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions."⁷²

B. Final Decision Prong

Broadly speaking, there are two ways for a federal court to find a land use agency's decision to be "final." The first is a specific agency action unambiguously declaring that its decision is indeed final. As land use practitioners know, such declarations are extremely rare. The second and most common way for a federal court to find a land use agency's decision to be "final" involves an analysis of the various rules and rationales from *Williamson* and *MacDonald*, which are discussed below. The analysis of the final decision prong begins with the first of these two ways.

1. Specific Agency Actions That Constitute "Final Decisions"

In general, when a land use agency itself unambiguously declares that a decision is final, a "final decision" exists. Perhaps the most unambiguous way to make such a declaration is for a land use agency to put its decision in writing. For example, a Nevada district court

⁶⁹. *Hoehne*, 870 F.2d at 532. A Grand Mufti is a high judge in Islamic law. See also *Executive 100, Inc., v. Martin County*, 922 F.2d 1536, 1543 (11th Cir. 1991) ("[I]f we [affirm the property owner's taking claim] we are opening the doors of the federal courts to review virtually all Florida zoning rulings . . .").

⁷⁰. *Scudder v. Town of Glendale*, 704 F.2d 999, 1003 (7th Cir. 1983).

⁷¹. See *supra* note 8.

⁷². *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989). See also *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) ("We are concerned that federal courts not sit as zoning boards of appeals . . .").

determined that a final decision had been made when the attorney for a land use agency stated in a letter to the property owner, "[y]ou may consider this letter [to be] the final administrative determination on the status of [your development] . . . application."⁷³ Additionally, when an agency staff member verbally informed a property owner that his future applications would be denied, the final decision prong was held to have been satisfied.⁷⁴

Agency actions, taken as a whole, can sometimes satisfy the final decision prong. For instance, the Eleventh Circuit found that the final decision prong was satisfied when the city "effectively conceded" that any development must be under zoning restrictions not permitting the plaintiff's intended use.⁷⁵ Similarly, final decisions were held to exist in two other Eleventh Circuit cases when it was clear that absolutely no development was allowed.⁷⁶ The total building moratoria involved in these cases answered the crucial ripeness question of how much development would be allowed.⁷⁷

The "run around" is another agency action that could satisfy the final decision prong. For instance, in a Ninth Circuit case, the property owner inquired several times to determine exactly how to comply

⁷³ *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1323-24 (D. Nev. 1992).

Not surprisingly, when a planning agency letter clearly states that a decision is *not* final, no final decision exists. In *St. Clair v. City of Chico*, 880 F.2d 199, 203 (9th Cir. 1989), the city's letter to property owners stating that a city determination of whether to allow sewer hookups would be "inappropriate 'at [this] time'" was held to be evidence of a non-final decision.

⁷⁴ *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990). See also *Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989) (finding that statement by county employee that the property owner would have "no chance" of amending the plan constituted a final decision).

⁷⁵ *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989). The court's conclusion was based on the fact that the city council, which had final authority over zoning matters, rejected the property owner's development plan.

Contrary to *Greenbriar*, other cases present facts which also seem to show that a planning agency has "effectively conceded" that no development would be allowed, yet still hold that no final decision has been made. For example, in *Unity Ventures v. Lake County*, 841 F.2d 770, 776 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988), the city stated in a letter merely that its position was not that it would "never" approve the property owner's request for a sewer connection. Because some possibility remained for approval of the request, the court held that the final decision prong had not been satisfied.

⁷⁶ See *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020, (1989). *But see Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

⁷⁷ A moratorium must ban 100% of potential development to constitute a final decision. See *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477 (N.D. Fla. 1992) (holding that ordinance prohibiting development on 95% of a lake-front lot not a final decision because the allowable use of the remaining 5% of the lot had not yet been determined). In this way, a government can effectively take 95% of the value of property and still not have to even defend its action in a federal court—let alone pay for the property it just took—because the ordinance generously left the property owner with 5% of his or her property.

with applicable regulations only to be continuously turned away by agency staff members.⁷⁸ In another case, an amendment to the general plan preventing a property owner's intended use was also held to satisfy the final decision prong.⁷⁹ Finally, in the very rare situation where an agency action is held to constitute a physical taking,⁸⁰ a final decision exists *per se* because "the physical invasion is itself a final governmental action."⁸¹

2. *Specific Agency Actions That (Shockingly) Do Not Constitute "Final Decisions"*

The following cases illustrate just how far federal courts will go to avoid concluding that a land use agency has made a "final decision." For example, a Florida district court concluded that no final decision had been rendered when a property owner originally sought development permits that were never issued because of a building moratorium.⁸² Then he sought permits for a scaled-down project that were granted but later revoked. Finally, an ordinance required the property in question to remain 95% undeveloped.⁸³ To find that the claim was unripe, the court seized upon the fact that the property owner had not alleged in his complaint that he had requested approval of the permits in accordance with the 95% non-development ordinance. Thus, amazingly, the court was able to conclude that the property owner had not met his burden of pleading that the limits on development rendered the project 100% economically unviable.⁸⁴

Additionally, a land use agency's decision is not final if other actions are necessary from any other agency or person. For example, a New York case involved a property owner who was required to

⁷⁸ Harris v. County of Riverside, 904 F.2d 497 (9th Cir. 1990).

⁷⁹ See *A.A. Profiles*, 850 F.2d at 1487 (finding that the run around "undeniably constituted a final, definitive position" of the agency). See also *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989).

⁸⁰ A physical taking occurs when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

⁸¹ *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 579 (9th Cir. 1991) (holding that mobile home rent control ordinance was a physical taking because ordinance transferred possessory interest to tenants, and therefore that a final decision existed), *cert. denied*, 113 S. Ct. 1049 (1993). *But see Eide v. Sarasota County*, 908 F.2d 716, 720, n.6 (11th Cir. 1990) (expressing no opinion as to whether *Williamson* ripeness doctrine would apply to physical taking).

Other kinds of physical takings have been held to constitute a final decision. See, e.g., *Mitchell v. Mills County*, 847 F.2d 486 (8th Cir. 1988) (property owner's land flooded); *J.B. Ranch, Inc. v. Grand County*, 958 F.2d 306 (10th Cir. 1992) (ordinance giving public access to private roads).

⁸² *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477 (N.D. Fla. 1992).

⁸³ *Id.* at 1479-81.

⁸⁴ *Id.* at 1481.

obtain, as a prerequisite to a building permit, a certificate from a housing agency verifying that the landlord did not harass tenants.⁸⁵ Until the property owner applied for the certificate from the other agency, revocation of his building permit was held not to be a final decision.⁸⁶ Similarly, in another case from a New York federal district court, an agency's decision was held not to be final when a property owner's plan was rejected because it lacked a prerequisite solid waste site permit from a state environmental agency.⁸⁷

Another example of this rule appears in a Virginia case involving eminent domain.⁸⁸ In this case, the condemnation hearing to perfect title under a "quick-take" eminent domain statute⁸⁹ was held not to be a final decision because the hearing was an additional action by a court, which was an agency other than the city. This rule also applies if the property owner is the person who must take the additional necessary action. For instance, a Nevada case held that no final decision had been rendered because the property owner failed to "explore the possibility" of obtaining transferable development rights (TDRs) from the planning agency.⁹⁰

A related rule is the requirement that before a decision can be "final," it must come from, in the words of *Williamson*, the "government entity charged with implementing the regulation."⁹¹ Lower courts have followed this rule by holding that when a city refused to connect a property owner's project to a municipal sewer system, and the property owner obtained a final decision from the state agency overseeing the sewer system, there had been no final decision from the city, which was the agency "charged with implementing the regulation."⁹²

C. The Meaningful Application Requirement

⁸⁵. *Weissman v. Fruchtman*, 700 F. Supp. 746 (S.D.N.Y. 1988).

⁸⁶. *Id.* at 754.

⁸⁷. *CECOS Int'l, Inc. v. Jorling*, 706 F. Supp. 1006 (N.D.N.Y. 1989).

⁸⁸. *HMK Corp. v. Chesterfield*, 616 F. Supp. 667 (E.D. Va. 1985).

⁸⁹. Under the statute, defeasible title vests in the state pending condemnation proceedings; after the proceedings, the state's title becomes indefeasible. V A. CODE ANN. §§ 33.1-89, 33.1-122 (Michie ed. 1987).

⁹⁰. *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1325 (D. Nev. 1992).

⁹¹. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

⁹². *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir. 1988). See also *St. Clair v. City of Chico*, 880 F.2d 199, 203 (9th Cir. 1989) (holding that a taking claim against County was unripe since the "County rejected the [property owners' application to build] because it believed they had not yet received a rejection from the City on their [related] application . . ." (emphasis added)).

A land use agency can make a final decision only when it has an application before it. The *MacDonald* rationale is that without a "meaningful" application from the property owner, the agency cannot determine exactly how the regulations would be applied to the property.⁹³ Therefore, the existence of a final decision cannot be determined without a meaningful application.

Two courts have briefly addressed the definition of "meaningful." In one case, the Ninth Circuit held that an application for a variance seeking to erect a fence, instead of the required wall, around a parking lot was only "minor," and hence, not meaningful.⁹⁴ Another Ninth Circuit case held that the submission of an "informal" draft of a development plan for comments by land use agency staff members was not a meaningful application.⁹⁵

MacDonald held that a meaningful application cannot include a request for "exceedingly grandiose development."⁹⁶ One case has discussed the meaning of an "exceedingly grandiose development" application.⁹⁷ The property owner planned to build a large resort on a 210-acre parcel of Hawaiian beach. This property was later downzoned to preservation and park uses. Given the stark contrast between the property owner's intended use and the zoning classification of the land, the court concluded that any applications to develop the property as a resort were "exceedingly grandiose."⁹⁸

Even if an application is a "meaningful" one, it must be formally rejected before it can be a final decision. This means that an aban-

⁹³. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 n.8 (1986) (holding that at least one "meaningful application" must be submitted before a decision is "final").

The rationale is well illustrated in *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). In *Vogler*, a federal agency required a miner to obtain a permit before he could enter a national preserve and to submit a mining plan before he could mine. His taking claim was held to be unripe because he never applied for a permit or submitted a plan. *Id.* at 642.

⁹⁴. *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 n.7 (9th Cir. 1990). The application was not meaningful because the denial of the fence variance "gives no indication of how the City would respond to a major development application." *Id.* The *Southern Pacific* court warned that the "meaningful application requirement also mandates that claimants pursue their applications and not abandon their applications at an early stage." *Id.* at 503.

⁹⁵. *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876-77 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988).

⁹⁶. *MacDonald*, 477 U.S. at 353 n.9.

⁹⁷. *Kaiser Dev. Co. v. City & County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).

⁹⁸. *Id.* at 942 & n.21. Note the reasoning: because the city destroyed almost all the property's value by regulation, any attempt to use the property is an "exceedingly grandiose" proposal and therefore the case is unripe. In other words, because the taking was so extensive, there is less of a chance of the property owner receiving compensation.

doned application cannot be a final decision.⁹⁹ For example, a California district court held that the actual plan or application submitted by the property owner must be rejected, even if other circumstances made the approval or rejection of the plan irrelevant.¹⁰⁰ In this case, a property owner submitted a "meaningful" development plan, but the city then passed an openspace ordinance prohibiting any development of his land. The property owner withdrew his application; the city, however, never formally rejected his plan. The court held that no final decision had been rendered on his development plan, even though the court admitted that it was reasonable under the circumstances for the property owner to have abandoned his plan.¹⁰¹

1. Types of Administrative Relief That Must Be Sought: Variance, Appeal, or Amendment

Recall that the rationale for the requirement to seek administrative relief was that "what [land use agencies] take with the one hand they may give back with the other."¹⁰² Accordingly, both *Williamson* and *MacDonald* established that before a property owner can claim a land use agency decision resulted in a taking, he or she must seek administrative relief from that decision. The relief sought can be a variance, appeal, or an amendment.¹⁰³

a. Variance

A property owner must seek a variance if one is available before the final decision prong can be satisfied.¹⁰⁴ Recall that the primary

⁹⁹. See, e.g., *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir.), *modified*, 830 F.2d 968 (1987); *Long Grove Country Club Estates v. Village of Long Grove*, 693 F. Supp. 640, 653 (N.D. Ill. 1988).

¹⁰⁰. *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988).

¹⁰¹. The judge in *Zilber* recognized the unfairness of the ripeness doctrine as it applied to that case, but felt constrained by precedent. *Id.* at 1200.

In a similar case, *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), the property owner initially applied for a water hookup to a property in an openspace zone. He later abandoned his application after a city public works staff member told him that the city "could not provide water services to the property." The court found that this was not a final decision because the application itself was not rejected. *Id.* at 1454.

¹⁰². *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350 (1986).

¹⁰³. Property owners have been required to seek other forms of administrative relief under the ripeness doctrine. See, e.g., *Stephans v. Tahoe Planning Dev. Agency*, 697 F. Supp. 1149, 1154 (D. Nev. 1988) (transferable development rights); *Ross v. City of Berkeley*, 655 F. Supp. 820, 841 (N.D. Cal. 1987) (arbitration).

¹⁰⁴. To seek a variance is to seek "[p]ermission to depart from the literal requirements of a zoning ordinance." BLACK'S LAW DICTIONARY 1553 (6th ed. 1990). A variance is often granted where strict adherence to the zoning regulations would cause "unique hardship." *Id.* A variance should only be required if the property owner's proposed use is inconsistent with existing

reason cited by the *Williamson* court why no final decision existed was that the property owner had not sought a variance.¹⁰⁵ The Sixth Circuit has held that seeking an available variance is a "prerequisite" to a successful taking claim.¹⁰⁶ In fact, courts in almost every circuit have held that a property owner must seek a variance before a decision can be considered final.¹⁰⁷

However, a property owner need not seek a variance when one is not available. Four cases from the United States Court of Federal Claims illustrate this rule well.¹⁰⁸ All four involved taking claims arising from wetlands regulations which prohibited any development of the property in question. The wetlands regulations provided for no variances whatsoever.¹⁰⁹ The Court of Federal Claims held in all four cases that, given the lack of variance provisions in the regulations, the claims were ripe.

When a property owner's proposed use *conforms* to land use regulations, a variance need not be sought because a variance still would not allow the development.¹¹⁰ Also, a variance need not be sought when a land use agency lacks the authority to grant variances

land use regulations. See *infra* note 110. However, federal courts often dismiss taking cases because a variance was available, without even analyzing whether the use conformed or was inconsistent. See *infra* note 112 and accompanying text.

¹⁰⁵. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985) ("Thus, in the face of [the property owner's] refusal to follow the procedures for requesting a variance . . . [the property owner] hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision . . .").

¹⁰⁶. *Seguin v. City of Sterling Heights*, 968 F.2d 584, 589 (6th Cir. 1992). See also *St. Clair v. City of Chico*, 880 F.2d 199, 203 (9th Cir. 1989) (describing the "two-step test" for determining ripeness as first, a "final decision" analysis and second, whether a variance was sought).

¹⁰⁷. See, e.g., *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, *rev'd on other grounds*, 938 F.2d 153 (9th Cir. 1991); *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir. 1988); *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506, 515 (1st Cir. 1987); *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991); *Wilhelmsen v. Board Comm'rs*, 694 F. Supp. 809 (D. Wyo. 1988); *Wintercreek Apts. v. City of St. Peters*, 682 F. Supp. 989 (E.D. Mo. 1988); *Jackson Court Condos. v. City of New Orleans*, 665 F. Supp. 1235 (E.D. La. 1987), *aff'd*, 874 F.2d 1070 (5th Cir. 1989).

¹⁰⁸. See *Formanek v. United States*, 18 Cl. Ct. 785 (1989); *Ciampetti v. United States*, 18 Cl. Ct. 548 (1989); *Beure-Co. v. United States*, 16 Cl. Ct. 42 (1988); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988).

The Eleventh Circuit has followed the Court of Claims. See *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1575 (11th Cir. 1989) (holding taking claim ripe where "there are no variances available under the applicable local law").

¹⁰⁹. See 33 C.F.R. §§ 320-24 (1992).

¹¹⁰. See *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1502 (9th Cir. 1990) ("Because the nature and density of appellants' proposed development did not conflict with express terms in the City's zoning ordinances or its general land use plan, a variance would not have led to tentative map approval, and the failure to seek a variance does not affect the ripeness of appellants' claim.").

such as when the planning agency is prevented by statute from granting variances for inconsistent uses.¹¹¹ Despite the above cases holding that a property owner need not always seek a variance, courts often dismiss taking claims based on a property owner's failure to seek a variance without fully investigating whether a variance would allow the proposed use or is even available.¹¹²

b. Appeal

An administrative appeal is one of the administrative remedies that a property owner must exhaust before the final decision prong can be satisfied. This requirement is illustrated by a district court decision from California.¹¹³ A property owner's development plan was rejected by the town council. Shortly thereafter, his property was reclassified as openspace by an initiative and he abandoned his plan. The new openspace ordinance contained a review process for the classification of property as openspace. The property owner's claim failed the final decision prong because he failed to utilize that appeal process.¹¹⁴ In a Connecticut case, the classification of a parcel as openspace, allegedly done by mistake, did not constitute a final decision because the aggrieved property owner should have sought a reclassification.¹¹⁵

c. Amendment

The Ninth Circuit went so far as to hold that a property owner whose development plan was rejected must seek an amendment to the zoning ordinance.¹¹⁶ A later Ninth Circuit panel reversed this holding,¹¹⁷ and no other circuit has adopted the amendment re-

¹¹¹. See Kassouni, *supra* note 2, at 27 (discussing *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), *amended in part*, 857 F.2d 567 (1988)).

¹¹². See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1336 (9th Cir. 1990), *rev'd*, 938 F.2d 153 (1991) (*Tahoe-Sierra I*).

¹¹³. *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988).

¹¹⁴. *Id.* at 1200. See also *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 888 F.2d 1573, 1575 (11th Cir. 1989) (holding taking claim unripe because property owners failed to utilize an available, albeit burdensome, appeal process—challenging a planning agency's decision through certiorari to a state court).

¹¹⁵. *Celentano v. City of West Haven*, 815 F. Supp. 561, 569 (D. Conn. 1993).

¹¹⁶. *Tahoe-Sierra I*, 911 F.2d at 1336.

In *Tahoe-Sierra I*, "The Ninth Circuit's 'holding' appears to be the opinion of a single judge—the Honorable Stephen Reinhardt." Kassouni, *supra* note 2, at 25 n.153. In a special concurrence, Judge Fletcher stated that she did not agree with the "ripeness" portion of the opinion, since she "would not reach the ripeness issue." *Id.* In a partial dissent, Judge Kozinski excepted to the "'ripeness' holding of the *per curiam* opinion." *Id.*

¹¹⁷. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 938 F.2d 153, 156 (9th Cir. 1991) (*Tahoe-Sierra II*).

quirement yet. However, this issue must be explored because another circuit might revive the amendment requirement, and because the reasoning behind the requirement illustrates just how far federal courts will go to avoid adjudicating land use cases.

In the Ninth Circuit case that introduced the amendment requirement,¹¹⁸ property owners challenged a general plan that imposed a virtual building moratorium. Because the general plan included an amendment procedure, the court concluded that the property owners were required to seek an amendment to the plan before their claim could be considered ripe.¹¹⁹ According to the court, an available amendment process "offers the same possibility regarding development as does a system for requesting variances."¹²⁰

In fact a variance and an amendment are very different, and the variance requirement should not be used interchangeably with an "amendment requirement." "A variance provides relief *from the application* of a land use regulation . . . For this reason, the granting of a variance is an *adjudicatory* function."¹²¹ In contrast, "[t]he adoption and amendment of a general plan . . . is a *legislative* function."¹²² Actually requiring property owners to pursue legislative relief is the exact opposite of attempting to reach a final decision. "An amendment . . . requires an exercise of political judgment. Political processes are, by their nature, infinite There is thus no way for a court to say that a legislative process has come to rest with respect to a challenged law."¹²³

Given the rationales for the ripeness doctrine, the final decision prong must be limited to adjudicatory relief. In essence, the ripeness doctrine requires that the land use agency adjudicate the permissible uses of a given parcel of property. Only when these uses have been decided upon can the existence of "taking" be determined according to *Williamson* and *MacDonald*. In contrast, legislative relief does not involve this process; if anything, decisions are less final. For these reasons, a court that requires property owners to seek what amounts to legislative relief clearly goes against the holdings and rationales of *Williamson* and *MacDonald*.¹²⁴

118. *Tahoe-Sierra I*, 911 F.2d 1331 (9th Cir. 1990).

119. *Id.* at 1336.

120. *Id.*

121. Kassouni, *supra* note 2, at 36 (second emphasis added).

122. *Id.* (emphasis added).

123. *Tahoe-Sierra I*, 911 F.2d at 1345-46 (Kozinski, J., dissenting) (footnotes omitted).

124. If seeking legislative relief should not be required of property owners, it also follows that a court should not require them to seek textual amendments to zoning ordinances.

2. "Reapplication" Requirement

Though *Williamson* required a property owner to receive a final decision on his or her application, *MacDonald* added the requirement that he or she must reapply after an initial rejection.¹²⁵ The reapplication requirement came from the statement in *MacDonald* that a property owner must obtain a "final and authoritative determination of the *type and intensity* of development legally permitted."¹²⁶ Lower courts have interpreted this to mean that only after a reapplication has been submitted can the "type and intensity" of permissible development be determined. A Ninth Circuit case explained that the reapplication rule means "a landowner may need to resubmit modified development proposals that satisfy the local government's objections to the development as initially proposed."¹²⁷ No case has indicated exactly how many reapplications are necessary.

Inherent in the reapplication rule is an assumption that property owners must make significant concessions to land use agencies. For example, the property owner should apply for less intensive uses. In one case, the final decision prong was not satisfied after a property owner's original development plan, which would have adversely impacted a deer habitat, was rejected as inconsistent with a state environmental law.¹²⁸ The Second Circuit held that no final decision had been rendered because the property owner "did not attempt to modify the location of the units or otherwise seek to revise its application."¹²⁹ Other courts seem to require property owners to compromise by scaling down their original project and seeking transferable development rights for future projects.¹³⁰

¹²⁵ See *supra* notes 44-46.

¹²⁶ *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) (emphasis added).

¹²⁷ *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990).

¹²⁸ *Southview Assoc. v. Bongartz*, 980 F.2d 84 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993).

¹²⁹ *Id.* at 92.

¹³⁰ See *Stephans v. Tahoe Regional Planning Agency*, 697 F. Supp. 1149, 1154 (D. Nev. 1988); *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1352 (D. Nev. 1992). Transferable development rights (TDRs) are a means of satisfying and avoiding the just compensation requirement, since "TDRs can ease the burden of a regulation such that it will not amount to a taking." JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 1214 (3d ed. 1993). See also *Developments in the Law--Zoning*, 91 HARV. L. REV. 1427, 1497-1501 (1978) (arguing that TDRs move the regulation away from the "too far" point which would constitute a taking). For further discussions of TDRs, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 188-90* (1985); David E. Ervin & James B. Fitch, *Evaluating Alternative Compensation and Recapture Techniques for Expanded Public Control of Land Use*, 19 NAT. RESOURCES J. 21 (1979).

The reapplication requirement apparently mandates political concessions as well. The Ninth Circuit seems to require a property owner not only to compromise with the land use agency itself, but he or she must also convince another municipality to make "political concessions" to the first agency.¹³¹ In another case, one of the reasons that the Tenth Circuit found that the final decision prong had not been satisfied was because the property owners had made "no efforts to explore the possibility of alternative development plans with the City."¹³² Similarly, a Kansas district court held that the final decision prong had not been satisfied in part because the court found that "there has been little or no dialogue between plaintiff and the City."¹³³ The apparent requirement that a citizen must make concessions to the government before his or her constitutional rights can be enforced in a federal court is a very novel concept in American constitutional law. This shows just how far federal courts will go to avoid adjudicating land use cases.

3. *Futility Exception*

The futility exception to the ripeness doctrine holds that if further applications would be "futile," a de facto final decision can be imputed to the land use agency.¹³⁴ As a prerequisite,¹³⁵ however, to satisfying the futility exception, a property owner must submit at least one "meaningful" application and seek any available administrative relief. "As harsh and counterintuitive as it may sound, . . . even when the local statute clearly precludes approval of any meaningful application . . . the futility exception to the final decision requirement will not

¹³¹ St. Clair v. City of Chico, 880 F.2d 199, 203 (9th Cir. 1989).

¹³² Landmark Land Co. v. Buchanan, 874 F.2d 717, 721 (10th Cir. 1989).

¹³³ Mid Gulf, Inc. v. Bishop, 792 F. Supp. 1205, 1210 (D. Kan. 1992).

¹³⁴ The futility exception is usually applied either to the final decision prong or sometimes to the entire ripeness doctrine. See *supra* note 48.

The futility exception has occasionally also been applied to the state compensation prong. See, e.g., Schnuck v. City of Santa Monica, 935 F.2d 171, 174 (9th Cir. 1991) (finding that the property owner "has not shown that bringing her claims in state court would be futile"); Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068, 1073 (M.D.N.C. 1992) (concluding that "it would be futile and a waste of judicial resources to require [the property owner] to apply for and be denied just compensation [by a state court] before continuing this action"), *aff'd*, 19 F.3d 11 (4th Cir. 1994).

¹³⁵ The *Lucas* decision could be read to cast some doubt on whether a meaningful application is a prerequisite to the futility exception. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2891 n.3 (1992) (stating that an application for a development permit or variance is not required where it would be "pointless").

Lucas' language has led one commentator to argue that "[s]ubmission of a development application is therefore *not* a prerequisite to application of the futility exception." Kassouni, *supra* note 2, at 51. However, *Lucas* did not substantially change the ripeness doctrine. See *supra* text accompanying notes 49-58.

apply, absent at least one rejected application and one rejected variance request."¹³⁶ The futility exception is not Supreme Court precedent,¹³⁷ the Ninth Circuit created it.¹³⁸ So far, not every circuit has adopted the futility exception.¹³⁹

Note that "[t]he precise test for determining whether a landowner has established the futility of pursuing a development application has not been clearly defined."¹⁴⁰ Not surprisingly, the property owner has the "heavy burden"¹⁴¹ of establishing the futility exception, and "any reasonable doubt ought to be resolved against that party."¹⁴² The Ninth and Tenth Circuits hold that the futility exception is not available unless it is "clear beyond peradventure that excessive delay in . . . a final decision [would cause] the present destruction of the property's beneficial use."¹⁴³

Under the futility exception, a property owner is excused from proving that the land use agency has made a final decision if "special circumstances exist such that a permit application is not a 'viable option,' or where the granting authority has dug in its heels and made it transparently clear that the permit, application or no, will not be forthcoming."¹⁴⁴ The futility exception "serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved."¹⁴⁵ The futility exception is a narrow one: "[T]he mere possibility, or even the probability, that the responsible agency may deny the permit should not be enough to trigger the [futility] excuse."¹⁴⁶

¹³⁶ Zilber v. Town of Moraga, 692 F. Supp. 1185, 1199 (N.D. Cal. 1988).

¹³⁷ See *supra* text accompanying note 41.

¹³⁸ The first case to discuss the futility exception is *American Sav. & Loan Ass'n v. Marin County*, 653 F.2d 364, 371 (9th Cir. 1981), which held that in a land use case, the property owner has "the heavy burden of showing that compliance with local ordinances would be futile."

¹³⁹ The First, Sixth, Ninth, Tenth, and Eleventh Circuits have applied the futility exception. See *Gilbert v. City of Cambridge*, 932 F.2d 51, 60-61 (1st Cir. 1991) *cert. denied*, 112 S. Ct. 192 (1991); *Seguin v. City of Sterling Heights*, 968 F.2d 584, 588 (6th Cir. 1992); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987); *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 721-22 (10th Cir. 1989); *Reahard v. Lee County*, 968 F.2d 1131, 1134 (11th Cir. 1992).

¹⁴⁰ *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990).

¹⁴¹ *Traweek v. City & County of San Francisco*, 920 F.2d 589, 594 (9th Cir. 1990).

¹⁴² *Gilbert*, 932 F.2d at 61.

¹⁴³ *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). The Tenth Circuit has adopted this language. See *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 721 (10th Cir. 1989).

¹⁴⁴ *Gilbert*, 932 F.2d at 61 (citations omitted).

¹⁴⁵ *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990).

¹⁴⁶ *Gilbert*, 932 F.2d at 61.

A property owner can fall within the futility exception by making an application under land use regulations that do not provide for administrative relief. For example, the Ninth Circuit found it would be futile for a property owner to seek a variance where the general plan did not have a variance procedure.¹⁴⁷ Conversely, the availability of a variance means that no futility exception will be recognized.¹⁴⁸ Another way for a property owner to fall within the futility exception is if the land use regulations clearly do not allow the contemplated use.¹⁴⁹ A property owner may also fall within the futility exception if a land use agency takes a clearly unreasonable amount of time on his or her application.¹⁵⁰ However, a delay of *six years* was held *not* to trigger the futility exception.¹⁵¹ At least two courts have hinted that a delay of up to eight years (the length of the delay in *Williamson*) would not trigger the futility exception.¹⁵²

Curiously, the futility exception has not been applied when the applicable land use regulations are amended to prevent a property owner's proposed use. For example, no futility exception was recognized when an ordinance was passed specifically to block the conversion of the property owner's apartments to condominiums.¹⁵³ Similarly, when an initiative downzoned a property owner's land to openspace, and could be amended only by the vote of a majority of the town's citizens, the Ninth Circuit did not recognize the futility exception because the property owners never submitted a plan to develop their property.¹⁵⁴ This example of downzoning by initiative most clearly shows the futility of a property owner putting his or her

¹⁴⁷. *Hoehne v. County of San Benito*, 870 F.2d 529, 534 (9th Cir. 1989).

¹⁴⁸. *See, e.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987).

¹⁴⁹. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989) (recognizing futility exception when city "effectively conceded that the only alternative plan of development would have been under the existing zoning ordinance" which prohibited the project). *See also Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987) (holding that testimony of county official showed futility of seeking variance).

¹⁵⁰. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1338 n.5 (9th Cir. 1990), *rev'd* 938 F.2d 153 (1991) ("Obviously a procedure designed to keep aggrieved landowners on ice *indefinitely*, or for longer than the government could reasonably require in order to reach a final decision under the circumstances" [could trigger the futility exception.]) (emphasis in original); *Kinzli v. City of Santa Cruz*, 818 F.2d 1499, 1454 n.5 (9th Cir. 1987) (an "excessive amount of time" may trigger futility exception).

¹⁵¹. *See Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986).

¹⁵². *See Kinzli*, 818 F.2d at 1454 n.5; *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989).

¹⁵³. *Traweek v. City & County of San Francisco*, 920 F.2d 589, 594 (9th Cir. 1990).

¹⁵⁴. *Kinzli*, 818 F.2d at 1455. *See also Amwest Invs., Ltd. v. City of Aurora*, 701 F. Supp. 1508, 1514 (D. Colo. 1988) (not recognizing the futility exception when property owner's land downzoned by initiative and city rejected his subdivision plan).

property to a contemplated use; however, the futility exception was not recognized.

Some circuits not only place the burden of proving futility on the property owner,¹⁵⁵ but amazingly require him or her to file, and then lose, a state court inverse condemnation suit before the futility exception is triggered.¹⁵⁶ The only plausible explanation for requiring a state inverse condemnation suit to be lost before making any determination on the clearly unrelated matter of whether a "final decision" has been made is that federal courts often use very questionable legal reasoning to avoid hearing land use cases.

D. State Compensation Prong

The second of the two *Williamson* ripeness prongs is "state compensation."¹⁵⁷ *Williamson* requires that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."¹⁵⁸ In other words, for a taking claim to be heard in federal court, a property owner must first pursue compensation in state court.¹⁵⁹ Nearly every circuit has decided at least one case holding that the state compensation prong is

¹⁵⁵. See *supra* notes 138-39.

¹⁵⁶. See *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). See also *Anderson v. Alpine City*, 804 F. Supp. 269, 273 (D. Utah 1992).

¹⁵⁷. Regarding the name of this prong, *Williamson* used the term "compensation," *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 185 (1985), and other cases have used "state remedies," see, e.g., *Zilber v. Town of Moranga*, 692 F. Supp. 1195, 1201 n.6 (N.D. Cal. 1988).

The essence of this prong is that *compensation* must be pursued in *state* court before a federal claim is ripe. Combining these two concepts, the term "state compensation" seems the most descriptive.

It is at the state compensation prong that the ripeness and abstention doctrines "intersect." *Blaesser, supra* note 3, at 89. See also *supra* note 35 (discussing the abstention doctrine as a possible additional reason that *Williamson* required state compensation to be sought). This intersection occurs because "the availability of an adequate state remedy for inverse condemnation (an issue of ripeness) can itself become the unsettled question of state law which may warrant abstention by the federal courts." *Blaesser, supra* note 2, at 90.

¹⁵⁸. *Williamson*, 473 U.S. at 194-195 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984)).

The ripeness requirement that property owners must seek state compensation is "conceptually distinct" from the exhaustion of remedies doctrine in other § 1983 cases. *Id.* at 192. The questionable rationale for excepting taking cases from every other kind of constitutional claim recognized under § 1983, which unlike taking claims do not require an exhaustion of remedies, is discussed in *Blaesser, supra* note 2, at 73-76.

¹⁵⁹. See *Picard v. Bay Area Regional Transit Dist.*, 823 F. Supp. 1519, 1523 (N.D. Cal. 1993) ("until state court procedures have been pursued, federal courts lack subject matter jurisdiction over taking claims").

not satisfied when a property owner initially files a land use case in federal court, instead of first pursuing state court relief.¹⁶⁰

The extreme importance of the state compensation prong must be amplified. Because failure to meet one of the two prongs means a claim is unripe,¹⁶¹ the existence of an adequate process for receiving state compensation in a land use case means that a taking claim is always unripe and hence never justiciable in federal court.

1. *Type of State Court Relief That Must Be Pursued*

In order to satisfy the state compensation prong, a property owner must seek *compensation*, not injunctive relief. The First Circuit explained that "*Williamson* leaves no doubt that, so long as the State provides an adequate process for securing compensation, federal equitable intervention in advance of resort to that [state] procedure is premature."¹⁶² The Seventh Circuit clearly illustrated this requirement when it held that a claim was unripe because the property owners sought injunctive relief, not compensation.¹⁶³

2. *"Adequate" Process for State Compensation*

Recall that *Williamson* requires a property owner to seek state compensation before turning to federal court, but only if an "adequate process for obtaining compensation" exists in the state court.¹⁶⁴ Accordingly, the existence of "adequate" compensation determines whether a property owner must file suit first in state court.

As a preliminary matter, it should be noted that the burden of proving whether state compensation is "adequate" is on the property owner. The burden is heavy: "[U]ntil the state courts establish that

¹⁶⁰ See, e.g., *Rocky Mtn. Materials & Asphalt, Inc. v. Board of County Comm'rs*, 972 F.2d 309 (10th Cir. 1992); *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992); *Schnuck v. City of Santa Monica*, 935 F.2d 171 (9th Cir. 1991); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573 (7th Cir. 1990); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1059 (1993); *Abbyss v. Delaware Dep't of Transp.*, 712 F. Supp. 1159 (D. Del. 1989); *Q.C. Constr. Co. v. Verrengia*, 700 F. Supp. 86 (D.R.I. 1988); *Northern Va. Law Sch. v. City of Alexandria*, 680 F. Supp. 222 (E.D. Va. 1988); *Jackson Court Condos., Inc. v. City of New Orleans*, 665 F. Supp. 1235 (E.D. La. 1987).

¹⁶¹ See *supra* note 33.

¹⁶² *Gilbert v. City of Cambridge*, 932 F.2d 51, 64 (1st Cir. 1991) (citation omitted).

¹⁶³ See *Coniston Corp. v. Village of Hoffmann Estates*, 844 F.2d 461, 463-64 (7th Cir. 1988) (holding that compensation prong not satisfied because property owners "have not explored the possibility of obtaining compensation for an alleged regulatory taking. In fact, they do not want compensation; they want their site plan approved.").

¹⁶⁴ *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

landowners may not obtain just compensation through an inverse condemnation action *under any circumstances*, [state] procedures are adequate within the terms of *Williamson County* and [the property owner's] failure to use them cannot be excused.¹⁶⁵ State compensation is "adequate" when it provides monetary relief.¹⁶⁶ However, state compensation can also be "adequate" even if it provides only injunctive¹⁶⁷ or both injunctive and monetary relief.¹⁶⁸ An "adequate process" for state compensation can also be administrative relief such as a state claims commission which awards monetary damages.¹⁶⁹

3. Examples of Adequate State Compensation

Federal courts, once again because of their dislike of adjudicating land use cases, go to great lengths to find a state's compensation

¹⁶⁵. *Austin v. City & County of Honolulu*, 840 F.2d 678, 681 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988) (emphasis added). *See also* *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991) ("Because the plaintiffs have not yet been turned away empty-handed [from state court], it is not clear whether their property has been taken without just compensation."), *cert. denied*, 112 S. Ct. 1174 (1992); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir. 1991) ("[A property owner's] allegation of mere generalized hostility of the state courts to taking claims does not excuse her failure to seek relief there. She must show that 'state courts establish that landowners may not obtain just compensation through an inverse condemnation action *under any circumstances*.'") (citation omitted) (quoting *Austin*, 840 F.2d at 681) (emphasis added); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1479 (9th Cir. 1989) ("adequate" state compensation existed despite property owner's allegation of "the California court's longstanding hostility toward taking claims" and "long delays" before taking claims are heard by state courts), *cert. denied*, 494 U.S. 1016 (1990); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) (a "suit for just compensation is not ripe until it is *apparent* that the state does not intend to pay compensation . . .") (emphasis added).

¹⁶⁶. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456 (9th Cir. 1987) (concluding that the state remedy was "adequate" because California law recognizes monetary damages for inverse condemnation claims).

Interestingly, one court has held that compensation from a different sovereign than the one taking the property is not an "adequate remedy." *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1341 (9th Cir. 1990) (concluding that federal compensation for taking by either California, Nevada, or federal interstate compact agency was not "adequate"), *rev'd*, 938 F.2d 153 (1991).

¹⁶⁷. *Queen Anne Courts v. City of Lakeville*, 726 F. Supp. 733, 739 (D. Minn. 1989) (holding that even though current Minnesota inverse condemnation law provides only injunctive relief, until Minnesota expressly holds that monetary damages are not available, state compensation is still "adequate").

Not surprisingly, federal courts make a great distinction between compensation and injunctive relief when it comes to requiring property owners to seek only compensatory relief, *see supra* notes 162-63. By stringently insisting that only compensation be sought, federal courts thus exclude more land use cases from their dockets. However, these same courts irreconcilably lump compensatory and injunctive relief together when deciding whether a state remedy is adequate, thus excluding even more cases. *See infra* note 168.

¹⁶⁸. *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 (1st Cir. 1991) (finding the state remedies "adequate" because Massachusetts law provides both injunctive and monetary relief).

¹⁶⁹. *See MAK Co. v. Smith*, 763 F. Supp. 1003, 1005 (W.D. Ark. 1991) (holding that the Arkansas Claims Commission constituted an "adequate state remedy").

remedy "adequate." At least superficially, federal courts recognize that a property owner should not be forced to pursue non-existent state compensation.¹⁷⁰ As the following cases illustrate, however, federal courts often require property owners to pursue state remedies that are arguably non-existent.

The fact that a state has never awarded monetary damages in an inverse condemnation case does not mean that state procedures for awarding compensation are inadequate. For example, a district court found that Iowa state law provided an "adequate" state compensation remedy merely because an inverse condemnation cause of action could be "implied from the Iowa Constitution" despite the fact that no case recognizing such an action was cited.¹⁷¹ Similarly, after the First Circuit could find no Puerto Rico inverse condemnation cases awarding monetary damages, it nevertheless dismissed a property owner's claim by concluding that state compensation was adequate.¹⁷²

Federal courts do not hesitate to dismiss land use cases as violative of the state compensation prong even when the status of a state's inverse condemnation law is unclear. For example, even though Missouri cases were "less than certain" concerning the availability of monetary damages for inverse condemnation, a district court held that state procedures for awarding compensation were "adequate."¹⁷³ The Missouri cases were "less than certain" because one case seemed to recognize monetary damages, while another did not.¹⁷⁴ Similarly, the Ninth Circuit found that even though Hawaiian inverse condemnation

¹⁷⁰. *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993) ("However, a plaintiff is not required to bring a state court action where it would be futile under existing state law.").

From its *Christensen* holding, the Ninth Circuit seemingly has created a "futility" exception to the compensation prong, where previously an exception by the same name was applied only to the final decision prong. See *supra* note 134.

¹⁷¹. *Mitchell v. Mills County*, 673 F. Supp. 332, 336 (S.D. Iowa 1987). See also *Southview Assocs. v. Bongartz*, 980 F.2d 84, 100 (2d Cir. 1992) (concluding that even though Vermont law has never recognized an inverse condemnation cause of action, the Vermont constitution could be interpreted to provide such a remedy).

¹⁷². *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506 (1st Cir. 1987).

¹⁷³. *Wintercreek Apts. v. City of St. Peters*, 682 F. Supp. 989, 993 (E.D. Mo. 1988).

¹⁷⁴. Compare *Harris v. Missouri Conservation Comm'n*, 790 F.2d 678, 681 (8th Cir. 1986) (recognizing that Missouri law provides inverse condemnation action for landowner challenging zoning designation) with *D & R Pipeline Constr. Co. v. Greene County*, 630 S.W.2d 236, 238 (Mo. Ct. App. 1982) (holding that Missouri law does not provide inverse condemnation action for landowner challenging refusal to rezone).

The *Wintercreek* court recognized that *D & R Pipeline* was a pre-*First English* case and probably would be decided differently in 1986 when *Harris* was decided. See *Wintercreek*, 682 F. Supp. at 993 n.3.

law was "unclear" (no Hawaiian case had ever recognized the cause of action), Hawaii provided an adequate state remedy.¹⁷⁵

Federal courts also conclude that very limited compensation remedies are adequate. For example, the Eighth Circuit held that Minnesota's compensation remedy was adequate where inverse condemnation damages are limited in that state to cases where the "taking or damage is irreversible."¹⁷⁶ The availability of a state mandamus proceeding to compel a land use agency to institute eminent domain proceedings was held by the Sixth Circuit to be "adequate" state compensation.¹⁷⁷

Federal courts also use the order in which suits are filed to dismiss land use cases. A Rhode Island district court case exemplifies how strictly federal courts apply the state compensation prong against property owners.¹⁷⁸ In that case, the property owner originally filed a declaratory judgment suit in state court alleging a taking. After the city failed to respond to the state court suit, the property owner removed the case to federal court. The federal court held that the claim was unripe because the property owner should not have abandoned the state suit; the fact that the property owner originally filed in state court convinced the federal court that state compensation was adequate.¹⁷⁹

a. Effect of First English on what Constitutes "Adequate" State Compensation

The Supreme Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (First English)*¹⁸⁰ is extremely significant to the ripeness doctrine. In *First English*, the Supreme Court established that *after* a taking has been shown to exist,¹⁸¹ the Taking Clause of the *federal* constitution requires the

¹⁷⁵. *Austin v. City & County of Honolulu*, 840 F.2d 678 (9th Cir. 1988). See also *Southview Assocs.*, 980 F.2d at 99-100 (concluding that "unsure and undeveloped" remedies in Vermont, which has never decided a regulatory taking inverse condemnation claim, are adequate).

¹⁷⁶. *Littlefield v. City of Afton*, 785 F.2d 596, 609 (8th Cir. 1986).

¹⁷⁷. *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031, 1035 (6th Cir. 1992).

The Sixth Circuit held that an available mandamus procedure was adequate "compensation" even though a successful litigant in such a proceeding would not receive any compensation, but rather would "receive" an eminent domain lawsuit, which may not result in any compensation.

¹⁷⁸. *Q.C. Constr. Co. v. Verrengia*, 700 F. Supp. 86 (D.R.I. 1988).

¹⁷⁹. *Id.* at 88.

¹⁸⁰. 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990).

¹⁸¹. The Court presumed the existence of a taking. *Id.* at 313 n.7. Therefore, the *First English* holding only applies after the existence of a taking has been established; of course,

government to provide "just" compensation to an aggrieved property owner, and not merely to invalidate the offending regulation.¹⁸² It is important to remember that "[t]he Court's holding in *First English* is limited to the compensation remedy."¹⁸³ It is also important to remember that the holding in *First English* defined already existing remedies under the *federal*, but not any state, constitution.¹⁸⁴

First English establishes a federal right to receive compensation once a temporary taking is found. Through the doctrine of incorporation, this federal right becomes a mandatory federal floor at the state level. As a result, property owners can no longer claim that the state does not have procedures to award just compensation.¹⁸⁵ Therefore, *First English* extinguishes the futility exception as applied to the second prong of the ripeness analysis. More importantly, if every state must provide compensation because of *First English*, arguably the state compensation prong is always satisfied. In turn, every case then becomes unripe because the land use agency's satisfaction of one prong renders the case nonjusticiable. Thus if *First English* automatically creates an adequate state remedy, taking claims could never be heard by federal courts. Obviously, this cannot be the case.

However, this mandated procedure does not guarantee "adequate" state remedies. State courts could easily deny property owners just compensation through state procedural and taking law. On the issue of how state procedural law could be used to deny just compensation, one state court candidly explained, "*First English* . . . did not address

under the ripeness doctrine, claims are almost always dismissed *before* the existence of a taking is determined.

¹⁸² *Id.* at 321-23.

¹⁸³ DANIEL R. MANDELKER, *LAND USE LAW* 338 (2d ed. 1988).

¹⁸⁴ *First English*, 482 U.S. at 307 (concluding that "the Fifth and Fourteenth Amendments to the United States Constitution would require compensation" for a taking).

First English's protections apply to the states through the incorporation doctrine, which holds that the "fundamental rights" protected by the Bill of Rights apply to the states through the Due Process Clause of the Fourteenth Amendment. See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994). The Taking Clause has been held to be one of those fundamental rights applied to the states through the Fourteenth Amendment. See *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 159 (1980).

¹⁸⁵ See, e.g., *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993) ("Compensation has been available *under California law* for inverse condemnation claims based on regulatory takings since the Supreme Court decided *First English*") (citation omitted) (emphasis added); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173-74 (9th Cir. 1991) (after *First English*, "California could not deny a damages remedy for a taking by regulation . . . It is clear, then, that a procedure for seeking compensation from the state was available to the [property owners.]; *Northern Va. Law Sch. v. City of Alexandria*, 680 F. Supp. 222, 225 n.3 (E.D. Va. 1988) ("Given the [*First English* decision], it seems unlikely that a Virginia court would deny compensation should it find that a taking has occurred [under the Virginia state constitution].").

the *procedural means* by which a [state] claim for inverse condemnation is asserted."¹⁸⁶ For example, state procedural law could impose upon taking claims stringent pleading requirements, short statutes of limitations, or long delays for a trial date. Similarly, states could define a "taking" so narrowly as to virtually prevent property owners from having a claim.

Because states could ensure that compensation is not awarded by crafting their own procedural and taking law, it should still be the case after *First English* that property owners could claim state procedures are futile. Under the current law, a property owner could lose his or her property without the benefit of an unbiased forum to decide the temporary takings claim under *First English*. This is so since a property owner who seeks a federally established remedy in state court would be barred from bringing the same claim in federal court under the doctrine of *res judicata* if the issue has been decided before by a state forum. Therefore, *First English* should not be relegated to an unfriendly court without any redressability in an unbiased court system.

4. "Inadequate" State Compensation

Only three land use cases, out of over one hundred, can be found to hold that state compensation was inadequate. In the first case, a North Carolina district court found that state inverse condemnation law had repeatedly not recognized an amortization period for billboard prohibitions,¹⁸⁷ and therefore held that the state compensation remedy was satisfied.¹⁸⁸

In the second case, a Florida district court found that state inverse condemnation law did not recognize a claim for a taking by confiscatory zoning.¹⁸⁹ Thus, a federal taking claim based on the confiscatory zoning was ripe.¹⁹⁰ (Florida state law subsequently

¹⁸⁶ *Roscco Holdings Inc. v. California*, 260 Cal. Rptr. 736, 743 (1989) (emphasis in original), *rev. denied* Cal. App. 2d (1989), *cert. denied*, 494 U.S. 1080 (1990).

¹⁸⁷ *Naegle Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068 (M.D.N.C. 1992). After finding that North Carolina state law provided inadequate compensation, the federal court in *Naegle* found the case ripe by concluding that "[g]iven this court's jurisdiction to hear the Fifth Amendment [taking] claim, it would be futile and a waste of judicial resources to require [the property owner] to apply for and be denied just compensation [by a state court] before continuing this action [citation omitted]. Thus, [the property owner's] claim is ripe for resolution by this court." *Id.* at 1073.

¹⁸⁸ *Id.*

¹⁸⁹ *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987). See also, *Dade County v. National Bulk Carriers, Inc.*, 450 So. 2d 213, 216 (Fla. 1984) (holding that, under Florida state law, confiscatory zoning does not constitute a taking).

¹⁹⁰ *Corn*, 816 F.2d at 1517.

provided compensation for confiscatory zoning takings.¹⁹¹ Accordingly, a later case in Florida district court alleging a confiscatory zoning taking was dismissed as unripe.)¹⁹²

In the third case, a property owner challenged a mobile home rent control ordinance. In contrast to most land use taking claims, there is a split in federal and state law: federal law considers these claims to be a compensable taking, while the relevant state law did not.¹⁹³ In this rare case, the court concluded that no adequate state remedies existed for this type of taking claim.¹⁹⁴

5. *Even "Adequate" State Compensation is Inadequate: State Courts Use the Ripeness Doctrine to Avoid Hearing Land Use Cases*

The tragic irony of the ripeness doctrine is that state courts, taking a cue from their federal counterparts, increasingly find taking claims unripe based on a borrowed version of the ripeness doctrine. It seems that federal ripeness cases have sent the signal to state courts that taking claims are not important, unnecessarily burdensome, and can be easily disposed of with the ripeness doctrine. For example, in an Oregon case, property owners who sought judicial review in Oregon state court of a land use agency's decision were denied just compensation because their state claim was "unripe" given the lack of a "final decision."¹⁹⁵ Interestingly, the Oregon state court in that case applied a ripeness analysis virtually identical to the federal ripeness doctrine¹⁹⁶ and even cited *MacDonald* as authority for its version of the doctrine.¹⁹⁷ Numerous other cases from Oregon state courts have

The favorable holding in *Corn* seems to be an anomaly; Eleventh Circuit courts have been distinguishing the case to such an extent that it could almost be considered overruled. See, e.g., *Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990).

¹⁹¹ *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622 (Fla. 1990).

¹⁹² *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1483 (N.D. Fla. 1992).

¹⁹³ *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991).

¹⁹⁴ *Id.* at 579. See also *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951 (9th Cir. 1991).

Before the *First English* decision, when many states had not yet decided to provide remedies for temporary regulatory takings, some land use cases met the state compensation prong. This principle is discussed in *JAMA Constr. v. City of Los Angeles*, 938 F.2d 1045, 1048 n.2 (9th Cir. 1991).

¹⁹⁵ *Larson v. Multnomah County*, 854 P.2d 476, 478 (Or. Ct. App. 1993). In a state court version of the ripeness doctrine, only the final decision prong can be used to find a claim unripe; the state compensation prong of the ripeness doctrine could not apply to a state ripeness doctrine because compensation is already being sought in state court.

¹⁹⁶ The court found that the property owners had not reapplied. *Id.* at 477.

¹⁹⁷ *Id.*

dismissed taking claims based on a state version of the ripeness doctrine.¹⁹⁸

Oregon, however, is by no means the only state to use a state version of the ripeness doctrine to prevent property owners from receiving just compensation for their property. A state ripeness doctrine has been used in this way in Illinois,¹⁹⁹ Michigan,²⁰⁰ New Hampshire,²⁰¹ New York,²⁰² Pennsylvania,²⁰³ Rhode Island,²⁰⁴ Virginia,²⁰⁵ and Washington.²⁰⁶

IV. CONCLUSION

This article has shown that, on the whole, federal courts dislike adjudicating land use cases and have applied the ripeness doctrine harshly in an effort to close the federal court house doors to land use taking cases. In order to do so, federal courts have been forced to stretch logic and violate the original rationales for the doctrine. For example, a land use agency's decision is not "final" even when an ordinance has been amended to prevent the project.²⁰⁷ In some cases, property owners must seek to amend ordinances that violate the Constitution²⁰⁸ or they must make concessions to the government²⁰⁹ before a federal court will consider hearing the case. In other cases, state compensation is considered "adequate" when no case or statute

¹⁹⁸. The state version of the ripeness doctrine occurs after the property owner is first denied permission to use their land as they wanted, and then did not seek an amendment to the general plan.

See, e.g., *Dority v. Clackamas County*, 838 P.2d 1103 (Or. Ct. App. 1992); *Cope v. City of Cannon Beach*, 836 P.2d 775 (Or. Ct. App. 1992); *Joyce v. Multnomah County*, 835 P.2d 127 (Or. Ct. App. 1992).

¹⁹⁹. *Drover Bank of Chicago v. Village of Hinsdale*, 566 N.E.2d 899 (Ill. App. Ct. 1991).

²⁰⁰. *Lake Angelo Assocs. v. Township of White Lake*, 498 N.W.2d 1 (Mich. Ct. App. 1993).

²⁰¹. *Blue Jay Realty Trust v. City of Franklin*, 567 A.2d 188 (N.H. 1989).

²⁰². *Albany Area Builders v. Town of Clifton Park*, 576 N.Y.S.2d 932 (A.D. 3 Dept. 1991); *In re Sterling Idea Ventures*, 570 N.Y.S.2d 96 (A.D. 2 Dist. 1991); *Town of Islip v. Zalak*, 566 N.Y.S.2d 306 (A.D. 2 Dept. 1991); *In re Matter of Stone v. McGowan*, 157 A.D.2d 882 (A.D. 3 Dept. 1990); *Petosa v. City of New York*, 522 N.Y.S.2d 904 (A.D. 2 Dept. 1987); *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183 (N.Y. 1986).

²⁰³. *Gardner v. Commonwealth Dep't of Environmental Resources*, 603 A.2d 279 (Pa. Commw. Ct. 1992); *Ass'n of Concerned Citizens of Butler Valley v. Butler Township Bd. of Supervisors*, 580 A.2d 470 (Pa. Commw. Ct. 1990).

²⁰⁴. *State v. Distant*, 455 A.2d 305 (R.I. 1983).

²⁰⁵. *Gary v. Board of Zoning Appeals*, 429 S.E.2d 875 (Va. 1993).

²⁰⁶. *R/L Assocs. v. Klockars*, 763 P.2d 1244 (Wash. Ct. App. 1988).

A handful of state cases have applied a state version of the ripeness doctrine and found a land use taking claim ripe for adjudication. See, e.g., *Matthews v. Shelby County Comm'n*, 615 So. 2d 605 (Ala. Civ. App. 1992); *Weingarten v. Town of Lewisboro*, 542 N.Y.S.2d 1012 (Supp. 1989); *De St. Aubin v. Flacke*, 496 N.E.2d 879 (N.Y. 1986).

²⁰⁷. See *supra* text accompanying note 113.

²⁰⁸. See *supra* notes 118-20.

²⁰⁹. See *supra* notes 128-33.

in that state has ever recognized an inverse condemnation cause of action.²¹⁰ A land use agency's six-year delay in reaching a decision is held not make the application "futile."²¹¹ Admittedly, federal dockets are crowded. But why have the property rights at issue in land use cases been singled out as civil liberties unworthy of protection?

Property rights deserve to be protected by federal courts. To open the federal court house doors to the important constitutional interests at stake in land use cases, federal courts must resist the urge to dismiss such cases on the technicalities and strained reasoning they currently employ and instead must begin to protect the right to be free from government confiscation of property.

The broad solution would be to overrule the ripeness doctrine of *Williamson* and *MacDonald*. Property rights are constitutional rights. Accordingly, federal courts (and a growing number of state courts) should not apply a special "ripeness doctrine" only to taking claims simply because they would rather not adjudicate such cases. A narrower solution would be to lessen the requirements of the ripeness test.²¹² First, the final decision prong should be retailored to fit its purpose which is to determine when a decision is final. With that in mind, the final decision prong should require a land owner to submit one application. Then the land use agency, if it denies the request, must explain the reasons for the denial and suggest ways the property owner's next application could be approved. If the property owner's second application was denied, a final decision may truly be said to exist. After all, the land use agency has the information regarding which uses are permissible—why should it be up to the property owner, who lacks this crucial information, to make multiple guesses? The common law has almost always held that the party having exclusive control of relevant information bears the burden of proving or disproving that issue.²¹³ Thus, the land use agency, which makes the decision about permissible uses and therefore has exclusive

²¹⁰. See *supra* notes 171, 175.

²¹¹. See *supra* note 151.

²¹². A suggested solution was to treat section 1983 taking cases as "disfavored" claims, and relegate the current ripeness test to a one application requirement. This would allow land owners to gain access to federal court at a much earlier stage and avoid incessant expenses. However, because calling something a "disfavored" claim reduces the hearing to a paper trial (courts usually require petitioners to prove "disfavored" claims on the pleadings), and raises a strong presumption in favor of government, this solution would place a greater burden on the land owner than that placed upon him or her from going through the current ripeness requirements.

²¹³. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (burden will be allocated to defendant if the facts are within the "knowledge and control of the defendant").

control of the information regarding the issue, should be required to bear the burden of going forward.

The strained reasoning and injustice of the ripeness doctrine is the result of a much larger problem. Government often wants its citizens' property, but seldom wants to pay for it. The courts' role must be to halt government's propensity to take.