



An Agricultural Law Research Article

A Statutory Beacon in The Land Use Ripeness Maze: The Florida Private Property Rights Protection Act

by

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A STATUTORY BEACON IN THE LAND USE RIPENESS MAZE: THE FLORIDA PRIVATE PROPERTY RIGHTS PROTECTION ACT

Patrick W. Maraist ***

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* Copyright 1995 by Patrick W. Maraist, Associate, Siemon, Larsen & Marsh, Boca Raton, Florida. B.B.A., 1993 (High Honors), Florida Atlantic University; J.D., 1996 (Honors), University of Florida College of Law. This Article is dedicated to my parents, Dr. Robert J. and Mary Anne Maraist, who are the most giving and caring people that I know. I would like to thank Professor Julian C. Juergensmeyer, Professor James C. Nicholas, and Professor Lars Noah, all of the University of Florida College of Law, for their scholarly advice. A special thanks also to Vivien Payne, Staff Editor, *Florida Law Review*, for her direction.

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I. INTRODUCTION

On October 1, 1995, the Bert J. Harris, Jr., Private Property Rights Protection Act,¹ (Property Rights Act or Act), became law in the State of Florida.² In a nutshell, the Property Rights Act creates an avenue of relief for a private landowner whose property has been "inordinately burdened" by a specific action of a state or local governmental entity.³ The Property Rights Act provides the landowner with a cause of action "separate and distinct" from the law of takings.⁴ This is significant since the law of takings has proven to be inadequate to protect landowners from overly burdensome governmental intrusions on private property rights.⁵ The Property Rights Act is designed to address many

1. FLA. STAT. § 70.001 (1995).

2. Although the Act became effective on October 1, 1995, the Act provides that:

No cause of action exists under this section as to the application of any law enacted on or before May 11, 1995, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date. A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended.

FLA. STAT. § 70.001(12). In other words, the Act is not retroactive.

3. *Id.* § 70.001(2).

4. *Id.* § 70.001(1).

5. See GOVERNOR'S PROPERTY RIGHTS STUDY COMM'N II, REPORT OF THE GOVERNOR'S PROPERTY RIGHTS STUDY COMMISSION II 57 (1994) [hereinafter COMMISSION REPORT] ("Resort to the judicial system did not seem to present a meaningful opportunity. Judges were perceived as not having the expertise in takings law that would be needed. . . .").

of the shortcomings of traditional takings jurisprudence, particularly in the area of ripeness.⁶

Historically, a landowner in Florida seeking relief from governmental burdens on property was required to overcome far too many obstacles before a court would hear the merits of the claim.⁷ These obstacles are primarily the result of ripeness requirements. Under the land use ripeness test, formulated by the United States Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*,⁸ the landowner is required to secure a final decision from the burdening agency and, if seeking federal court jurisdiction, must seek compensation from the state before the claim will be ripe for judicial review.⁹ Not only does this test lack any notion of equity,¹⁰ but it also is applied in a much more rigid manner than the traditional ripeness test.¹¹ The land use ripeness requirements have been interpreted by many courts to force the landowner to conduct a "wild goose chase"¹² to track down a final decision from the burdening governmental agency.

6. See David L. Powell et al., *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 282 (1995); Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315, 333 (1995).

7. See Stephen I. Adler & Daniel M. Anderson, *Takings and Related Causes of Action Under Federal and Texas Law*, 1994 INST. ON PLAN., ZONING & EMINENT DOMAIN § 9.02(4), at 9-33 to 9-42 (Carol J. Holgren ed.) (discussing the numerous requirements a landowner has to meet to fulfill ripeness requirements for a takings claim).

8. 473 U.S. 172 (1985).

9. *Id.* at 186.

10. See Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2-10 (1992). "Conspicuously absent from this new doctrine [land use ripeness] are the equitable considerations which formed the basis of the Court's more established definition of ripeness." *Id.* at 2.

11. See *id.* at 2-3 (stating that the courts have developed a ripeness doctrine that is particularly rigid when applied to constitutional property rights claims); Gregory Overstreet, *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*, 10 J. LAND USE & ENVTL. L. 91, 91 (1994).

12. A circuit court judge expressed his sentiments on the ripeness requirements in the land use context in a decision that was later reversed by the Fourth District Court of Appeals:

"[B]ackwards to any common sense; it is backwards to the way professional land planners and architects proceed; and it places the burden of governing on the wrong foot. Plaintiffs have the right to rely on the plain language of the Defendant's Comprehensive Land Use Plan; they have the right to be guided by common sense; and, they have the right to be dealt with forthrightly and not shuffled off on a wild goose chase."

City of Riviera Beach v. Shillingburg, 659 So. 2d 1174, 1179 (Fla. 4th DCA 1995) (quoting trial court's second final order).

Furthermore, confusion and inconsistency plague the judiciary's application of the ripeness doctrine to land use litigation.¹³ Due to the variety of claims that may support a land use cause of action,¹⁴ the courts have had difficulty in distinguishing between the array of ripeness standards that apply to these various claims.¹⁵ In addition, many state courts also require a claimant to exhaust administrative remedies before the case will be deemed ripe for review.¹⁶ Although exhaustion is not a requirement of ripeness,¹⁷ the courts continue to intermingle these

13. See Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 INST. ON PLAN., ZONING & EMINENT DOMAIN § 7.01, at 7-3 (Carol J. Holgren ed.) ("[The Supreme] Court has issued Delphic pronouncements in the land use field which, taken together, produce no easily discernible pattern."); Vargas, *supra* note 5, at 333.

14. For instance, a land use claim may be pursued under a facial or as applied just compensation takings claim, an as applied arbitrary and capricious due process claim, or a due process takings claim. See, e.g., *Tari v. Collier County*, 56 F.3d 1533, 1535-36 (11th Cir. 1995) (considering an as applied arbitrary and capricious due process claim and a just compensation temporary takings claim).

15. See *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990) (stating "[c]ourts have often confused the standards for [these claims] . . . and often one cannot tell which claim has been brought or which standard is being applied").

16. See, e.g., *Lee County v. Morales*, 557 So. 2d 652, 654 (Fla. 2d DCA 1990) ("In this case, the trial court should have required appellees to exhaust their administrative remedies."); *Taylor v. Village of North Palm Beach*, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995) ("The ripeness doctrine, which requires a claimant to exhaust administrative remedies before resorting to a judicial solution, is not just a technical requirement; it has a very practical application to takings cases.").

17. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 474 U.S. 172, 192-93 (1985); see also DANIEL R. MANDELKER, *LAND USE LAW* § 8.08 (3d ed. 1993) ("The exhaustion doctrine must be distinguished from the ripeness doctrine that is a barrier to bringing land use cases in federal court."); 5 JACOB A. STEIN ET AL., *ADMINISTRATIVE LAW* § 48.01, at 48-4 to 48-5 (1996) ("The ripeness concept should not be confused with exhaustion of administrative remedies which, while related, focus on procedures rather than substance."). Exhaustion has been described in the following manner:

The doctrine of exhaustion of administrative remedies serves interests of judicial economy by requiring parties to pursue all administrative solutions before seeking judicial relief. It is designed to prevent judicial interference in the administrative process and to allow the agencies an opportunity to develop a complete factual record, apply their expertise and discretion, and possibly resolve the conflict without judicial intervention. The doctrine is applied to class actions, includes both state and federal administrative procedures, and may be waived by either the courts or the agency.

Id. § 49.01. But see ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.4.3, at 125 (2d ed. 1994). According to Professor Chemerinsky,

two doctrines while many landowner's pursuits for relief are cast to the side.¹⁸ As a result of the rigidity of the ripeness doctrine and the confusion in the judiciary, the ripeness requirements in the land use context have created an almost impenetrable wall between landowners and the judicial system.¹⁹

In recognition of the difficulty landowners have confronted in their attempts to litigate governmental burdens on private property, the Florida Legislature, in May of 1995, passed the Property Rights Act.²⁰ Under the Property Rights Act, a landowner's dispute will constructively ripen 180 days after the landowner submits a claim to the burdening governmental entity.²¹ The Property Rights Act thus speeds up the process for obtaining judicial review of burdensome governmental actions.²² To appreciate the significance of the ripeness provisions of the Property Rights Act, it is important to analyze the ripeness doctrine as it has been applied by both federal and state courts.²³

Section II of this Article provides a synopsis of the general principles of the ripeness doctrine. In Section III, this Article provides a history of the application of the ripeness doctrine in the land use context by the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the Florida court system. Section IV summarizes the ripeness requirements for land use claims in Florida. The pitfalls and the harsh effects of the ripeness doctrine, as it has been applied to land use claims, is highlighted in Section V. Section VI introduces the rise of the Property Rights Movement in Florida and provides a synopsis of

Ripeness is obviously closely related to requirements for exhaustion of administrative remedies before seeking federal court review; a case is not ripe until such exhaustion has occurred. In fact, in cases claiming a government taking of property without just compensation, the [Supreme] Court has held that the matter is not ripe until compensation has been sought and denied through the available administrative procedures.

Id. (footnotes omitted) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

18. See, e.g., *Reahard v. Lee County*, 30 F.3d 1412, 1416 n.12 (11th Cir. 1994). Several Florida courts also have applied the exhaustion requirement to land use claims. See, e.g., *City of Jacksonville Beach v. Prom*, 656 So. 2d 581, 582 (Fla. 1st DCA 1995); *Florida Power Corp. v. Department Envtl. Regulation*, 605 So. 2d 149, 152 (Fla. 1st DCA 1992); *Monroe County v. Gonzalez*, 593 So. 2d 1143, 1145 (Fla. 3d DCA 1992); *Hill v. Monroe County*, 581 So. 2d 225, 226-27 (Fla. 3d DCA 1991); *David v. City of Dunedin*, 473 So. 2d 304, 306 (Fla. 2d DCA 1985); *Wood v. Twin Lakes Mobile Homes Village*, 123 So. 2d 738, 740 (Fla. 2d DCA 1960).

19. See Kassouni, *supra* note 10, at 11; Overstreet, *supra* note 11, at 92.

20. FLA. STAT. § 70.001 (1995); see *supra* note 5 and accompanying text.

21. FLA. STAT. § 70.001(4)-(5).

22. *Id.*

23. See Overstreet, *supra* note 11, at 92 (stating that the ripeness doctrine is used by both federal and state courts to preclude judicial review of land use claims).

prior attempts to pass private property rights legislation in the Florida Legislature. This Section culminates in the introduction and analysis of the Private Property Rights Protection Act as it pertains to the ripeness issue.

II. GENERAL PRINCIPLES OF RIPENESS

Ripeness, a term simple in principle²⁴ yet perplexing in application,²⁵ refers to conditions that must exist before a dispute is sufficiently mature to enable a court to decide a case on the merits.²⁶ If a court determines that the conditions do not exist, the court will dismiss the case on the grounds that the case is not ripe.²⁷ Since the ripeness determination is a threshold inquiry,²⁸ a plaintiff whose case is dismissed as not ripe will generally have no judicial insight as to the validity of the underlying claims.²⁹ Generally, the court's dismissive mandate will require a plaintiff to seek ripeness finality, a task that may

24. See, e.g., Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 161 (1987) (stating that "[t]he central principles of the ripeness doctrine are unproblematic").

25. See, e.g., Thomas E. Roberts, *Ripeness after Lucas*, in *AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION* 11, 12 (David L. Callies ed., 1993) ("Interpreting the [Supreme] Court's ripeness rules has not been an easy task."); Berger, *supra* note 13, § 7.01, at 7-2 ("The problem which has hard-working judges sounding like so many fruit peddlers, squeezing their cases to see whether they are ripe or not, has causes which can be laid at several feet.").

26. See, e.g., Bruce I. Weiner, Casenote, *Obstacles and Pitfalls for Landowners: Applying the Ripeness Doctrine to Section 1983 Land Use Litigation*, 7 J. LAND USE & ENVT'L. L. 387, 391 (1992). According to one treatise, "[a]lthough there is no precise definition of 'ripeness,' the concept involves determining whether decisions of a particular agency are at a stage which permits judicial resolution." STEIN ET AL., *supra* note 17, § 48.01, at 48-3. As another commentator stated, "[r]ipeness . . . is best understood as the determination of whether a federal court can grant preenforcement review; for example, when may a court hear a request for a declaratory judgement, or when must it decline review?" CHEMERINSKY, *supra* note 17, § 2.4, at 115. Yet another commentator describes the ripeness doctrine as "a tool designed to determine when judicial review is appropriate." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 11 (1995).

Black's Law Dictionary states that "[a] case is ripe for decision by an appellate court if the legal issues involved are clear enough and well enough evolved and presented so that a clear decision can come out of the case." BLACK'S LAW DICTIONARY 1327 (6th ed. 1990).

27. Weiner, *supra* note 26, at 391.

28. See, e.g., *Shillingburg*, 659 So. 2d at 1180; Terry D. Morgan, *Regulatory Takings: A State and Federal Perspective*, 1991 INST. ON PLAN., ZONING & EMINENT DOMAIN § 6.01, at 6-2 to 6-3 (Carol J. Holgren ed.).

29. See Morgan, *supra* note 28, § 6.02[1], at 6-3. "Ripeness for review is a question of law, not fact, and it is error to submit the matter to a jury." *Id.* § 6.02[1], at 6-3 to 6-4 (citing *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989)).

ultimately be akin to chasing a feather in the wind.³⁰ Therefore, a thorough understanding of the ripeness doctrine is an essential prerequisite for avoidance of wasted litigation efforts.³¹

Although there exists conflict concerning the specific justification for the ripeness doctrine,³² the relevance of the doctrine can be supported under both constitutional and prudential principles.³³ The "case or controversy" clause in Article III of the United States Constitution³⁴ requires federal courts to dismiss merely hypothetical cases that lack any clear and sufficient injury.³⁵ In this aspect, ripeness promotes the constitutional principle of Separation of Powers by "avoiding judicial review in situations where it is unnecessary for the federal courts to become involved because there is not a substantial hardship to postponing review."³⁶

30. See, e.g., Berger, *supra* note 13, § 7.03[3], at 7-24 (describing the variance requirement of the ripeness doctrine in the land use arena as a "journey into never-never land").

31. See Overstreet, *supra* note 11, at 91 ("The ripeness doctrine of the Taking Clause is the most important legal principle in federal land use litigation.").

32. Compare Morgan, *supra* note 28, § 6.02[1], at 6-3 ("A ripeness challenge goes to a court's subject matter jurisdiction under the case or controversy clause of Article III of the federal constitution.") with Nichol, *supra* note 24, at 156 ("[T]he Court's effort to bring the ripeness doctrine under the umbrella of the case or controversy requirement is unfortunate. Not only is constitutionalization inconsistent with the doctrine's premises, but it implies a rigidity and formalism that are at odds with the doctrine's operation.").

33. See, e.g., CHEMERINSKY, *supra* note 17, at 13; Stein, *supra* note 26, at 11.

34. U.S. CONST. art. III, § 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. As Professor Chemerinsky notes: "The Supreme Court has interpreted the terms 'cases' and 'controversies' as creating important limits on federal judicial power." CHEMERINSKY, *supra* note 17, § 1.1, at 6.

35. See, e.g., *Babbitt v. United Farm Worker's Nat'l Union*, 442 U.S. 289, 302 (1979) ("[T]he positions of the parties are sufficiently adverse . . . to present a case or controversy. . . ."); *Roe v. Wade*, 410 U.S. 113, 128 (1973) ("[W]e are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy."). See also CHEMERINSKY, *supra* note 17, § 2.4.1, at 116; Weiner, *supra* note 26, at 391 ("Exercising jurisdiction over a premature claim is beyond the power of the court under Article III. If the court finds itself without jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action.").

36. CHEMERINSKY, *supra* note 17, § 2.4.1, at 116.

The prudential component of the doctrine, the more flexible, judicially-crafted component that may be applied by both state and federal courts, relates to the need to have a record supported by concrete facts and decisions that a court can review.³⁷ Without such a record, a reviewing court would simply be performing guesswork in rendering a decision on the dispute. The prudential aspect of ripeness also is utilized by the judiciary to refrain from deciding cases that are within the court's jurisdiction but are nonetheless inappropriate for judicial review.³⁸

While both the constitutional and prudential justifications support the ripeness doctrine,³⁹ a court's decision to follow one or the other

37. "[R]ipeness is said to enhance the quality of judicial decision-making by ensuring that there is an adequate record to permit effective review." *Id.* (footnote omitted). "The prudential restrictions result from the fact that most courts would rather avoid speculative cases, defer to finders of fact with greater subject matter expertise, decide cases with fully-developed records, and avoid overly broad opinions, even if these courts might constitutionally hear a dispute." Stein, *supra* note 26, at 11; see also RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH (1989) ("It is not enough that a controversy might one day erupt; plaintiff must show that it has already done so, thereby presenting a legal issue in a concrete context.").

38. Under the prudential component, "although the Constitution permits federal court adjudication, the Court[s] ha[ve] decided that in certain instances wise policy militates against judicial review." CHEMERINSKY, *supra* note 17, § 2.1, at 42. For instance, the exercise of prudential ripeness was illustrated by Justice Brandeis when he stated, "[t]he Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936).

39. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 81-82 (1978) (finding sufficient Article III jurisdiction, the Court proceeded to note adequate prudential ripeness justifications for review). In addition, several commentators have suggested that the distinctions between constitutional and prudential ripeness are not clear. See CHEMERINSKY, *supra* note 17, § 2.4.1, at 116 ("The focus on whether there is sufficient injury without preenforcement review seems inextricably linked with the constitutional requirement for cases and controversies, whereas the focus on the quality of the record seems prudential."); Roberts, *supra* note 25, at 13 ("[T]he line between jurisdictional and prudential ripeness is a cloudy one."). In addition to the constitutional and prudential justifications, there are various policy arguments that have been asserted in support of the ripeness doctrine, including concerns for judicial economy and effective judicial review. CHEMERINSKY, *supra* note 17, § 2.4.1, at 116. One commentator proffered other policy justifications:

If a record is concrete rather than abstract in nature, the Court may find a way of interpreting the statute to avoid or minimize the constitutional issue. The statute may be interpreted to raise constitutional problems as applied to some issues and not to others. Or, the application of customs behind the statute may justify a narrow interpretation of its scope. Not to be excluded is the possibility that if the Court waits for an actual controversy, the whole constitutional problem may just be eliminated by later developments.

drastically will affect a plaintiff's pursuit for relief.⁴⁰ Viewed as a prudential limit, a court may exercise discretion in applying the ripeness doctrine,⁴¹ thereby granting the court more flexibility in determining whether or not to decide the case on the merits.⁴² By contrast, a court that is inclined to apply the ripeness doctrine pursuant to Article III⁴³ will treat the ripeness question as a subject matter jurisdiction issue.⁴⁴ Accordingly, since subject matter jurisdiction may be challenged at any point by either party⁴⁵ or by the judge,⁴⁶ a plaintiff may suddenly find his case dismissed on ripeness grounds after tremendous time and cost have been expended.⁴⁷

Although the failure to satisfy the ripeness analysis has potentially harsh effects, the standard ripeness test affords the courts an opportunity

40. It is important to note that the distinction between constitutional and prudential ripeness illustrates how the doctrine is used by both the federal and state courts. For an analysis of these distinctions, see R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. LAND USE & ENVT'L. L. 101, 102 n.10 (1994) ("If finality ripeness is a prudential concern, then any court may exercise its discretion to bar a developer's claims. If it is animated by Article III of the federal Constitution, however, then the doctrine is applicable only to the federal courts.") (citing PAUL M. BATOR ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. II, §§ 231-269 (3d ed. 1988)).

It is well recognized that federal courts exercise ripeness under both constitutional and prudential justifications. See *supra* note 39. It also is well recognized that state courts mandate ripeness finality prior to hearing the merits of a plaintiff's claim. See *infra* pt. III.C. While the state courts adopt and apply federal ripeness requirements, it has been noted that the state courts apply ripeness not via any constitutional mandate such as Article III, but only under prudential concerns. See Lyman, *supra*, at 102 n.10.

Even if the state courts are acting only under prudential ripeness, the state courts have not exhibited any tendency to apply the doctrine any more flexibly than if it were being applied under constitutional mandate. See *infra* pt. III.C. In this respect, the labels used to provide the authority to apply ripeness are somewhat meaningless. See Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692 (1990) ("[A] requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that. Nothing in the content of the [justiciability] doctrines explains their constitutional or prudential status."). Recently, a majority of the United States Supreme Court labelled ripeness as prudential. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012-13 (1992).

41. See *supra* notes 37-38 and accompanying text.

42. See, e.g., *Lucas*, 505 U.S. at 1012-13; *Buckley v. Valeo*, 424 U.S. 1, 114-18 (1976).

43. See *supra* notes 34-35 and accompanying text.

44. See, e.g., *Tari*, 56 F.3d at 1535; *Reahard*, 30 F.3d at 1415; *Eide*, 908 F.2d at 720; *Morgan*, *supra* note 28, § 6.02[1], at 6-3; *Roberts*, *supra* note 25, at 13.

45. CHEMERINSKY, *supra* note 17, § 5.1, at 249.

46. *Id.* § 5.1, at 250.

47. See, e.g., *City of Pompano Beach v. Yardarm Restaurant*, 641 So. 2d 1377, 1379 (Fla. 4th DCA 1994) (noting that expense of extended litigation was hampering developer's ability to complete project); *Kassouni*, *supra* note 10, at 11 ("The time and money required to comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation.").

to incorporate equitable considerations into the analysis.⁴⁸ This ripeness test, exemplified by the United States Supreme Court in *Abbott Laboratories v. Gardner*,⁴⁹ requires a court to evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."⁵⁰ For instance, the *Abbott* Court granted preenforcement review of The Food and Drug Administration's regulation requiring the inclusion of generic names for prescription drugs on all labels.⁵¹ After determining that the issue presented was a "purely legal one,"⁵² the court stated that "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted. . . ."⁵³ Even though this test is somewhat flexible,⁵⁴ and incorporates equitable considerations,⁵⁵ the test has been

48. See Kassouni, *supra* note 10, at 2 ("In many cases, especially those involving First Amendment freedom of speech issues, equity has been the strongest argument in favor of judicial review.").

49. 387 U.S. 136 (1967).

50. *Id.* at 149. As the Court stated:

The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. This problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Id. at 148-49 (footnote omitted). Thus, it could be stated that this test incorporates both constitutional and prudential concerns.

51. *Id.* at 152-53.

52. *Id.* at 149. This purely legal issue was "whether the [enabling] statute was properly construed by the Commissioner to require the established name of the drug to be used *every time* the proprietary name is employed." *Id.* (emphasis in original) (footnote omitted).

53. *Id.* at 153. The *Abbott* Court, noting the costs involved with compliance with the regulation and the detrimental effects on the public's confidence in the plaintiff's drug products that may result if the plaintiffs were required to challenge the regulations only as a defense to an action brought by the government, concluded that the hardship to the plaintiffs mandated judicial review. *Id.* at 152-53.

54. *Abbott Laboratories* was influenced by *United States v. Storer Broadcasting*, 351 U.S. 192 (1956), *Frozen Foods Express v. United States*, 351 U.S. 40 (1956), and *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407 (1942), three cases that "ha[d] taken a . . . flexible view of finality." *Abbott Laboratories*, 387 U.S. at 150-51.

problematic. Due to difficulty in applying the ripeness standards,⁵⁶ this test has led to confusion⁵⁷ and inconsistency⁵⁸ in the judicial system.

III. THE ORIGINS OF RIPENESS IN LAND USE

A. *The United States Supreme Court*

The United States Supreme Court's pronouncements on the ripeness doctrine in the land use arena have left lower courts, landowners, and commentators baffled. In its attempt to fashion a land use ripeness doctrine, the Court has been criticized as being elusive⁵⁹ and unpredictable.⁶⁰ Furthermore, the ripeness rules that can be discerned from the Court's decisions have been referred to as "a body of devices which are elaborate decision-avoiders."⁶¹ Nonetheless, an overview of the Court's handling of the ripeness issue in the land use context is an appropriate starting point. As the end of this section illustrates, the Court recently has granted certiorari on a ripeness case from the United States Court of Appeals for the Ninth Circuit.⁶² Perhaps the Court will take this opportunity to clear up the havoc that the lower courts have created in interpreting the following decisions.

1. Laying the Tracks For Finality: *Penn Central* and *Agins*

The United States Supreme Court's application of ripeness principles to land use cases began in 1978 in *Penn Central Transportation Co. v. City of New York*.⁶³ In *Penn Central*, the owners of Grand Central

55. See *supra* note 48.

56. CHEMERINSKY, *supra* note 17, § 2.4.1, at 116 ("The questions of whether there is sufficient hardship to permit preenforcement review and whether the record is adequately focused cannot be reduced to a formula.").

57. *Id.* ("[I]t is often difficult to distinguish why in some instances ripeness was found, but in other seemingly similar circumstances it was denied.").

58. See NOWAK & ROTUNDA, *supra* note 39, at 68 ("While th[e] general ripeness principal is not disputed, its application by the Supreme Court has resulted in a line of cases with seemingly inconsistent rulings. At least the grounds distinguishing them are too subtle for the commentators to appreciate.").

59. Stein, *supra* note 26, at 3.

60. 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, 94 (1988) ("None of the judicial pronouncements on finality provide any reliable method for determining when an application is truly 'meaningful' and reapplication is not necessary for a takings claim or any other claim to be ripe for consideration." (emphasis in original)).

61. Berger, *supra* note 13, § 7.02, at 7-3 to 7-4.

62. *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir.), cert. granted, 117 S. Ct. 293 (Oct. 15, 1996) (No. 96-243); see *infra* pt. III.A.4.

63. 438 U.S. 104 (1978).

Station applied to New York City's Landmarks Preservation Commission for permission to construct a 55-story office building on the roof of Grand Central Station.⁶⁴ The Commission, which had designated the Station an historic landmark a year earlier,⁶⁵ rejected the applications.⁶⁶ The owners then filed suit, claiming that the application of New York City's Landmark Preservation Law to their property constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments.⁶⁷

Rejecting that there was a taking of the property, the Court noted that there were other permissible uses of the property available to the owner.⁶⁸ The Court was convinced that there was a possibility that an application for the construction of a "smaller structure" would be approved by the Commission.⁶⁹ Therefore, since the owners did not reapply after the initial permit was denied, the Court resisted assuming that the Commission would not approve a less intensive application.⁷⁰ This decision paved the way for subsequent requirements that an applicant modify or resubmit a proposal before a case is ripe, with some courts applying the rationale that an agency should be given the "opportunity to change its mind."⁷¹

The Supreme Court continued to lay the foundations of the ripeness doctrine in the land use context in *Agins v. City of Tiburon*.⁷² In *Agins*, the owners of prestigious waterfront property claimed that their property was taken without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.⁷³ The landowners sought \$2 million in damages as well as a declaration that

64. *Id.* at 116.

65. *Id.* at 115. Once a site was designated a landmark, the owner had a duty to keep the building in good repair. *Id.* at 111-12. Any alteration to the landmark had to be approved by the Commission. *Id.* at 112.

66. *Id.* at 117.

67. *Id.* at 119.

68. *Id.* at 136-37.

69. *Id.* The court noted in a footnote that "[c]ounsel for appellants admitted at oral argument that the Commission has not suggested that it would not, for example, approve a 20-story office tower along the lines of that which was part of the original plan for the terminal." *Id.* at 137 n.34.

70. *Id.* at 137. "[N]othing the Commission has said or done suggests an intention to prohibit any construction above the terminal." *Id.*

71. *See, e.g., Tinnerman*, 641 So. 2d at 525 ("[T]he ripeness requirement of a final decision requires more than finality because it includes an opportunity for government to change its mind.").

72. 447 U.S. 255 (1980).

73. *Id.* at 257.

the zoning ordinances were unconstitutional.⁷⁴ According to the complaint, recently adopted zoning ordinances limited the use of their property to one-family dwellings, accessory buildings, and open-space uses.⁷⁵ Although the owners claimed that the city had "completely destroyed the value of [the] property for any purpose,"⁷⁶ their fatal flaw was that they had never sought approval for the development of their land under the zoning ordinances.⁷⁷

The Court declined to rule on the as applied challenge since the landowners did not submit a plan for development, as the ordinances required.⁷⁸ According to the Court, there was no concrete controversy regarding the application of the specific zoning provisions since the ordinance was not actually applied to the owners property.⁷⁹ With regard to the facial challenge, the Court ruled that, because the ordinance permitted construction of up to five residences on their property, the appellants' were free to pursue their reasonable investment expectations by submitting a development plan to local officials.⁸⁰ Therefore, the adoption of the ordinance did not constitute a taking of the property.⁸¹

2. The Williamson County Test

Both *Penn Central* and *Agins* demanded a final decision regarding application of an ordinance or regulation to a claimant's property. *Williamson County Regional Planning Commission v. Hamilton Bank*⁸² extended this notion and incorporated it into a two-prong ripeness test that the Court applied to a land use claim.⁸³ In *Williamson County*, the county adopted zoning ordinances and subdivision regulations that allowed cluster development in order to provide for open space in the

74. *Id.* at 258.

75. *Id.* at 257. The zoning ordinances placed the property in a Residential Planned Development and Open Space Zone. *Id.* In addition, density restrictions limited the amount of single family dwellings on the five-acre tract to between one and five. *Id.*

76. *Id.* at 258. The owners claimed that the land was "the most expensive suburban property in the State, and that the best possible use of the land [was] residential." *Id.* at 262.

77. *Id.* at 257.

78. *Id.* at 260.

79. *Id.* "Construction is not permitted until the builder submits a plan compatible with 'adjoining patterns of development and open space.' In passing upon a plan, the city also will consider how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces." *Id.* at 262 (quoting *TIBURON, CAL. ORD. NO. 123 N.S. § 2(F)*).

80. *Id.* at 262.

81. *Id.* at 263.

82. 473 U.S. 172 (1985).

83. *Id.* at 186.

community.⁸⁴ Pursuant to these regulations,⁸⁵ the developer received preliminary plat approval for a cluster residential home development.⁸⁶ Thereafter, the developer conveyed to the county a permanent open space easement for a golf course and spent nearly \$3 million building the golf course and \$500,000 installing sewer and water facilities.⁸⁷ The preliminary plat was reapproved four times before the Commission gave final plat approval for 212 single-family dwellings.⁸⁸

In 1977, the county changed the density provisions of its zoning ordinance.⁸⁹ Although the Commission initially renewed the preliminary plat under the new regulations, the Commission later rejected a revised plan the developer was required to submit before seeking approval for the remaining sections of the subdivision.⁹⁰ The developer appealed to the Board of Zoning Appeals, which determined that the Commission should have applied the 1973 ordinances and regulations.⁹¹ Nonetheless, the Commission refused to follow the Board's decision⁹² and disapproved two subsequently filed preliminary plats.⁹³

84. *Id.* at 176. Cluster zoning allows homes to be grouped together rather than being evenly spaced so a common area can be retained as an open space. *See id.* A golf course community is a good example.

85. *Id.* at 177. The County's subdivision ordinance and the commission's subdivision regulations required developers to first seek approval of a preliminary plat. *Id.* Approval of a preliminary plat did not constitute approval of a final plat and approval of a preliminary plat would lapse if a final plat was not submitted within one year of the date of approval, unless the commission granted an extension or the approval of the preliminary plat was renewed. *Id.* The final plat "was required to conform substantially to the preliminary plat, and, in addition, to include such details as the lines of all streets, lots, boundaries, and building setbacks." *Id.*

86. *Id.* The preliminary plat indicated that 260 acres of the 676 acre development was to be reserved for an open space golf course. *Id.* The number of allowable dwelling units was 736, but lot lines were drawn in for only 469 units. *Id.*

87. *Id.* at 178.

88. *Id.*

89. *Id.* The new ordinance required that calculations of allowable density exclude 10% of the total acreage to account for roads and utilities and reduced the number of allowable units from 1,089 per acre to 1 per acre. *Id.*

90. *Id.* at 179-80. The commission required a revised preliminary plat because the original preliminary plat contained errors and omissions. *Id.* at 179. The commission rejected the revised preliminary plat because it did not comply with the density requirements and the lots were placed on slopes with a grade greater than 25%. *Id.*

91. *Id.* at 180-81. The Board was empowered to hear and decide appeals on land use decisions and to hear and decide applications for variances. *Id.* at 181 n.3. Variances would be granted "where by reason of exceptional topographic situations or conditions of a piece of property the strict application of the provisions . . . would result in practical difficulties to or undue hardship upon the owner of such property." *Id.*

92. The Commission claimed that the Board lacked jurisdiction to hear appeals from the Commission. *Id.* at 181-82.

93. *Id.*

The landowner⁹⁴ then filed suit in federal court pursuant to 42 U.S.C. § 1983.⁹⁵ Although the jury would have awarded the landowner \$350,000 for a temporary taking of the property, the court granted judgement notwithstanding the verdict in favor of the Commission.⁹⁶ The United States Court of Appeals for the Sixth Circuit reversed, holding that the evidence supported the jury's finding of a temporary taking.⁹⁷

Although the United States Supreme Court granted certiorari to determine whether governments must pay money damages to a landowner whose property has been taken temporarily by the application of government regulations, the Court ultimately declined to answer that question.⁹⁸ According to the Court, "[b]ecause respondent ha[d] not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures [the state] provide[d] for obtaining just compensation, respondent's claim [w]as not ripe."⁹⁹ This statement is in essence the two-prong test that has subsequently been applied in nearly every land use case to determine if the case is ripe for judicial review.¹⁰⁰ The Court proceeded to detail the two prongs of the test.

The *Williamson County* Court justified the final decision prong by stating that an as applied takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."¹⁰¹ Although the landowner had satisfied the *Agins* threshold requirement by submitting a plan for the development of the property,¹⁰² the *Williamson County* Court ruled that the landowner should have taken the extra step to request a variance from the zoning ordinance and subdivision regulations.¹⁰³ Under the *Williamson County*

94. *Id.* at 181. Hamilton Bank acquired, through foreclosure, the 257.65 acres that had not been approved for development. *Id.* Hamilton Bank submitted the plat that had been initially approved in 1973 and subsequently reapproved several times. *Id.* The bank also submitted a new plat seeking development of only 688 units, reflecting density adjustments for land that had been taken for a parkway. *Id.*

95. *Id.* at 182.

96. *Id.* at 183.

97. *Id.* at 183-84.

98. *Id.* at 185. "Once again, we find that the question is not properly presented, and must be left for another day." *Id.*

99. *Id.* at 186.

100. *See infra* pt. IV.

101. *Williamson County*, 473 U.S. at 186.

102. *Id.* at 187.

103. *Id.* at 187-88. According to the Court, a variance would have allowed the owners to develop the property according to its proposed plat. *Id.* at 188. "It appears that variances could

test, the landowner must request a variance from each regulation that formed the basis for denying the original application.¹⁰⁴ According to the Court, "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question,"¹⁰⁵ it is "impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed."¹⁰⁶ The Commission's refusal to approve the preliminary plat left the owner with the option to develop the subdivision according to its plat after obtaining variances.¹⁰⁷ Therefore, since the respondent failed to seek any variance and since there was no final reviewable administrative decision, the case was not ripe.¹⁰⁸

Before leaving the analysis of the finality prong, the Court distinguished the ripeness finality requirement from the exhaustion of administrative remedies frequently required under an administrative challenge.¹⁰⁹ According to the Court:

While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.¹¹⁰

have been granted to resolve at least five of the Commission's eight objections . . . including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%." *Id.*

104. *Id.* at 189 n.11.

105. *Id.* at 191.

106. *Id.* at 189 n.11.

107. *Id.* at 190.

108. *Id.*

109. *Id.* at 192-93.

110. *Id.* at 193. The Court continued:

Resort to [administrative exhaustion] procedures would result in a judgement whether the commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed.

In sum, exhaustion of administrative procedures would not be required so long as a landowner has obtained a final and definitive decision from the agency enforcing the ordinance or regulation.¹¹¹

The second prong of the *Williamson County* ripeness test is the requirement that the landowner seek compensation through state procedures, if the state has provided such procedures.¹¹² The Court found this requirement to be implicit in the nature of a takings claim since the Fifth Amendment proscribes only the taking of property without just compensation.¹¹³ Therefore, before a taking without just compensation can be found, compensation must have been denied.¹¹⁴

Analyzing the respondent's claim, the Court noted that Tennessee law provided an inverse condemnation process whereby landowners could seek compensation.¹¹⁵ The *Williamson County* Court reasoned that until a landowner seeks compensation through this inverse condemnation process and is denied adequate compensation for the taking, the State's action is not complete.¹¹⁶ Accordingly, since respondent failed to pursue the state procedures, the claim was not ripe.¹¹⁷

The *Williamson County* Court also ruled that review of the claim under a due process analysis was premature.¹¹⁸ The Court did not determine whether or not the regulation went "too far" so as to exceed a valid exercise of the police power and constitute a due process violation.¹¹⁹ The Court ruled that it was unable to determine if this regulation had gone "too far."¹²⁰ As the Court stated:

111. *See id.*

112. *Id.* at 194. This requirement is triggered if "the government has provided an adequate process for obtaining compensation, and [that] resort to that process 'yield[s] just compensation.'" *Id.* (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984)).

113. *Id.* at 194 n.13.

114. *Id.* at 195.

115. *Id.* at 196.

116. *Id.* at 195.

117. *Id.* at 196-97.

118. *Id.* at 197-200. The Commission proffered that the landowner's claim should be analyzed under a due process theory on the notion that a "regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power." *Id.* at 197. The remedy under the due process theory would be "invalidation of the regulation, and if authorized and appropriate, actual damages." *Id.*

119. *Id.*

120. *Id.* at 199-200. According to the Court, a regulation goes too far if it "becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Id.* at 199.

[R]esolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.¹²¹

Because respondent failed to apply for a variance, this analysis could not be undertaken.¹²²

3. Refinement of the *Williamson County* Test: The *MacDonald* and *Lucas* Decisions

In *MacDonald, Sommer & Frates v. Yolo County*,¹²³ the Court enunciated in more detail what the *Williamson County* ripeness test requires.¹²⁴ In *MacDonald*, the landowner had submitted a tentative subdivision map to the County Planning Commission detailing the subdivision of the property into 159 single-family and multi-family residential lots.¹²⁵ The Commission rejected the plan since the plan failed to provide for sufficient access to the subdivision and for adequate sewer and water service, and because the local Sheriff's Department would not be able to provide sufficient protection to the proposed subdivision.¹²⁶

In response, the landowner filed suit in state court for declaratory and monetary relief.¹²⁷ In addition to making a regulatory takings claim, the complaint stated that "any application for a zone change, variance or other relief would be futile."¹²⁸ After the California Court of Appeal affirmed the lower court's dismissal of the complaint for failure to state a claim and the California Supreme Court denied

121. *Id.* at 199-200.

122. *Id.* at 200.

123. 477 U.S. 340 (1986).

124. *Id.* at 348-53.

125. *Id.* at 342.

126. *Id.* at 342-43. The Board actually rejected the plan on other grounds as well, but the landowners only raised these four before the Supreme court. *Id.* at 342.

127. *Id.* at 344. The owner claimed that the county's denial of all permit applications, subdivision maps and other requests resulted in the county's appropriation of the property for a "public, open-space buffer." *Id.*

128. *Id.*

review,¹²⁹ the landowner petitioned for review by United States Supreme Court.¹³⁰

The *MacDonald* Court began its inquiry by stating that the finality prerequisite to a regulatory takings claim required "a final and authoritative determination of the type and intensity of development legally permitted on the subject property."¹³¹ Furthermore, with respect to the compensation requirement, the Court stated that "[t]he local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other."¹³² The Court did not address whether the regulation had gone too far or whether the compensation was "just" since the court ruled that "no answer is possible until a Court knows what use, if any, may be made of the affected property."¹³³ Although the Board rejected one subdivision proposal, the Court was convinced that this was not a final decision since there was a possibility that some development would be permitted.¹³⁴ Therefore, since the owner did not reapply with "less ambitious" plans,¹³⁵ the Court held that the claim was not ripe for review.¹³⁶

According to the *MacDonald* Court, however, the reapplication requirement may not be necessary in every situation.¹³⁷ In the pursuit to find a definitive decision on the permissible use of the property, the

129. *Id.* at 346. According to the California Court of Appeal:

"[P]laintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. . . . [T]he refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development."

Id. at 347 (quoting the California Court of Appeal).

130. *Id.* at 348.

131. *Id.* "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.*

132. *Id.* at 350. "[A] court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide." *Id.*

133. *Id.*

134. *Id.* at 352.

135. *Id.* at 353 n.9. "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.*

136. *Id.* at 353.

137. *Id.* at 350-53.

landowner will "not [be] required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this information."¹³⁸ In addition, the *MacDonald* Court stated that futile applications would not be required under the ripeness doctrine.¹³⁹ The Court was convinced, however, that since the property at issue was zoned residential, any reapplication for a less intensive development plan would not be useless.¹⁴⁰ Although the initial application was not approved, the Court stated that "[t]he implication is not that future applications would be futile, but that a meaningful application ha[d] not yet been made."¹⁴¹

In *Lucas v. South Carolina Coastal Council*,¹⁴² the Supreme Court applied the futility exception alluded to in *MacDonald*¹⁴³ to rule that a land use case was ripe for review.¹⁴⁴ In *Lucas*, a developer purchased two lots located in a coastal residential development.¹⁴⁵ Although the lots were approximately 300 feet from the beach, the developer was not required to obtain a permit prior to development.¹⁴⁶ However, two years after the developer purchased the land, the South Carolina Beachfront Management Act established a baseline marking the points where erosion had occurred during the last forty years.¹⁴⁷ The Act prohibited "construction of occupiable improvements" seaward of the line and provided no exceptions.¹⁴⁸ Since the developer's land was seaward of this baseline, he filed suit.¹⁴⁹ The South Carolina Supreme

138. *Id.* at 350 n.7. The Court cited to *Williamson County*, where Justice Stevens, in a concurring opinion, remarked that a Due Process claim may prevail if a burdened landowner could prove "that an unconstitutional procedure had resulted in an unnecessary delay in obtaining approval of its development plan." *Id.* (citing *Williamson County*, 473 U.S. at 205 (Stevens, J., concurring in judgment)).

139. *Id.* at 352 n.8.

140. *Id.*

141. *Id.*

142. 505 U.S. 1003 (1992).

143. See *supra* notes 137-41 and accompanying text.

144. *Lucas*, 505 U.S. at 1012-13.

145. *Id.* at 1006-07. The developer paid \$975,000 for two residential lots located on a barrier island east of Charleston, South Carolina. *Id.* The developer intended to construct single-family residences on the lots, similar to the residences that had been constructed on the adjacent lots in the development. *Id.*

146. *Id.* at 1008. The regulations in required owners of coastal zone land that qualified as a "critical area" to obtain a permit from the South Carolina Coastal Council prior to developing the land. *Id.* The parcels at issue in this litigation were not designated "critical areas." *Id.*

147. *Id.*

148. *Id.* at 1008-09. The Act permitted only nonhabitable improvements, such as wooden walkways and decks. *Id.* at 1009 n.2.

149. *Id.* at 1009.

Court rejected his claim that the Act effected a taking of his property without just compensation.¹⁵⁰

After the arguments before the South Carolina Supreme Court, but before that court had ruled on the case, the Act was amended to authorize the Council to grant special permits for construction east of the baseline.¹⁵¹ The *Lucas* Court rejected the Council's argument that the developer's claim was not ripe since he had failed to seek a permit under the amendment.¹⁵² Since the South Carolina Supreme Court did not rest its judgment on ripeness grounds,¹⁵³ the *Lucas* Court ruled that "it would not accord with sound process to insist that Lucas pursue the late-created 'special permit' procedure before his takings claim can be considered ripe."¹⁵⁴ Furthermore, even though the developer did not submit any plan for development, this did not bar judicial review.¹⁵⁵ Applying the futility exception, the Court noted that "such a submission would have been pointless" since the Council had stipulated that even if there had been an application, no building permit would have been issued.¹⁵⁶

150. *Id.* at 1009-10. That court ruled that a regulation enacted to prevent serious public harm did not require compensation. *Id.* at 1010.

151. *Id.* at 1010-11.

152. *Id.* at 1012.

153. *Id.* As the Court stated, "the South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings . . . preferring to dispose . . . on the merits." *Id.*

154. *Id.* According to the Court, "[t]hat there is a discretionary 'special permit' procedure by which he may regain . . . beneficial use of his land goes only to the prudential 'ripeness' of Lucas's challenge, and . . . we do not think it prudent to apply that prudential requirement here." *Id.* at 1012-13. One commentator suggests that "[t]his is significant since if ripeness had been seen as an Article III subject matter jurisdiction issue, the Supreme Court would have been obliged to dismiss the case even though the state supreme court had ignored the problem." Roberts, *supra* note 25, at 14. The *Lucas* Court stated, however, that it did have Article III jurisdiction:

Given the South Carolina Supreme Court's dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas's taking claim, it is appropriate for us to address that component as if the case were here on the pleadings alone. Lucas properly alleged injury in fact in his complaint; . . . [n]o more can reasonably be demanded.

Lucas, 505 U.S. at 1012 n.3.

155. *Lucas*, 505 U.S. at 1011. However, the developer would be required to apply for a "special permit" under the 1990 amendment for future construction before any subsequent claim would be ripe. *Id.*

156. *Id.* at 1013 n.3.

4. *Suitum* and the Runaway Ripeness Train: The Change to Put *Williamson County* Back on Track

On October 15, 1996, the United States Supreme Court granted certiorari in the case of *Suitum v. Tahoe Regional Planning Agency*.¹⁵⁷ The Court will review a decision from the United States Court of Appeals for the Ninth Circuit that illustrates how the judiciary has twisted the *Williamson County* final decision requirement and eviscerated the futility exception. Petitioner owns an 18,300 square foot parcel of land located in a residential subdivision.¹⁵⁸ The Tahoe Regional Planning Agency (TRPA), respondent, halted petitioner's plans to build a residential home on the parcel after determining that the parcel was located in a Stream Environment Zone (SEZ).¹⁵⁹ Under the local plan, the TRPA establishes a number under the Individual Parcel Evaluation System (IPES) representing a parcel's relative environmental suitability for development.¹⁶⁰ Since petitioner's property was located in a SEZ, the TRPA assigned the parcel a zero IPES score.¹⁶¹ As a result of this

157. 80 F.3d 359 (9th Cir.), *cert. granted*, 117 S. Ct. 293 (Oct. 15, 1996) (No. 96-243). The questions presented for review are as follows:

Must a property owner sell transferable development rights (TDRs) and apply for agency approval of the sale in order to ripen a takings claim under the *Williamson County* final decision requirement:

- a) when the regulatory agency has already conclusively determined that no viable use of her parcel of land will be permitted;
- b) when a TDR transfer will not allow her to make any use of her parcel of land; and
- c) when the maximum extent of TDRs available for transfer are already definite and certain, and can be valued by normal appraisal methods?

Petition for Writ of Certiorari at i, *Suitum* (No. 96-243).

158. *Suitum*, 80 F.3d at 361. Other residences border three sides of the parcel at issue while a "paved street with a curb, gutter, and all utilities necessary for a single-family residence" border the fourth side of the parcel. Petition for Writ of Certiorari at 4.

159. The local plan creates these SEZs to convey surface waters from upland areas into Lake Tahoe and its tributaries. *Suitum*, 80 F.3d at 361. Once a parcel is designated an SEZ, the plan only allows new land coverage or other permanent land disturbance "for certain limited public uses." *Id.*

160. *Id.*

161. *Id.*

score, petitioner was precluded from any development on the parcel.¹⁶² The TRPA upheld the IPES score after petitioner appealed.¹⁶³

Ideally, this claim would be ripe for review under *Williamson County*.¹⁶⁴ However, the Ninth Circuit upheld the district court's grant of summary judgment to the respondent on ripeness grounds.¹⁶⁵ The key to the Ninth Circuit's opinion was the Transfer of Development Rights (TDR) program established by TRPA. Under the TDR program, a property owner may transfer land coverage, residential development rights, and residential allocations.¹⁶⁶ Since petitioner did not apply to transfer her rights under the TDR program, the court held that her claim was not ripe.¹⁶⁷

The court referred to the *Williamson County* requirement when it ruled that before filing suit, petitioner should have sought a " 'final decision from [TRPA] regarding the application of the regulation to the property at issue.' " ¹⁶⁸ According to the court, "[w]ithout an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property."¹⁶⁹ The court equated the TDR program with modifications of development plans and requests for variances, stating that the common theme is "facilitating alternative uses of the property."¹⁷⁰ The court concluded that the TRPA transfer of development rights scheme was a use of SEZ property.¹⁷¹

162. The plan "establishes four criteria that the property owner must meet before building a single-family residence: (1) an IPES score above the numerical level established for development in that calendar year; (2) a residential development right; (3) adequate land coverage; and (4) a residential allocation." *Id.*

163. *Id.*

164. See *supra* text accompanying note 105.

165. *Suitum*, 80 F.3d at 364.

166. *Id.* at 361. Petitioner had two "rights" which would theoretically be transferred: First, *land coverage*, which consisted of 183 square feet of land. Although the parcel was 18,300 square feet, the program only allowed owners of property within a SEZ to transfer one percent of the total property area. A property owner may transfer land coverage to a receiving parcel within the same hydrologic zone allowing for construction of a larger project on the receiving parcel. Second, *a residential development right*. Subject to county approval and the use and density eligibility of the receiving parcel, residential development rights may theoretically be transferred anywhere in the Lake Tahoe Basin. Although petitioner had obtained a residential allocation in 1989, she did not use it and it reverted to the county. *Id.*

167. *Id.* at 362.

168. *Id.* (citing *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 474 (9th Cir. 1994)) (emphasis added).

169. *Id.* The court continued, "[w]ithout pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone." *Id.* (citing *MacDonald*, 477 U.S. at 348).

170. *Id.* at 363.

171. *Id.* "The key inquiry is whether the property retains 'any reasonable beneficial use[.]' "

Petitioner argued that the claims were ripe "because the TDR program is a 'ruse, a sham.'" ¹⁷² Petitioner produced testimony from a former TRPA staff member that the TDR program had produced no sales and that the parcel at issue had no marketable development rights. ¹⁷³ This testimony was excluded by the trial court since he was not an appraiser capable of providing "valuation" of development rights. ¹⁷⁴ Since TRPA presented evidence that Suitum's development rights "possess some significant value," the court concluded that petitioner failed to show that participation in the TDR program would be futile. ¹⁷⁵ Thus, since petitioner did not apply for transfers through the TDR program, the court held that the claims were not ripe for adjudication. ¹⁷⁶

The *Suitum* decision from the Ninth Circuit is a clear misapplication of the final decision requirement of *Williamson County*. The *Suitum* court itself cited the final decision requirement as mandating a final decision regarding the application of the regulations "to the property at issue." ¹⁷⁷ Indeed, the TRPA did apply the regulations to the property when it determined that the property was located in the SEZ and assigned it an IPES score of zero. ¹⁷⁸ By allowing the TRPA, or any other agency, to implement a scheme to indefinitely avoid a final decision by tying a use of one's land to a theoretical transfer of TDR's to another person's parcel, an aggrieved property owner will be forever

Id. (citing *MacDonald*, 477 U.S. at 349). "That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial." *Id.* (emphasis in original).

172. *Id.*

173. *Id.*

174. *Id.* The court ruled that exclusion of this testimony was not an abuse of discretion since the witness's "experience in facilitating property owners in TDR program transfers is not equivalent to experience in assigning a market value to TRPA development rights." *Id.*

175. "TRPA's evidence shows that without an allocation right, Suitum's development rights are valued from \$10,000 to \$21,500 or more. With an allocation right, the value increases by approximately \$30,000 [although she had no allocation right]." *Id.*

176. *Id.* at 364.

177. See *supra* note 13 and accompanying text.

178. See *supra* notes 5-7 and accompanying text.

stuck in a ripeness maze seeking a final decision.¹⁷⁹ The end result will be no access to the judiciary.

Additionally, the Ninth Circuit's handling of the futility exception is in contravention of the *Lucas* decision.¹⁸⁰ The *Lucas* Court stated that it would have been "pointless" for a developer to send a plan for development because no building permit would have been issued.¹⁸¹ Likewise in the *Suitum* case, the petitioner argued that the TDR program would not result in any sales.¹⁸² Furthermore, the *MacDonald* Court stated that in seeking a final decision, a landowner would not have to resort to "unfair procedures to obtain this information."¹⁸³ By requiring *Suitum* to proceed in a TDR program that has not been successful, the TRPA as well as the Ninth Circuit are requiring a landowner to proceed through "unfair procedures." The United States Supreme Court should take this opportunity to place the *Williamson County* test back on track in order to avoid such inequitable results.

B. *The Eleventh Circuit's Formulation of the Ripeness Test*

In *Corn v. City of Lauderdale Lakes*,¹⁸⁴ the United States Court of Appeals for the Eleventh Circuit applied the *Williamson County* ripeness test and held a state takings claim was ripe for review.¹⁸⁵ In *Corn*, a

179. According to the petitioner's Petition for Writ of Certiorari,

The Ninth Circuit has compounded the confusion by its application of the final decision ripeness doctrine in this case. The court below requires Mrs. Suitum to apply for administrative approval of the use of transferrable development rights by another landowner in order to ripen her takings claim. This holding severs the final decision ripeness requirement from its doctrinal underpinning—which is to allow courts to analyze takings claims in the context of a definitive determination of the extent of development allowed on the subject property. The Ninth Circuit has taken a doctrine that aims for certainty and rendered it uncertain, as there is no limit to the number of irrelevant procedures that a property owner may be forced to utilize.

Petition for Writ of Certiorari at 12.

180. *Lucas*, 505 U.S. at 1003; see *supra* notes 142-56 and accompanying text.

181. *Lucas*, 505 U.S. at 1013 n.3.

182. See *supra* note 17.

183. *MacDonald*, 477 U.S. at 350 n.7.

184. 816 F.2d 1514 (11th Cir. 1987).

185. *Id.* at 1520. Although *Corn* was one of the first Eleventh Circuit cases in which both the finality prong and the state compensation prong of the *Williamson County* test were applied, two prior Eleventh Circuit decisions had held takings claims were not ripe for failure to seek compensation under available state procedures prior to filing claims in federal court. See *Boothe v. Manatee County*, 812 F.2d 1372 (11th Cir. 1987) (plaintiff failed to show that Florida's inverse condemnation remedy for the taking of a right of way for road purposes unavailable or

landowner, after more than ten years of struggling with the city over its zoning changes, filed suit pursuant to 42 U.S.C. § 1983 against the city.¹⁸⁶ The case was dismissed from federal district court on ripeness grounds.¹⁸⁷ On appeal however, the Eleventh Circuit ruled that the landowner had satisfied both portions of the *Williamson County* ripeness test.¹⁸⁸

Applying the finality prong, the *Corn* court ruled that there was "no issue" that this prong had been met since the City had already rejected one plan and had conceded that no development would have been permitted.¹⁸⁹ Therefore, since the ordinance created a complete moratorium on development of the property, any variance request would have been futile.¹⁹⁰ In addition, the landowner fulfilled the state compensation requirement since, at the time, Florida had no procedures by which a property owner could recover compensation for injuries resulting from an unreasonable zoning regulation later declared invalid.¹⁹¹ Accordingly, the court remanded to the district court for review on the merits.¹⁹²

In *Executive 100, Inc. v. Martin County*,¹⁹³ the Eleventh Circuit dismissed several counts of the landowners' complaint as not ripe.¹⁹⁴ In *Executive 100*, plaintiffs "filed applications for amendments to the Martin County Comprehensive Land Use Plan to change the zoning of their parcels from agricultural/rural ranchette to industrial."¹⁹⁵ After the Board of County Commissioners denied the requests, the plaintiffs filed suit pursuant to 42 U.S.C.A. § 1983.¹⁹⁶ The plaintiffs appealed after the district court dismissed all counts of the complaint as not ripe.¹⁹⁷

inadequate); *Anthony v. Franklin County*, 799 F.2d 681 (11th Cir. 1986) (plaintiff failed to show that Florida's inverse condemnation remedy for deprivation or impairment of right of access unavailable or inadequate).

186. *Corn*, 816 F.2d at 1515. Two months after the landowner had received approval of site plans for the building of a mini-warehouse/shopping center, the city council adopted three new ordinances which prevented further development of the property. *Id.*

187. *Id.*

188. *Id.* at 1520.

189. *Id.* at 1516 n.3. The court stated that "[f]inality is manifested by a showing that there is no beneficial use to which the property may be put. . . ." *Id.* at 1516.

190. *Id.* at 1516.

191. *Id.* at 1519.

192. *Id.* at 1520.

193. 922 F.2d 1536 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991).

194. *Id.* at 1542.

195. *Id.* at 1538. Rural Ranchette permits development of one house per five acres. *Id.* at 1538 n.1.

196. *Id.* at 1538.

197. *Id.* at 1539.

Addressing the plaintiff's due process takings claims, the Eleventh Circuit stated that "[i]n order for these claims to be ripe for adjudication, the plaintiffs must obtain a final decision regarding the application of the zoning ordinances to their property, including denial of variance applications."¹⁹⁸ The court also ruled that the plaintiffs' taking of property without just compensation claim was not ripe.¹⁹⁹ After citing the *Williamson County* ripeness requirements, the court ruled that the plaintiffs failed to pursue just compensation from the State of Florida.²⁰⁰ Although the Eleventh Circuit had ruled in *Corn* that Florida did not provide a procedure for pursuing just compensation,²⁰¹ two recent decisions required a different conclusion by the *Executive 100* court.²⁰²

The court cited *First English Evangelical Lutheran Church v. Los Angeles*,²⁰³ where the United States Supreme Court held that "when a state regulation temporarily deprives a property owner of all use of his property, the state must provide for compensation under the just compensation clause."²⁰⁴ Moreover, the *Executive 100* court noted that "Florida courts have recognized that under *First Lutheran Church* property owners have the right to bring reverse condemnation proceedings seeking compensation for regulatory takings."²⁰⁵ Therefore, since the plaintiffs had not pursued compensation through Florida's inverse condemnation proceeding, the plaintiffs' claims that the government had confiscated their property without just compensation were not ripe for adjudication.²⁰⁶

In *Tari v. Collier County*,²⁰⁷ the Eleventh Circuit demonstrated that it will go to extreme bounds to find the lack of a final decision.²⁰⁸ The plaintiffs in *Tari* had owned and operated a wholesale and retail fruit tree business in Collier County for nearly eight years.²⁰⁹ Tari received a Notice of Violation from a Collier County Code Enforcement Investigator which ordered Tari to cease all operations of the nursery.²¹⁰ After complying with the order, Tari "contacted several individ-

198. *Id.* at 1540.

199. *Id.* at 1542.

200. *Id.*

201. See *supra* note 191 and accompanying text.

202. *Executive 100*, 922 F.2d at 1542.

203. 482 U.S. 304 (1987).

204. *Executive 100*, 922 F.2d at 1542 (citing *First Lutheran Church*, 482 U.S. at 315).

205. *Id.* (citing *Joint Ventures*, 563 So. 2d at 622).

206. *Id.*

207. 56 F.3d 1533 (11th Cir. 1995).

208. See *id.* at 1535-37.

209. *Id.* at 1534.

210. *Id.* The Notice provided in part;

uals within the Zoning Department to investigate the status of his case and to discuss his options."²¹¹ Tari filed suit against the County after the County issued a second Notice of Violation.²¹² Although a magistrate judge issued a report and recommendation finding the complaint was ripe, the district court dismissed the as applied arbitrary and capricious due process claim and the just compensation temporary taking claim as not ripe.²¹³

The Eleventh Circuit applied the *Williamson County* test and ruled that for either claim to be ripe, the decisionmaker must have reached a final decision regarding the application of the ordinance to the property.²¹⁴ The court held that the County had not made a final decision to apply the zoning ordinance to the property.²¹⁵ According to the court:

Despite the language in the Notice which instructed Tari to cease his operations immediately, it was made obvious to him that the decision of the Code Enforcement Investigator to send the Notice, much like the decision of a police officer to make an arrest, was not a final decision to apply the zoning ordinance to his property.²¹⁶

The court reasoned that Tari's conversations with members of the zoning department "should have signalled to him that a final decision

All wholesale and retail operations must cease at the above location and all signs must be removed IMMEDIATELY upon receipt of this notice. . . . Any person who violates this zoning ordinance or who fails to comply with any of the requirements shall upon conviction thereof be fined, or imprisoned, or both as provided by law and in addition shall pay all costs and expenses involved in the case. Each day such a violation continues shall be considered a separate offense.

Id. (emphasis in original).

211. *Id.* Both the investigator and the Code Enforcement Director advised Tari that if he did not agree with the investigator's interpretation of the zoning ordinance, he could have the matter reviewed by the Collier County Zoning Director. *Id.* The Assistant County Attorney sent a letter to Tari explaining the County's two alternative methods of enforcing a zoning violation. *Id.* One method was to prosecute a zoning violation in County Court as a misdemeanor after the County Attorney's legal opinion is completed and the State Attorney's office is directed to proceed. *Id.* The other method was to take the zoning violation to the Code Enforcement Board. *Id.* If a violation is confirmed, "an Order to Comply is entered and fines only begin to run upon non-compliance after the date set for compliance by the Board." *Id.*

212. *Id.*

213. *Id.* at 1535.

214. *Id.* (citing *Williamson County*, 473 U.S. at 186).

215. *Id.* at 1537.

216. *Id.* at 1536. "Despite the strong language in the Notice of Violation instructing Tari to shut down his nursery, we cannot conclude that this Notice constituted a final decision." *Id.*

had not yet been made" and that the proper procedure would be to appeal to the Code Enforcement Board.²¹⁷ The court concluded that since the Code Enforcement Board had not decided whether or not Tari had violated a zoning ordinance, the case was not ripe for review.²¹⁸

C. Florida State Courts' Adoption of the Williamson County Test

Although prior Florida courts had incorporated ripeness principles in land use decisions,²¹⁹ and others had actually discussed the Supreme Court's ripeness test,²²⁰ one of the first Florida courts to articulate ripeness standards was the First District Court of Appeal in *Glisson v. Alachua County*.²²¹ Although the landowner had filed a facial challenge against land use regulations, the *Glisson* court nonetheless proceeded to discuss the ripeness standards that would apply to an as applied takings claim.²²² The court noted that " 'an essential prerequisite to a taking claim is a final decision by the government as to what use of the property will be allowed,' " ²²³ and then stated that "[a] final decision may be shown by (1) a rejected development plan, and (2) a denial of a variance."²²⁴ Furthermore, the court ruled that the futility exception could not be invoked "until at least one meaningful application has been filed."²²⁵ The court, however, stated that the foregoing requirements would not be applicable to a taking claim arising in the context of a facial challenge.²²⁶

217. *Id.* at 1536-37.

218. *Id.* at 1537. "[I]f a local investigator's issuance of a citation was all that was necessary for a claim to ripen, the federal courts would become 'master zoning boards' in disputes which are best handled at the local level." *Id.*

219. *See, e.g.,* *Moviematic Indus. v. Board of County Comm'rs*, 349 So. 2d 667 (Fla. 3d DCA 1977) (affirming lower court's denial of review of a rezoning since landowner failed to take positive steps to develop the property).

220. *See, e.g.,* *Department of Envtl. Regulation v. MacKay*, 544 So. 2d 1065 (Fla. 3d DCA 1989) (concluding that landowner's claim was premature due to failure to apply for permit and seek variance); *Bensch v. Metropolitan Dade County*, 541 So. 2d 1329 (Fla. 3d DCA 1989) (affirming dismissal of landowner's taking complaint for failure to seek variance); *Joint Ventures*, 519 So. 2d at 1072 (Ervin, J., concurring) (arguing claim should have been dismissed for failure to obtain a final decision from agency, as required by United States Supreme Court precedent); *Lee County v. New Testament Baptist Church*, 507 So. 2d 626 (Fla. 2d DCA 1987) (ruling that since landowner requested and received variances, the regulation had not been applied to property).

221. 558 So. 2d 1030 (1st DCA), *rev. denied*, 570 So. 2d 1304 (Fla. 1990).

222. *Id.* at 1035-36.

223. *Id.* at 1036 (citing *MacDonald*, 477 U.S. at 348).

224. *Id.* (citing *Unity Ventures v. Lake County*, 841 F.2d 773, 774 (7th Cir. 1988)).

225. *Id.* (citing *Unity Ventures*, 841 F.2d at 775).

226. *Id.* "Where, as in the instant case, a taking claim arises in the context of a facial

In *City of Jacksonville v. Wynn*,²²⁷ the First District Court of Appeal of Florida held that a takings claim was not ripe for review since the landowners failed to obtain a final decision concerning application of a comprehensive plan to the subject property.²²⁸ In *Wynn*, owners of six residential lots claimed that the effect of the City's Comprehensive Plan, as applied to their property, constituted a taking for which compensation was due.²²⁹ The owners claimed that their property, zoned Low Density Residential under the Plan, was no longer conducive to residential zoning.²³⁰ The owners presented expert testimony stating that the property values would more than triple if the land were zoned commercial.²³¹

The *Wynn* court reversed the trial court's determination that a taking occurred.²³² Because the landowners had not submitted any plan for the development of the property or sought a plan amendment, the court ruled that the city had not been given the opportunity to apply the plan to the subject property.²³³ Therefore, since there was no final decision concerning application of the Plan to the property, the takings claim was not ripe for review.²³⁴

The Fourth District Court of Appeal of Florida, in *Tinnerman v. Palm Beach County*,²³⁵ ruled that even under a complete building permit moratorium, a landowner's inverse condemnation claim was not ripe.²³⁶ In *Tinnerman*, landowners petitioned Palm Beach County to rezone the subject property from agricultural residential to general commercial, with a concurrent special exception to permit a planned commercial development.²³⁷ The Board of County Commissioners approved the zoning change petition and granted a building permit for a warehouse.²³⁸ The Board, however, ruled that no other building permits would be issued until construction of a six-lane highway had

challenge rather than in the context of a concrete controversy concerning the effect of a regulation on a specific parcel of land, the only issue is whether the mere enactment of the regulation constitutes a taking." *Id.*

227. 650 So. 2d 182 (Fla. 1st DCA 1995).

228. *Id.* at 188.

229. *Id.* at 184.

230. *Id.*

231. *Id.*

232. *Id.* at 188.

233. *Id.* at 187.

234. *Id.* at 188.

235. 641 So. 2d 523 (Fla. 4th DCA 1994).

236. *Id.* at 524.

237. *Id.*

238. *Id.*

begun.²³⁹ The landowners filed a complaint in circuit court, which found the claims seeking declaratory relief and recovery for inverse condemnation were not ripe for review.²⁴⁰

The court cited the *Williamson County* requirement for a final decision and then proceeded to describe the functions of the ripeness doctrine.²⁴¹ According to the *Tinnerman* court, "the doctrine recognizes decisions are subject to change based on input from various and competing interests."²⁴² Furthermore, "the ripeness requirement of a 'final decision' enables a court to determine whether a taking has occurred, and, if so, its extent."²⁴³

The *Tinnerman* court ruled that, although the zoning regulations provided that the board's action was a "final action,"²⁴⁴ the board's decision was not a final decision.²⁴⁵ According to the court, "the ripeness requirement of a final decision requires more than procedural finality because it includes an opportunity for government to change its mind."²⁴⁶ Notwithstanding the building permit moratorium, the court reasoned that the burden was on the landowner to convince the board to lift the moratorium.²⁴⁷ The court also refused to recognize the landowner's futility argument, ruling that "[f]utility is not established until at least one meaningful application has been filed."²⁴⁸ Thus, since the court ruled that it was "left to speculate as to what actions the county would have taken had appellants pursued available alternatives," the court ruled that the case was not ripe.²⁴⁹

IV. THE RIPENESS STANDARD IN FLORIDA LAND USE

An analysis of both federal and state land use decisions illustrate that the ripeness requirements vary depending upon the type of takings claim the landowner files. In addition, these standards will vary somewhat

239. *Id.*

240. *Id.* at 525.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* The Executive Director of Palm Beach County Planning, Zoning, and Building Department testified that the board has the authority to take final action on zoning matters and that the vote to approve or deny a petition is "final action." *Id.*

245. *Id.*

246. *Id.* "Although the code is silent on obtaining variances when a use is approved, it provides for such steps as applying for modifications, or abandoning the special use." *Id.*

247. *Id.* at 525-26. "Appellant made no attempt to have the board alter its decision." *Id.* at 526.

248. *Id.* "Appellants' futility argument is purely speculative." *Id.* (footnote omitted).

249. *Id.*

depending on whether the claim is filed in federal or state court.²⁵⁰ This section summarizes the ripeness requirements that apply to a Fifth Amendment Takings claim.

A. As Applied Fifth Amendment Taking Claim

In order for a violation of the Just Compensation Clause to be ripe for adjudication, the landowner must overcome two hurdles: the requirement for a final decision, and the need to resort to state procedures for just compensation.²⁵¹ As the *Williamson County* Court reasoned, the final decision requirement is necessary to determine "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations."²⁵² The state compensation prong is required since the Fifth Amendment is violated only if compensation is denied.

1. Final Decision

The Florida courts have adopted the federal ripeness requirement of a final decision from the government regarding the permissible uses of the landowner's property.²⁵³ The final decision prong includes three components: (a) Development Application, (b) Variance Request, and (c) Reapplication. One commentator describes these three requirements in terms of "thresholds" that must all be passed in order to avoid dismissal of an as applied taking claim on ripeness grounds.²⁵⁴

a. Development Application Requirement

The first component of the final decision prong is the requirement that the landowner submit a development application or permit request to the appropriate agency. Initially articulated by the *Agins* Court,²⁵⁵ this requirement has been applied by both lower federal courts²⁵⁶ and

250. The Fifth Amendment of the United States Constitution applies against the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897); see also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 623 n.1 (1981).

251. *Williamson County*, 473 U.S. at 186; see also *Tari*, 56 F.3d at 1535; *Eide*, 908 F.2d at 720; *Wynn*, 650 So. 2d at 186.

252. *Williamson County*, 473 U.S. at 191; see *supra* notes 96-104 and accompanying text.

253. See, e.g., *Martin County v. Section 28 Partnership*, 668 So. 2d 672, 678 (Fla. 4th DCA 1996).

254. *Blaesser*, *supra* note 60, at 78.

255. *Agins*, 447 U.S. at 262.

256. See, e.g., *Tari*, 56 F.3d at 1535; *Eide*, 908 F.2d at 720; *Corn*, 816 F.2d at 1516; *Restigouche, Inc. v. Town of Jupiter*, 845 F. Supp. 1540, 1546 (S.D. Fla. 1993).

by the Florida state courts.²⁵⁷ The rationale for requiring a submission of a development plan or permit request is that without such a submission or request, the government entity charged with implementing the ordinance would not have an opportunity to apply the ordinance to the property.²⁵⁸ The courts require an owner to submit a "meaningful application"²⁵⁹ and to make "a definite and meaningful effort to obtain . . . approval. . . ."²⁶⁰

An application will not be considered meaningful if the owner's "actual intent" was to use the property for some other purpose.²⁶¹ Moreover, the agency's denial "must be based on the merits of the application before direct access to the circuit court is available."²⁶² Therefore, procedural or substantive errors in the application or administrative hearing thereon would preclude fulfilling the application condition.²⁶³

b. Variance Request Requirement

In addition to submitting an initial application or request, a landowner must seek a variance request from the agency before the decision will be a final decision. According to one author: "A variance is an administrative authorization for property to be used in a manner departing from the literal requirements of a zoning ordinance. A variance may be granted where strict enforcement of the applicable regulations . . . would result in unnecessary hardship."²⁶⁴ A variance request, as set forth in *Williamson County*, "would result in a conclusive determination by the [entity] . . . whether it would allow [landown-

257. *Palm Beach County v. Wright*, 641 So. 2d 50, 54 (Fla. 1994); *Tampa-Hillsborough County v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994); *Schillingburg*, 659 So. 2d at 1180; *Taylor*, 659 So. 2d at 1173; *Wynn*, 650 So. 2d at 187; *Tippett v. City of Miami*, 645 So. 2d 533, 534 (Fla. 3d DCA 1994); *Yardarm Restaurant*, 641 So. 2d at 1386; *Tinnerman*, 641 So. 2d at 525; *Alexander v. Town of Jupiter*, 640 So. 2d 79, 82 (4th DCA), *appeal dismissed*, 648 So. 2d 725 (Fla. 1994); *Martinez v. Bolding*, 570 So. 2d 1369, 1370 (Fla. 1st DCA 1990); *Glisson*, 558 So. 2d at 1036; *Morales*, 557 So. 2d at 654; *MacKay*, 544 So. 2d at 1066; *Bensch*, 541 So. 2d at 1330; *New Testament Church*, 507 So. 2d at 628; *Bowen v. Florida*, 448 So. 2d 566, 568 (Fla. 2d DCA 1984).

258. *See, e.g., Wynn*, 650 So. 2d at 187.

259. *See, e.g., Section 28 Partnership*, 668 So. 2d at 678; *Shillingburg*, 659 So. 2d at 1180-81; *Taylor*, 659 So. 2d at 1172-73; *Glisson*, 558 So. 2d at 1036.

260. *Yardarm Restaurant*, 641 So. 2d at 1387.

261. *See Shillingburg*, 659 So. 2d at 1180-81 (stating "[w]e cannot consider [the] application for a dock to be a meaningful application if [the] actual intent was to use the property to build a residence").

262. *Bowen*, 448 So. 2d at 569.

263. *See id.*

264. PATRICK J. ROHAN, 6 ZONING AND LAND USE CONTROLS § 43.01[2] (1996).

er] . . . to develop the subdivision in the manner [the landowner] proposed."²⁶⁵ Lower federal courts²⁶⁶ and Florida state courts²⁶⁷ demand that a landowner request a variance before a case will be deemed ripe. The Eleventh Circuit has required a landowner to "have applied for at least one variance to a contested zoning ordinance because only then could a jury determine whether and to what extent a landowner was deprived of her land."²⁶⁸ Similarly, the Fourth District Court of Appeal of Florida has stated that a variance must be sought because "[r]ipeness requires a firm delineation of permitted uses so that the extent of the taking can be analyzed."²⁶⁹

According to the Eleventh Circuit, a landowner need only apply for a variance request if a variance is available under the applicable ordinance or regulation.²⁷⁰ However, if a variance procedure is available, a landowner's claim will not be ripe for review until the landowner requests a variance.²⁷¹ Moreover, denial of a variance does not necessarily constitute a final decision for ripeness purposes.²⁷² The court is likely to require that a variance application include a development plan and address all of the criteria mandated by the applicable variance ordinance before the application will be deemed "meaningful."²⁷³

c. Reapplication Requirement

The third component of the finality requirement is that the landowner has sought reapplication of the development proposal or permit request. In *Penn Central*, the Supreme Court believed that an application for a smaller structure possibly would have been approved.²⁷⁴ Similarly, according to the *MacDonald* Court, a reapplication for less grandiose plans would have presumably been met with more favorable review.²⁷⁵ Since "[l]and use planning is not an all-or-nothing proposition,"²⁷⁶

265. *Williamson County*, 473 U.S. at 193.

266. See, e.g., *Tari*, 56 F.3d at 1536 n.5; *Reahard*, 30 F.3d at 1415; *Executive 100*, 922 F.2d at 1540-41; *Eide*, 908 F.2d at 721; *Greenbrier*, 881 F.2d at 1574; *Corn*, 816 F.2d at 1516.

267. See, e.g., *Tinnerman*, 641 So. 2d at 525-26; *Glisson*, 558 So. 2d at 1036; *Morales*, 557 So. 2d at 654; *MacKay*, 544 So. 2d at 1066; *Bensch*, 541 So. 2d at 1330; *New Testament Baptist Church*, 507 So. 2d at 628; *Shirley Homes*, 291 So. 2d at 42-43.

268. *Tari*, 56 F.3d at 1536 n.5.

269. *Tinnerman*, 641 So. 2d at 526.

270. *Greenbrier*, 881 F.2d at 1575.

271. *MacKay*, 544 So. 2d at 1066; *Bensch*, 541 So. 2d at 1330.

272. *McKee v. City of Tallahassee*, 664 So. 2d 333, 334 (Fla. 1st DCA 1995).

273. *Id.*

274. *Penn Central*, 438 U.S. at 137; see *supra* notes 69-70 and accompanying text.

275. *MacDonald*, 477 U.S. at 353 n.9.

276. *Id.* at 347.

there is an assumption that "what [an agency may] . . . take with the one hand they may give back with the other."²⁷⁷ The Eleventh Circuit has stated that a reapplication is required in a takings claim because "a determination on precisely what use is permitted is of great relevance in ascertaining whether a taking has occurred."²⁷⁸

d. Exception to the Final Decision Requirement

The futility exception alluded to in a footnote to the *MacDonald* opinion has become a part of the ripeness analysis.²⁷⁹ The *Lucas* Court applied the exception, noting that it would have been "pointless" to require submission of development plans as a prerequisite to judicial review since the authorities had stipulated that no building permit would have been issued.²⁸⁰ The futility exception may apply when the agency lacks power to grant relief or is "openly hostile" to the proposed development, or when the regulation was adopted to prevent the type of proposed development.²⁸¹ The Eleventh Circuit has stated that the futility exception "does excuse the repeated submission of development plans where the submission would be futile."²⁸² However, the Florida courts have been reluctant to apply this exception to landowners' claims.²⁸³

2. State Compensation Prong

According to the *Williamson County* Court, this prong requires a landowner to seek compensation through state provided procedures before a takings claim will be ripe for judicial review.²⁸⁴ This requirement will be triggered if the landowner's suit is filed or is removed to a federal court.²⁸⁵ Furthermore, this prong must be satisfied only if the state compensation procedure is both available and adequate.²⁸⁶ The rationale for this requirement is that the Fifth Amendment proscribes only a taking without just compensation.²⁸⁷

277. *Id.* at 350.

278. *Greenbriar*, 881 F.2d at 1576 n.11.

279. *MacDonald*, 477 U.S. at 353 n.8.

280. See *supra* note 156 and accompanying text.

281. *Berger*, *supra* note 13, § 7.03[6], at 7-30 to 7-36.

282. *Eide*, 908 F.2d at 726 (footnote omitted).

283. See *infra* pt. V.B.

284. *Williamson County*, 473 U.S. at 195.

285. See, e.g., *Reahard*, 30 F.3d at 1417-18.

286. *Williamson County*, 473 U.S. at 196.

287. See *id.* at 194-97.

The Eleventh Circuit has enforced this requirement.²⁸⁸ The *Corn* court found the takings claim to be ripe since at the time Florida had not established a state remedy for inverse condemnation.²⁸⁹ Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."²⁹⁰ Florida now provides such a procedure for seeking compensation.²⁹¹ Therefore, before a takings claim will be ripe for review by a federal court, the landowner in Florida must seek compensation through Florida's inverse condemnation process.²⁹²

B. *Facial Takings Claim*

If a plaintiff files a facial challenge to an ordinance or regulation, the claim will be ripe for review as soon as that ordinance or regulation becomes effective.²⁹³ In filing a facial challenge, the landowner is typically seeking an invalidation of a regulation or ordinance.²⁹⁴ As the First District Court of Appeal of Florida stated in *Glisson*, "[w]here . . . a taking claim arises in the context of a facial challenge rather than in the context of a concrete controversy concerning the effect of a regulation on a specific parcel of land, the only issue is whether the mere enactment of the regulation constitutes a taking."²⁹⁵ Although the ripeness requirements can be avoided by filing a facial challenge, a landowner's chance of success on such a claim is slim.²⁹⁶

V. THE PITFALLS OF LAND USE RIPENESS REQUIREMENTS

The rationale of the original ripeness doctrine, as enunciated in *Abbott*, was "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial

288. See *Tari*, 56 F.3d at 1535-38; *Reahard*, 30 F.3d at 1416-18.

289. See *supra* note 191 and accompanying text.

290. DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 20.7, at 606-08 (2d ed. 1986) (quoting *Thornburg v. Port of Portland*, 376 P.2d 100, 101 n.1 (Or. 1962)).

291. See *supra* notes 204-05 and accompanying text.

292. See *Tari*, 56 F.3d at 1535-38; *Reahard*, 30 F.3d at 1416-18.

293. See *Agins*, 467 U.S. at 260-63.

294. *Blaesser*, *supra* note 60, at 83.

295. *Glisson*, 558 So. 2d at 1036.

296. See *infra* pt. V.B.

interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”²⁹⁷ The ripeness doctrine has valid purposes for fulfilling Article III requirements and for preventing judicial resources from being spent on disputes that could be remedied before local zoning boards. However, the ripeness doctrine has been turned into a ripeness game in the land use context. The loser is far too often the landowner, particularly those landowners that lack the resources to play the ripeness game.²⁹⁸ Furthermore, courts have applied the ripeness doctrine in such a confusing manner that the only predictable result is that the claim is likely to be dismissed.

A. *Confusion and Inconsistency in the Judiciary*

There has been confusion and inconsistency in the judiciary’s application of the ripeness doctrine to land use claims.²⁹⁹ The initial difficulty has been deciphering what ripeness standard to apply to the landowner’s claim. The Eleventh Circuit’s opinion in *Eide* provides evidence of such confusion.³⁰⁰ The *Eide* court found that in several cases, the courts erroneously have applied the ripeness standards of *Williamson County*.³⁰¹ As the *Eide* court stated, “[c]ourts have confused the standards for . . . just compensation, due process takings, and arbitrary and capricious due process [claims], and often one cannot tell which claim has been brought or which standard is being applied.”³⁰² The *Eide* court recognized that this confusion may result in incorrect disposition of a landowner’s claim.³⁰³

Another area of confusion exists with the courts’ interpretation of the exhaustion doctrine. Some courts require landowner claimants to exhaust all administrative avenues as a condition of meeting the ripeness requirements.³⁰⁴ The *Williamson County* Court explicitly recognized

297. *Abbott Laboratories*, 387 U.S. at 148-49.

298. See Larry Kaplow, *Property Rights Bill Readied*, PALM BEACH POST, Apr. 16, 1995, at A1 (“[G]etting paid for regulations that limit the usefulness of your property is a bureaucratic mess that takes years and demands a high standard of proof of damage. Both sides [of the property rights dispute] acknowledge that small landowners have trouble surviving the process to get compensation.”).

299. See *supra* notes 13-15 and accompanying text.

300. See *Eide*, 908 F.2d at 722-26.

301. *Id.* at 722.

302. *Id.* (footnote omitted). As the court conceded, “[t]his court has itself confused due process takings and arbitrary and capricious due process claims.” *Id.* (citing *Greenbriar*, 881 F.2d at 1570).

303. See *id.* at 722-23.

304. See *supra* notes 16-18 and accompanying text.

that exhaustion is not a requirement of ripeness.³⁰⁵ The inconsistent application the two doctrines has been recognized by the Eleventh Circuit's opinion in *Reahard*.³⁰⁶ Nonetheless, several Florida courts still require exhaustion as an additional hurdle in the landowner's pursuit for relief.³⁰⁷

Judicial inconsistency further complicates the land use ripeness doctrine. The futility exception to the ripeness requirement is at the forefront of this inconsistency.³⁰⁸ Some courts require the landowner to submit at least one meaningful application before this exception may be recognized.³⁰⁹ Other courts have gone further and ruled that the futility exception could not be applied until at least one meaningful variance has been denied.³¹⁰ This requirement may be a waste of time for all affected parties and may result in more financial loss to the landowner.³¹¹ Unless the futility exception is to remain futile, the judiciary must clearly articulate when the exception shall apply.

B. *Harsh Results to the Landowner*

Although the ripeness doctrine makes theoretical sense, the practical effect of its application in the land use context is to raise too many obstacles for a landowner to pass prior to having a court hear the merits of the underlying claim. Many claimants are left at the courthouse steps after spending extraordinary amounts of money to even knock on the courthouse door.³¹² One study indicates that landowners have had their cases dismissed by federal district courts in nearly 94% of the decisions.³¹³ According to the study, 26% were dismissed under the finality requirement, 56% were dismissed for failure to pursue available state procedures to seek just compensation, and 18% were dismissed under both of the prongs.³¹⁴ Moreover, since the ripeness doctrine is widely

305. See *supra* notes 109-11 and accompanying text.

306. *Reahard*, 30 F.3d at 1417 n.12.

307. See *supra* notes 16 & 18 and accompanying text.

308. "The deficiencies of the ripeness standard in zoning cases are most apparent with regard to the 'futility exception.'" *Eide*, 908 F.2d at 727 (Shoob, J., concurring).

309. *Id.* at 726-27.

310. See, e.g., *McKee*, 664 So. 2d at 334.

311. "That often logical approach [requiring at least one meaningful application] . . . fails to account for specific facts, which, in the individual cases, might even render a single application a waste of time." *Eide*, 908 F.2d at 727.

312. As one commentator has described the situation, the effect of ripeness at the federal level is to "leav[e] the federal courthouse door only slightly ajar for land use cases which involve only the most egregious examples of arbitrary action by local governments." Blaesser, *supra* note 60, at 75.

313. *Id.* at 91.

314. *Id.*

used by the Florida courts, a case dismissed from federal court is likely to meet the same fate in the state court.³¹⁵

The confusion in the judiciary inevitably leads to unjust effects on the property owner. Since the court is likely to view the ripeness determination as a jurisdictional issue,³¹⁶ the landowner's claim will be dismissed with no determination on the merits.³¹⁷ As the landowner goes back through the entire process to try and obtain a ripe claim, the proposed land use is halted while mortgage or other overhead expenses may be accumulating. In addition, one commentator has noted that some of the leading takings cases have taken up to six years to litigate with costs exceeding half a million dollars.³¹⁸ Faced with the ripeness hurdles, many landowners may simply decide not to even file a takings claim.³¹⁹

Moreover, the equitable considerations that formulate a portion of the original ripeness doctrine are missing from the ripeness test that has been applied in the land use context.³²⁰ The United States Supreme Court, in the *Abbott Laboratories* decision, ruled that the claim was ripe for review since "the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions."³²¹ The courts have clearly lost sight of any notions of equity when they require a landowner to close down an eight-year-old business or be subject to

315. According to one commentator:

In effect, the ripeness doctrine excludes land use cases from federal courts 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. Thus, the ripeness doctrine has been used first by federal courts, then by state courts, to deny property owners just compensation.

Overstreet, *supra* note 11, at 92 (footnotes omitted).

316. See *supra* note 44 and accompanying text.

317. See *supra* notes 45-46 and accompanying text.

318. Vargus, *supra* note 5, at 333 n.97.

319. Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 628 (1995) ("Adding to the hardship, procedural hurdles can bar litigation on the merits of takings claims for anywhere from five to ten years. Thus, when faced with a government takings claim, many property owners choose not to pursue their rights under the Fifth Amendment.").

320. See *supra* notes 48-50 and accompanying text.

321. *Abbott Laboratories*, 387 U.S. at 154.

finances and a criminal record and still rule that the case is not ripe for review.³²²

The requirement that a landowner submit an initial plan for approval does not pose much difficulty for the landowner. The games begin when the courts require variance requests and multiple applications. These obstacles will be even greater and more arbitrary if the *Suitum* requirement that landowners partake in a TDR program prior to a takings claim being deemed ripe is upheld by the United States Supreme Court.³²³ This "places the burden of governing on the wrong foot."³²⁴ As an example, a landowner's claim has been deemed not ripe even when the applicable regulations provided that the board's decision was "final action."³²⁵ The Fourth District Court of Appeal of Florida required the landowner to seek a variance since "the ripeness requirement of a final decision requires more than procedural finality because it includes an opportunity for government to change its mind."³²⁶ Such decisions are the type that send challenging landowners on a "wild goose chase."³²⁷

Moreover, the futility exception has provided little shelter from the landowner's trek through this bureaucratic and judicial ripeness maze.³²⁸ In particular, the Fourth District appears to have adopted an Eleventh Circuit opinion that would grant the futility exception only when the landowner is informed that the "proposed project was 'dead' and the [agency] had 'settled on a final use.'" ³²⁹ The possibility of any governmental entity communicating in such a manner to a property owner is remote. Furthermore, such judicial pronouncements effectively signal to the planning agencies methods by which to avoid the finality prong.

VI. PRIVATE PROPERTY RIGHTS LEGISLATION

The ripeness requirements in land use litigation have hindered, and, in many instances, actually blocked landowners' pursuits for relief under

322. See *Tari*, 56 F.3d at 1534, 1536-37.

323. See *supra* pt. III.A.4.

324. See *Shillingburg*, 659 So. 2d at 1179; *supra* note 12.

325. *Tinnerman*, 641 So. 2d at 525.

326. *Id.* "Although the code is silent on obtaining variances when a use is approved, it provides for such steps as applying for modifications, or abandoning the special use." *Id.*

327. See *supra* note 12.

328. As one commentator noted, "[a]n allegation of futility based on unofficial policy is difficult to establish, absent years of delay or multiple application rejections." Lyman, *supra* note 40, at 123-24.

329. *Tinnerman*, 641 So. 2d at 526 n.3 (quoting *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1546-47 (11th Cir. 1994)).

traditional takings law.³³⁰ After years of frustration with this judicial ripeness barricade,³³¹ burdened landowners have taken their grievances to the legislative branches.³³² The frustration is evidenced by the growing number of legislative attempts to ease the difficulties landowners have suffered. It has been estimated that over sixty property rights bills have been introduced at the state level across the nation.³³³

The property rights movement in the state of Florida gained momentum during the 1970s.³³⁴ However, it was the legislative battles of the 1990s that ultimately led to the passage of the Property Rights Act.³³⁵ This Act provides an opportunity for burdened landowners to have their claims addressed by the judiciary. Although the Act does not change the ripeness requirements of takings jurisprudence,³³⁶ the statutory ripeness provisions are a beacon for potential landowner litigants. Before introducing and analyzing the ripeness aspects of the Property Rights Act, a brief background of the events that occurred just prior to the passage of the Act will shed light on the relevant political climate.³³⁷

A. *The Governor's Property Rights Study Commission II*

In 1993, Florida Governor Lawton Chiles established the Governor's Property Rights Study Commission II to evaluate the status of property rights in the state of Florida and to make proposals to the Governor.³³⁸ The seventeen-member Commission held public meetings throughout the state to hear testimony from concerned citizens.³³⁹ Many of the

330. See *supra* pt. V.B.

331. See *supra* note 19 and accompanying text.

332. See Marzulla, *supra* note 319, at 628; Powell, *supra* note 5, at 258.

333. Marzulla, *supra* note 319, at 633 (footnote omitted).

334. Powell, *supra* note 5, at 258.

335. *Id.* at 259-65.

336. See *supra* note 3.

337. This section is intended only to provide a brief overview of the legislative history of the property rights proposals and the relation to the ripeness standards. For a more detailed analysis, see Powell, *supra* note 5, § II; Kent Wetherell, *Florida Property Rights Legislation: The "Midnight Version" and Beyond*, 22 FLA. ST. U. L. REV. 525 (1994).

338. FLA. EXEC. ORDER NO. 93-150 §§ 1, 2 (June 4, 1993). The governor's directions to the Commission included studying "[t]he issue of protection of private property rights and the protection of the public interest in proper growth management and environmental protection" and "[t]he current and potential effectiveness of Florida law in providing substantially affected persons with appropriate remedies of law to protect their private property rights and any changes necessary to assure meaningful and effective remedy to affected property amounts." FLA. EXEC. ORDER NO. 93-354 § 3 (Dec. 28, 1993).

339. COMMISSION REPORT, *supra* note 4, at 56-57. The Commission heard from 62

landowners that testified complained that "the system is too complex and expensive."³⁴⁰ Other landowners expressed frustration with the delay inherent in the current judicial process.³⁴¹ Such concerns appeared to be directed at the absurd and harsh effects of the ripeness requirements.

The Commission proposed legislation whereby a landowner who believed that a development order "inordinately limited the effective and practical use" of the property may apply for intermediation.³⁴² The proceeding with the intermediary was to be "informal," with the focus of the inquiry being on "the impact of the governmental action."³⁴³ The proposed legislation addressed the ripeness issue by providing that, upon either the agency's or the landowner's rejection of the intermediary's recommendation, the agency issue "a decision which describes the use or uses available to the subject property."³⁴⁴ Once the agency issued such an order, the claim would have been ripe, as a matter of law, for judicial review.³⁴⁵ During the 1994 Regular Session of the Legislature, the substance of the Commission's proposal was filed as House Bill 1967.³⁴⁶ Although the bill raised needed debate on the status of property rights, the legislation was never passed.³⁴⁷

B. *The Private Property Rights Protection Act*

After several other efforts to pass private property rights legislation also failed during the 1994 legislative session,³⁴⁸ both the Florida House and Senate again considered bills addressing the issue during the 1995 session.³⁴⁹ The political pressure on the legislature was high since

witnesses in three public hearings held in North, Central, and South Florida. *Id.* at 56.

340. *Id.* at 57. According to the Report, the citizens believed that "[r]esort to the judicial system did not seem to present a meaningful opportunity." *Id.*

341. *Id.*

342. *Id.* at 7-8.

343. *Id.* at 16-17.

344. *Id.* at 28-29.

345. *Id.* at 29.

346. Powell, *supra* note 5, at 261 & n.20; Wetherell, *supra* note 337, at 546 n.146; *see also* Fla. H.B. 1967 (1994).

347. *See* Powell, *supra* note 5, at 261.

348. *See id.* at 260-61; Wetherell, *supra* note 337, at 549-53.

349. *See* Fla. H.B. 1335 (1995); Fla. S.B. 2912 (1995). These bills were both based on a draft bill written by an ad hoc working group. "Governor Lawton Chiles directed Secretary Linda Loomis Shelley of the Florida Department of Community Affairs to convene . . . to draft a consensus proposal [for property rights legislation] which would win the support of lawmakers and affected constituencies." Powell, *supra* note 5, at 263-64 (footnote omitted). Though the two versions were initially somewhat different, Senate Bill 2912 was later changed to match the text of the House Bill 1335. *See* Committee Substitute for Senate Bill 2912 (1995). Ultimately the

there had not been any solution to the grievances voiced in the Commission Study.³⁵⁰ The ensuing legislative debates pitted governmental officials and planners, who proclaimed that the Property Rights Act would stifle planning efforts,³⁵¹ against property owners, who rejoiced that they may finally be granted relief for governmental burdens on private property.³⁵² The Property Rights Act, as signed by the governor on May 18, 1995,³⁵³ reflects a compromise between these two views.³⁵⁴

The Property Rights Act provides an aggrieved landowner an alternative to the traditional route of a takings claim. In drafting the Act, the Legislature intended to provide "a separate and distinct cause of action from the law of takings."³⁵⁵ Under the Property Rights Act, a landowner who believes that an action of the government has "inordinately burdened an existing use of real property or a vested right to a specific use"³⁵⁶ is required to submit a claim in writing to the head of the agency that issued the burdening order.³⁵⁷ This is to be performed "[n]ot less than 180 days prior to filing an action under [the Property Rights Act]."³⁵⁸ The landowner must include in the written claim a "bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property."³⁵⁹ If the alleged burdening governmental action involves more than one governmental entity, the statute requires that the landowner present such a claim to each of these governmental entities.³⁶⁰ Furthermore, the governmental entity, during the 180-day period, is required to make a written settlement offer to the landowner.³⁶¹

two bills "were incorporated into one amendment which was adopted as a substitute for the language in another bill, Committee Substitute for House Bill 863." Powell, *supra* note 5, at 264; *see also* Fla. CS for B.H. 863.

350. *See* Powell, *supra* note 5, at 262.

351. Bob LaMendola, *Law Lets Owners Sue If Land Is Hit by Regulations*, SUN SENTINEL (Ft. Lauderdale), May 9, 1995, at 1A, 8A; Marjorie Lambert, *Debate Grows Over Property Rights: Land Owners Demanding Government Compensation for Lost Values*, SUN SENTINEL (Ft. Lauderdale), Apr. 4, 1995, at 1A, 6A.

352. Adam Yeomans, *Property Rights Bill on Governor's Desk: Chiles Expected to Sign Compensation Law*, SUN SENTINEL (Ft. Lauderdale), May 4, 1995, at 14A.

353. Fla. Laws ch. 95-181 (1995) (enacting Committee Substitute for House Bill No. 863 as law).

354. Vargas, *supra* note 5, at 318.

355. FLA. STAT. § 70.001(1) (1995).

356. *Id.* § 70.001(2).

357. *Id.* § 70.001(4)(a).

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* § 70.001(4)(c). The settlement offer may include:

Unless the landowner accepts the settlement offer during the "180-day-notice period," each governmental entity to which a claim was presented must issue a "written ripeness decision."³⁶² This ripeness decision must identify the "allowable uses" of the property.³⁶³ If the governmental entity fails to issue a ripeness decision *during the 180-day-notice period*, the prior governmental entity's action will be deemed ripe for review in the circuit court.³⁶⁴

On the other hand, if the governmental entity issues a ripeness decision, the claim also will be "ripe or final for the purpose of the judicial proceeding created by [the Property Rights Act] . . . notwithstanding the availability of other administrative remedies."³⁶⁵ Furthermore, if the landowner rejects the governmental entity's settlement offer and ripeness decision, the landowner may file a claim for compensation in circuit court.³⁶⁶ However, the circuit court, in determining whether the governmental entity has inordinately burdened the property, will consider the governmental entity's offer and ripeness decision as part of the record for review.³⁶⁷

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1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
 2. Increases or modifications in the density, intensity, or use of areas of development.
 3. The transfer of developmental rights.
 4. Land swaps or exchanges.
 5. Mitigation, including payments in lieu of onsite mitigation.
 6. Location on the least sensitive portion of the property.
 7. Conditioning the amount of development or use permitted.
 8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
 9. Issuance of the development order, a variance, special exception, or other extraordinary relief.
 10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.
 11. No changes to the action of the governmental entity.

Id.

362. *Id.* § 70.001 (5)(a).

363. *Id.*

364. *Id.* In addition, the governmental entity's failure to issue a ripeness decision will operate as a ripeness decision that the property owner has rejected. *Id.*

365. *Id.* This language states that the claim is ripe only for the statutory cause of action. Thus, the ripeness decision does not equate with ripeness for purposes of a takings claim. See Powell, *supra* note 5, at 282 n.165.

366. FLA. STAT. § 70.001(5)(b).

367. *Id.* § 70.001(6)(a).

C. Analysis of the Ripeness Provision of the Act

The Property Rights Act provides an alternative to the rigidity and harshness of the ripeness doctrine that has been applied to the traditional land use claims. The legislation addresses the citizens' frustrations with the judicial system that were voiced to the Property Rights Commission.³⁶⁸ As a result of the Property Rights Act, the relative burdens of the parties are now on a more equal footing since both the landowner and the government are required to take affirmative steps to resolve the land use dispute.³⁶⁹ This will alleviate the complexity and delay that landowners have historically confronted when seeking relief in the judiciary.

Under the Property Rights Act, the landowner is required to submit a proposal to the agency, just as would be required if the landowner were pursuing a takings claim.³⁷⁰ However, the landowner no longer has to seek endless variance requests and submit numerous reapplications in order to proceed under the Property Rights Act.³⁷¹ Once the governmental entity has the landowner's proposal, it is required to make a decision on the request and reveal, through the "ripeness decision," the available uses of the property.³⁷² This prevents the landowner from having to play a guessing game with the government as to the permissible uses of the property. The net effect is to speed up the process for obtaining judicial review by providing constructive ripeness 180 days after the property owner files a claim.³⁷³

Another way in which the Property Rights Act speeds up the ripening process is by recognizing, under the section that requires the

368. See *supra* notes 340-41 and accompanying text.

369. See FLA. STAT. § 70.001(4) & (5).

370. See *supra* notes 357-60 and accompanying text.

371. See *supra* note 365 and accompanying text.

372. See *supra* note 363 and accompanying text.

373. *Black's Law Dictionary* defines "constructive" as:

That which is established by the mind of the law in its act of *construing* facts, conduct, circumstances, or instruments. That which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence inferred, implied, or made out by legal interpretation. . . .

BLACK'S LAW DICTIONARY 313 (6th ed. 1990) (emphasis in original). "Constructive ripeness" may seem to be an anomaly, but, due to the structure and mandate of the Property Rights Act, the term seems to be appropriate to describe the result of the ripeness sections. Due to the ripeness mess that has plagued the law of takings, perhaps there is no other method to provide landowners their day in court than to provide for constructive ripeness.

landowner to send the claim and appraisal to governmental entities, that there could be multiple entities responsible for the burdening action or relevant to the complete resolution of the issue.³⁷⁴ Thus, the statute mandates that the landowner send a claim to each governmental entity.³⁷⁵ If the landowner is not aware of the extent of the administrative process involved in resolving the dispute, the governmental entity may be mandated to assist the landowner in resolving any ambiguity by identifying other relevant parties.³⁷⁶ This section of the statute may alleviate some of the problems inherent with the application of the exhaustion requirement to the ripeness doctrine.³⁷⁷ By requiring a claim to be sent to each governmental entity that may have an influence in resolution of the dispute, and by requiring each entity to issue a ripeness decision if a settlement is not reached,³⁷⁸ each party to the resolution process is theoretically involved in the 180-day period. This prevents a landowner from having to proceed in a piecemeal manner with every possibly relevant governmental entity.³⁷⁹

Although the Property Rights Act speeds up the ripening of the landowner's dispute, this is accomplished without sacrificing the constitutional and prudential safeguards of traditional ripeness principles.³⁸⁰ The constitutional mandate that a case or controversy exist is satisfied since the governmental entity's ripeness decision will be deemed final action.³⁸¹ In addition, if the entity does not issue the ripeness decision, the Property Rights Act ripens the entity's prior action into final action.³⁸² Thus, there will not be a merely hypothetical case. The claim, which will contain the facts of the controversy and the appraisal value of the land, combined with the settlement offer and ripeness decision, will provide evidence of a clear and sufficient injury that any potential reviewing federal court will be able to evaluate in rendering a decision.³⁸³

374. FLA. STAT. § 70.001(4)(a).

375. *Id.*

376. *Id.* ("[I]f a complete resolution of all relevant issues . . . in the view of a governmental entity to whom a claim is presented, requires the active participation of more than one governmental entity [the landowner shall present a claim to each entity]."). *Id.* Powell notes that there is some ambiguity in the statute as to which party must actually submit the claim to the other entities. Powell, *supra* note 5, at 277 n.128.

377. See *supra* notes 304-07 and accompanying text.

378. FLA. STAT. § 70.001(5)(a).

379. See *supra* note 304 and accompanying text.

380. See *supra* notes 33-38 and accompanying text.

381. See *supra* note 364 and accompanying text.

382. See *supra* note 365 and accompanying text.

383. See *supra* note 35 and accompanying text.

The Property Rights Act also provides a mechanism for satisfying prudential concerns.³⁸⁴ The governmental entity's settlement offer and ripeness decision will provide a reviewing court a record supported by concrete facts and decisions.³⁸⁵ However, if the governmental entity fails to issue either a settlement offer or a ripeness decision, satisfaction of prudential requirements may be more attenuated. Nonetheless, since prudential ripeness is the more flexible of the two ripeness justifications,³⁸⁶ the lack of a settlement offer or ripeness decision is not detrimental to prudential ripeness principles. In any event, because the Property Rights Act requires the landowner to provide a claim to the governmental entity, the circuit court will be equipped with concrete facts and the fair market value of the property.³⁸⁷ This is likely to be sufficient to satisfy prudential ripeness concerns.³⁸⁸

VII. CONCLUSION

The Property Rights Act is a legislative response to a judicial doctrine that has stifled landowners' claims for nearly two decades. The ripeness requirements of *Williamson County* and subsequent court decisions have effectively precluded a landowner from having a judicial determination on the merits of an as applied takings claim. By enacting the Property Rights Act, the legislature is attempting to reopen the courthouse doors to allow landowners access to the judiciary to assert a fundamental constitutional right.³⁸⁹ Although the Property Rights Act does not specifically change takings law,³⁹⁰ the constructive ripeness provided under the Act is a step in the right direction and will permit at least a portion of landowners to have their claims heard by the judiciary.

Furthermore, the mere presence of the ripeness provisions in the Property Rights Act may signal to the judiciary the need for consideration of equitable principles in application of the land use ripeness test, as the traditional ripeness test required.³⁹¹ Hopefully the judiciary will

384. See *supra* notes 37-38 and accompanying text.

385. See *supra* notes 361-63 and accompanying text.

386. See *supra* notes 41-42 and accompanying text.

387. See *supra* note 359 and accompanying text.

388. See *supra* note 38 and accompanying text.

389. See *supra* note 312 and accompanying text.

390. See *supra* note 3 and accompanying text.

391. See *supra* note 48 and accompanying text. Furthermore, since the ripeness provisions of the Property Rights Act do not compromise the constitutional or prudential concerns underlying the ripeness doctrine, see *supra* notes 380-88 and accompanying text, the judiciary may likewise lessen the ripeness constraints inherent in the law of takings without sacrificing constitutional and prudential safeguards.

respond to these signals by lessening the number of ripeness obstacles that a landowner must overcome when pursuing a traditional takings claim. The United States Supreme Court has the opportunity to remedy the situation in the *Suitum* case, which should be set for oral arguments early in the spring of 1997.³⁹² If the Court clearly articulates the ripeness standard in the land use context, landowners will be better positioned to assert their constitutional rights. Additionally, agencies will have more adequate notice of the line between regulation and arbitrary and capricious tactics. This will be particularly important for those governmental burdens that are not actionable under the Property Rights Act³⁹³ and therefore must be pursued under the traditional routes that have historically been blocked by ripeness requirements.

392. See *supra* pt. III.A.4.

393. See FLA. STAT. § 70.001(3)(C) & (D). These sections define what "governmental entit[ies]" and "action[s] of . . . governmental entit[ies]" are within the scope of the act. *Id.* Any other action by any other governmental entity cannot be challenged under the act.