

Ripeness and Exhaustion of Remedies: Getting to the Merits

presented by

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I. INTRODUCTION

Ripeness for adjudication is a basic subject matter jurisdiction consideration for virtually any legal claim. But in the context of regulatory takings, the ripeness doctrine has taken on far more than routine proportions, as a high percentage of takings claims in state and federal courts have been dismissed on ripeness grounds. Thus, it is an important subject for the practitioner.

Unfortunately, ripeness decisions in this field can be as difficult to reconcile as decisions concerning the substantive merits of takings claims. In recent years, however, the United States Supreme Court has provided more guidance concerning what constitutes a final agency decision for purpose of ripening a takings claim.

II. THE DOCTRINE & UNDERLYING POLICY

The general definition of a regulatory taking is a helpful point of reference for defining ripeness in the regulatory taking context:

The general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 670, 67 L.Ed. 322 (1922).

With that in mind, the essence of the ripeness doctrine is the requirement that an owner of regulated property obtain a sufficiently final determination of what use of his land will be permitted prior to asking a court to decide whether any regulation has gone “too far.”

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Though rather simply stated, application of these ripeness rules has proven difficult at times. Ripeness holdings have varied according to the type of claim (facial or as-applied), the type of regulatory issue (permitting or zoning), the type of agency involved (local, state or federal), the respective operating rules of agencies (appeals and variance procedures), the judicial forum (state, federal, or even among circuits) and sometimes, in unspoken terms, the type of plaintiff (big developers or small landowners). Despite numerous court decisions and commentaries on what it takes to ripen a takings claim, some uncertainty in applying the rules of ripeness still persists.

The basic policy underpinning the ripeness requirement in takings law is admittedly sound. Common sense and judicial economy support the notion that an aggrieved landowner should first attempt to resolve a land use problem directly with the agency involved. A myriad of solutions might occur to the parties before resort to litigation because agencies usually have discretion to soften their general regulations in application to particular situations. The ripeness doctrine ensures that this flexibility is explored. *See Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659, 1667 137 L.Ed.2d 980 (1997).

The principle also serves orderly government and the separation of powers:

Judicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government.

Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153, 157 (Fla. 1982). Most of all, the doctrine ensures presentation of a concrete takings controversy capable of resolution, for without a final determination of allowable use, no court could intelligently determine whether any regulation “goes too far.”

III. “OVER-RIPENESS” - GOOD POLICY GONE BAD

As logical as it is to obtain an agency’s decision before resorting to court, the mere expense of modern administrative land use application and the tactical avoidance of “final” decisions by some unscrupulous agencies has, in many cases, prevented legitimate claimants from ever having the merits of their claims heard in court.

Until relatively recently, courts too readily went along with the administrative gamesmanship. Many cases held that an owner must not only submit a formal and detailed application for a proposed use and obtain an adverse decision on the application, but also must appeal the decision on various administrative levels. Some decisions went even further to hold that even after appeals, a claim might not be ripe if the owner could have proposed less intense uses. Thus, even a long sought after “final order” might be short of the final determination requisite for ripeness.

Because the cost of even a routine land use application (with the attendant engineering and architectural submissions) is substantial, this judicial trend kept all but the wealthiest plaintiffs from ever reaching the court house steps.

The burden placed on landowners to “keep guessing” about what level of use an agency might approve often proved too expensive and time consuming for owners, even when government acted in good faith, and it created a climate ideal for government gamesmanship.

Thus, a logically good policy, intended to allow agencies flexibility in resolving land use disputes, frequently allowed them practical immunity on a constitutional issue. Many legal commentators railed about this problem. For an example, see *See, e.g., Gregory Overstreet, The Ripeness Doctrine of the Takings Clause: A Survey of Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91 (1994); John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the “Ripeness Mess”?* A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse, 31 THE URBAN LAWYER, 395-396 (Spring 1999); Michael M. Berger, *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 3: Takings Issues: Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol’y 99 (2000).

Eventually, the courts adjusted in light of this pattern of harsh results. While current ripeness law still requires a final decision upon meaningful administrative application (absent “futility,” as discussed below), it has been refined by the establishment of clearer outer limits on an agency’s ability to elude ripened claims. This more pragmatically fair trend is evident in both federal and state takings jurisprudence, as illustrated by recent decisions emanating from the United States Supreme Court and the Florida courts.

IV. RIPENESS ACCORDING TO THE SUPREME COURT

A. Two-Prongs

The United States Supreme Court set forth a two-pronged test for whether a federal takings claim is ripe in its earlier landmark decision, Williamson County Regulatory Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). First, the regulatory authority must reach a final decision regarding the allowable development on the plaintiff's property; and second, the owner must exhaust state compensation remedies before resorting to federal court.

B. Final Decision

As the term suggests, requirement of a final decision dictates that there be both a formal "decision" and that the decision be "final." There generally can be no cognizable decision unless the landowner has elicited one by "meaningful" application. Also, even a formal decision may not be sufficiently final if the landowner does not pursue reasonably available alternatives.

To illustrate, enactment of a land use regulation generally does not constitute a final decision. A land use application which forces agency application of the regulation to a particular site is necessary to trigger ripeness. If an application does not do this, it may not be deemed "meaningful" by the courts. For example, in Agins v. Tiburon, 447 U.S. 255 (1980), the Supreme Court rejected a claim that a zoning law had deprived a landowner of the ability to develop in part "because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions." *Id.* at 260.

Similarly, in MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) the court reasoned that the county's rejection of a landowner's initial "subdivision proposal" did not ripen a claim because the proposal did not elicit a final, definitive decision concerning the extent to which development would be permitted. It was therefore not a "meaningful" application. *Id.* at 352. The subdivision proposal had been rejected for its failure to show adequate provision for streets, water and sewer, and police protection. This was, however, not a final decision of what uses would be permitted, and the landowner's claim was premature.

As noted, the existence of viable alternatives may also preclude a finding that an agency decision, even if "formal," was not final. For example, in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) the Court held that ripeness was lacking because the landowner had not pursued variance procedures provided by the challenged regulatory scheme. A good recent illustration of this principle is found in the Federal Court of Claims decision, Sieber v. U.S., 53 Fed. Cl. 570 (2002). There, a claim by the owners of timber land was held unripe because, after rejection of an initial wildlife "take" permit (necessary due to the presence of endangered owls), the U.S. Fish &

Wildlife Service indicated it would approve the landowners' proposed timber operation if it would submit a mitigation plan along with its permit application similar to plans approved for similarly situated landowners. Because the landowners refused to re-submit, the court held that the agency had not reached its final decision concerning allowable timbering.

While logical, the principle that an owner should pursue alternatives has been subject to abuse in the form of agencies and/or courts suggesting that there was yet another alternative use for which a landowner should have applied or administrative remedy which should have been pursued.²

C. Limits of the "Final Decision" Requirement

In recent years, however, the Supreme Court has curbed this abuse by better defining the outer limits of the final decision requirement, most notably in its decisions, Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) and Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

Suitum involved a couple who had bought a residential lot near the Nevada shore of Lake Tahoe, in 1972. The lot fell within the jurisdiction of the Tahoe Regional Planning Agency, an interstate regulatory agency created by a state compact between Nevada and California in 1969. Efforts to preserve the ecology of the lake proved insufficient, so a 1980 amendment to the compact required the agency to adopt a more stringent development plan. Pursuant to that mandate, the agency adopted a 1987 plan containing a parcel evaluation system which allowed development of residential lots within the basin based upon a point and lottery system. To develop a vacant parcel, an owner would have to both obtain a building allocation through the lottery system and a sufficient score under the parcel evaluation system. While it did not provide for variances, the development plan created transferable development rights (TDR's).

In 1987, Mrs. Suitum (by then a widow) received an allocation through the annual lottery, but was denied permission to construct a house on her lot because of its location within a "stream environment zone" (which rated a score of zero under the parcel evaluation system due to potential runoff into the lake). Her lot automatically had some TDR's which technically could be sold to owners of other eligible lots (one "residential development right" and a 1% land coverage right, equal to 183 square feet). Mrs. Suitum could also pursue bonus TDR's under provisions of the plan. Rather than attempting to

² For examples of this excess in the lower federal courts, see the federal district court decision reversed in Del Monte Dunes at Monterey, Ltd. V. City of Monterey, 920 F.2d 1496 (9th Cir. 1990) and the federal appellate decisions in Schulze v. Milne, 849 F.Supp. 708 (N.D. Cal. 1994) *aff'd in part, rev'd in part on other grounds*, 98 F.3d 1346 (9th Cir. 1996) and Glendon Energy Co. V. Borough of Glendon, 836 F.Supp. 1109 (E.D. Pa. 1993).

increase or transfer any of her TDR's, Mrs. Suitum filed takings claims under 42 U.S.C. § 1983 in federal court.

The U.S. District Court held that her claim was not ripe because it was uncertain how the transfer of development rights might impact investment backed expectations, and the Ninth Circuit affirmed. The Supreme Court reversed, holding Suitum's claim was ripe because there had been a final determination by the agency that Suitum's property fell entirely within a stream environmental zone upon which, according to the plan, there could be no additional "land coverage or other permanent land disturbance." The Court reasoned that because the plan provided no procedure for a variance from this rule, there was no occasion for Suitum to take further steps to obtain a final decision about the **use** of her property. Whether or not she could mitigate the economic impact of the denial through marketing her TDR's was irrelevant to the question of whether she had obtained a final decision sufficient to ripen her claim.

The justices were uniformly critical of the agency's ripeness position. The majority seemed concern with the agency's use of the TDR's provisions to keep Suitum's claim "at bay." In response to the agency's argument that Suitum's claim not be ripe until the value potential of her TDR's was realized by going through the procedures for transfer (including the allocation lottery, marketing the rights, and then applying for agency approval of transfer to the receiver lot), the majority stated that "such a rule would allow any local authority to stultify the Fifth Amendment's guarantee." *Id.* at 1668.

Thus, Suitum contradicts the notion that ripeness requires that a landowner have pursued every possible economic use of property prior to bringing a claim.

Palazzolo involved a landowner who had made several applications to develop his 18 acre, predominantly wetland, property in Rhode Island. The land had been platted into 74 separate lots, and development would require filling the land, similarly to other residential development in the vicinity. After the subdivision, salt marsh regulations were enacted which precluded development except upon issuance of a special exception. Special exceptions were to be limited to instances where an applicant could demonstrate that the development would serve a compelling public interest instead of just individual or private interest.

Prior to enactment of these marsh regulations, Palazzolo had obtained development approvals, but they were revoked the year that the regulations were enacted. Years later, Palazzolo re-applied to develop the property in a manner that would require filling approximately 18 acres, but unlike his previously revoked approvals, this would be done without any dredging. This 18-acre fill application was denied. So was a re-submitted application to fill only 11 acres in connection with development of the land as a beach recreational area. This too was denied in order to keep the Palazzolo property in its

natural state and because the jurisdictional agency did not find a compelling public interest to be served by the development. Palazzolo then sued for a regulatory taking.

The courts of Rhode Island held his claim was not ripe because Palazzolo had not further submitted for “less ambitious” plans, leaving in doubt the extent to which the agency would have allowed development. The U.S. Supreme Court reversed this finding because the restrictive nature of the underlying regulation, combined with the record of the agency applications of it to the subject property. The Court found that there was no indication the agency would have found a compelling public interest even if the beach club proposal had been for a smaller area. Palazzolo at 619-620.

In the course of its reasoning, the Court provided some useful rubric, stating:

While a landowner must give a land-use authority an opportunity to exercise its discretion, **once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.** The case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted.

Id. at 620 (emphasis supplied). Thus, an apparent lack of discretion to approve or a pattern of denial which makes the extent of allowable reasonably certain, will ripen a claim without necessity for further formal application.

The Palazzolo court specifically rejected the Rhode Island courts' acceptance of the agency's contention that because the agency represented it would have approved one homesite on the small upland portion of the property, the landowner's failure to apply for such a lesser use defeated his claim. In that regard, the majority stated:

In assessing the significance of petitioner's failure to submit applications to develop the upland area it is important to bear in mind the purpose that the final decision requirement serves. Our ripeness jurisprudence imposes obligations on landowners because '[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes.'

Ripeness doctrine does not require a landowner to submit

applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.

Id. at 621 (Citations omitted, emphasis supplied). Thus Palazzolo establishes that a landowner need not seek further formal decisions where prior ones have made the potentially permitted use of land reasonably certain.

D. Futility

While the final decision enables a court to determine whether a regulation has “gone too far,” it is subject to the proviso that “[a] property owner is of course not required to resort to . . . unfair procedures in order to obtain this determination.” Yolo County, *supra* at 350, n.7. This proviso is commonly referred to as the “futility” exception.

Palazzolo confirmed this outer limit of the Court’s ripeness requirement in response to the contention by the agency (and adopted by the Rhode Island courts) that the landowner could not bring his claim because he had not yet applied for a local municipal rezoning nor for a state environmental department sewage disposal permit that would be necessary to residentially develop the property. The court rejected this argument on the basis the coastal agency’s prior decisions had made the extent of allowable use clear, and that there was “no indication that any use involving any substantial structures or improvements would have been allowed.” In light of this the Court reiterated that federal ripeness rules do not require submission of “further and futile” applications.

Another Supreme Court case in which the futility exception had been established is City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). At page 698, the court approvingly references the decision of the Ninth Circuit which reversed the lower District Court’s finding that the landowner’s claim was not ripe even “after five years, five formal decisions, and 19 different site plans” had been rejected by the City.

The Ninth Circuit’s opinion chronicles how the landowner’s development had been repeatedly denied by the City even upon making several re-submissions, each time meeting conditions which the City expressed would merit its approval. After reviewing various scenarios to which the futility doctrine could apply (unfair procedures, excessive delay to the point of denying a property’s beneficial use, rejection of prior submissions,

and applications which the government is powerless to grant), the court held that Del Monte Dunes experience was one such scenario. Concluding that, “[r]equiring appellants to persist with this protracted application process to meet the final decision requirement would implicate the concerns about disjointed, repetitive, and unfair procedures,” the court held that its claim was ripe. Del Monte Dunes of Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990) at 1501-1506.

E. Exhaustion of State Judicial Remedies

The second prong for federal takings ripeness under Williamson County, the exhaustion of state compensation procedures, has been generally interpreted to mean state court procedures, not just state administrative procedures. This is a fairly straightforward requirement, but has some very complex implications for effectively preserving a federal takings claim. (See sub-part F below.)

The following are some examples of how federal courts enforce this second ripeness prong: Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994) *cert den.* 115 S.Ct. 1693 (1995); New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996); Hacienda Valley Mobile Estates, v. City of Morgan Hill, 353 F.3d 651 (9th Cir. 2003), *cert. dismissed* No. 03-1681 (U.S. Jan. 5, 2005)(holding rent control challenge must proceed first in state court).

There are a couple of notable exceptions to this second prong. First, if a state law does not provide a compensation remedy, one need not litigate a takings claim in state court prior to bringing one in federal court. This was the case with the Del Monte Dunes litigation, *supra*. The landowner there was permitted to initiate suit in federal court because, at that time the complaint was filed, California law did not provide compensation for a regulatory taking. Del Monte Dunes, 526 U.S. at 710.

The second exception to Williamson’s second prong is the assertion of a “facial” takings claim which alleges that a land use regulation, on its face, fails to advance a legitimate interest. This exception was explained in Sinclair Oil Corp. v. County of Santa Barbara, 96 F. 3d 401 (9th Cir. 1996) *cert den.* 523 U.S. 1059 (1998), which drew a distinction between a facial claim which alleges “failure to advance” and one which alleges that a regulation denies all economically viable use. The latter type of facial claim would be subject to the Williamson requirement of exhaustion state compensation remedies because it depends on the extent to which a landowner has been denied use of the

property *and* compensation for the denial. *Id.* at 406-407.

F. Reserving Federal Claims - The Preclusion Problem

In satisfying the second prong of Williamson, a litigant risks precluding a federal takings claim in the process of ripening it by operation of either *res judicata* (merger and bar) or issue preclusion (collateral estoppel).

Res judicata may be avoided by (1) not raising federal takings claims in state court and (2) clearly reserving those claims from the outset of the state court litigation. Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11 Cir. 1992); Saboff v. St. Johns River Water Management District, 200 F.3d 1356 (11th Cir. 2000); Santini v. Connecticut Hazardous Waste Management Service, 42 F.3d 118 (2d Cir. 2003); DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004). Compare, Johnson v. City of Shorewood, 360 F.3d 810 (8th Cir. 2004)(pitfall in bringing federal claims first in state court).

For example, a state court reservation for a takings case arising in Florida might read as follows:

Plaintiffs hereby reserve federal claims which arise from the facts alleged in this complaint, and expressly ask this Court not to rule on any federal issues or claims arising from said facts. Specifically, the scope of this action is limited in that the Plaintiffs are asserting no federal claim whatever under the Fifth Amendment of the United States Constitution for the taking of property and just compensation and are expressly limiting their claims in that regard to violations of the Florida State Constitution, specifically Article X, Section 6, Fla. Const. Pursuant to the application of England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964) in the takings context by Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir.), cert. denied, 429 U.S. 897, 97 S.Ct. 260, 50 L.Ed.2d 180 (1976), Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992), Saboff v. St. Johns River Water Management District, 200 F.3d 1356 (11th Cir. 2000), Santini v. Connecticut Hazardous Waste Management Services, 42 F.3d 118 (2d. Cir. 2003), and DLX Inc. v. Kentucky, 381 F.3d

511 (6th Cir. 2004), Plaintiffs expressly reserve the right to litigate all federal Fifth Amendment taking claims in a federal forum should the courts of Florida deny relief, pursuant to Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

Even upon a proper reservation, however, issue preclusion and collateral estoppel remain problematic given a split on this issue among the federal circuits. Some hold that a proper reservation in state court will prevent the operation of both *res judicata* and issue preclusion after an unsuccessful state litigation. *See, e.g., Santini and DLX, supra.* Other circuits have held that similarities between federal and state takings law gives rise to issue preclusion on those similar issues, effectively barring a federal claim despite the existence of federal jurisdiction. *See, e.g., Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) *cert. den.* 119 S.Ct. 278 (1998) and Wilkinson v. Pitkin County Board of Commissioners, 142 F.3d 1319 (10th Cir. 1998).

The Ninth Circuit recently reiterated its Dodd holding in San Remo Hotel, L.P. v. San Francisco, 364 F.3d 1088 (9th Cir. 2004), but the United States Supreme Court has recently granted certiorari in San Remo, and will hopefully confirm that there remains a meaningful federal forum for Fifth Amendment takings claims which arise from the application of state or local law. San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 685 (2004).

V. RIPENESS FOR TAKINGS CLAIMS IN FLORIDA

A. Meaningful Application & Final Decision

Florida courts have generally adopted federal ripeness policy, including the requirement of a sufficiently final decision upon at least one meaningful application. Lost Tree Village Corp. v. City of Vero Beach and Town of Indian River Shores, 838 So.2d 561 (Fla. 4th DCA 2002) at 570, Taylor v. Vill. of N. Palm Beach, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995). In some cases, Florida courts have also found a lack of ripeness where the landowner had not re-applied for less intense uses upon denial of a more grandiose plan.

For instance, in Tinnerman v. Palm Beach County, 641 So.2d 523 (Fla. 4th DCA 1994),

an owner applied for rezoning from agriculture to commercial use, consistent with the relevant comprehensive plan. The owner's application was granted subject to a condition that there be no actual construction until the fronting road was improved. The condition creating this effective moratorium on building permits was later modified to allow some of the commercial development before road improvement, after which the owner sued for temporary taking for the time that the moratorium had existed. The trial court dismissed the claim as unripe and was upheld on appeal because the owner had not submitted less intense proposal when comments by Board members indicated they would consider alternate uses.

The Fourth District held similarly in Martin County v. Section 28 Partnership, 676 So.2d 532 (Fla. 4th DCA 1996), where the owner of square mile of land sought to develop a golf course community through PUD rezoning and a comp plan amendment to allow for urban services. The comp plan amendment was denied by the County Commission, and the rezoning application was never voted upon because it would have been inconsistent with the existing comp plan. The owner brought a takings claim (among others), but it was not ripe because, while the owner had been denied a comp plan amendment and associated PUD, it had not applied for less intense uses available under the existing zoning.

The court in McKee v. City of Tallahassee, 664 So.2d 333 (Fla. 1st DCA 1995) refused to acknowledge futility where an owner of property classified as "successional forest" sought a variance from development restrictions and was denied. The First District affirmed the trial court's dismissal of the owner's inverse case as unripe, finding that the denial of a variance was not a final decision regarding the development that would be permitted. The court did not deem the variance application "meaningful" because it did not include a specific development plan, despite its recognition that the cost of preparing a development plan might well exceed the value of the property in question. In concluding that there was no futility, the court relied heavily on agency "assurances" that a "properly drawn" application would be given favorable consideration and that the agency would work with the owner's conceptual development plan to minimize regulatory expense.

By contrast, the appellate court in Koontz v. St. Johns River Water Management District, 720 So.2d 560 (Fla. 5th DCA 1998) *rev. den.* 729 So.2d 394 (Fla. 1999), reversed the trial court's dismissal on ripeness grounds where the owner had made only one application which was denied. The owner applied to develop a portion of his 14.9 acre property and sought a permit to dredge 3.4 acres. The agency agreed to recommend

approval if the owner would deed the remaining portion to the conservation area and do off site mitigation by replacing culverts or doing other work on other property owned by the district. The owner agreed to deed requirements but refused the off site mitigation demand, alleging that further mitigation would be economically infeasible. In reversing, the District Court rejected the agency's position that the owner should have made "additional filings making other concessions until the District finally approves the permits before an owner is permitted to pursue a regulatory taking." The court specifically ruled that "[i]f the governing body finally turns down an application and the owner does not desire to make any further concessions in order to possibly obtain an approval, the issue is ripe," and recognized that the imposition of a further application requirement would have the resultant effect of discouraging the owner, "so that he might just go away." The court further reasoned that the owner's final submission "drew a line in the sand" beyond which he would not proceed, making the issue "ripe" for determination.

City of Riviera Beach v. Shillingburg, 659 So.2d 1174 (Fla. 4th DCA 1995) presents a disturbing example of how an agency may thwart an owner's best efforts to ripen a takings claim in applying for the least intense use conceivable. The case involved submerged lands in intracoastal waterway which were originally zoned for single family development and later re-designated "special preservation" by the city in its comprehensive planning process. The express policy of the "special preservation" designation was to preclude any development of submerged lands, but the plan also commissioned a study to determine what uses might be compatible with the preservation policy. Given previous case law holding that mere enactment of a preservation land use category might not support a takings claim, Shillingburg attempted in good faith to demonstratively ripen his claim by applying for the most passive use imaginable – a viewing dock – denial of which under the new designation would surely show the lack of any economically viable use. The city denied his dock permit, and Shillingburg brought his takings claim.

To stave off liability, the city requested a stay before trial to pursue an amendment to its plan which would allow non-motorized viewing docks such as the one requested. A stay was granted while the Department of Community Affairs considered the city's proposed amendment. The amendment was ultimately adopted, paving the way for approval of the owner's dock application. Despite the owner's contention that he had applied for the viewing dock to illustrate how little use could be made of his property and that it did not provide an economically viable use (to which the trial court agreed), the Fourth District dismissed Shillingburg's takings claim on the technical ground that, given the amendment, he could have the dock for which he applied! The merits of whether a

viewing dock constituted an economically viable use of the property were never reached.

After the Shillingburg appeal, the landowner applied for a permit to build a single family residence on the submerged lands. Riviera Beach denied the application, stating in its denial letter that the City's comprehensive plan did not allow the construction of residential development in areas with a "special preservation" land-use designation. The landowner then filed an action for a regulatory taking. The court dismissed the complaint on the grounds that the claims, again, were not ripe because she failed to show she made a "meaningful application" to Riviera Beach for an amendment to the comprehensive plan. The landowner filed a second complaint. This time she specifically alleged that Riviera Beach denied her building permit and attached the city's denial letter. The trial court again dismissed her complaint for lack of ripeness.

The landowner appealed the dismissal, and this time, the Fourth District ruled for the landowner. Taylor v. City of Riviera Beach, 801 So.2d 259 (Fla. 4th DCA 2001). The court found the landowner's building permit application constituted a "meaningful application," making her regulatory taking claim ripe for judicial review.

Further evidence that Florida courts have fully embraced Palazzolo's refinements to the ripeness rule is found in Lost Tree Village Corp. v. City of Vero Beach and Town of Indian River Shores, 838 So.2d 561 (Fla. 4th DCA 2002) which contains a summary of Florida's adaptation of Williamson County's first prong. *Id.* at 570-572. The case then applies those principles to an array of facial and as-applied claims raised by the owners of the islands in that case.

C. **Futility**

Florida courts also recognize the futility exception to ripeness. For example, in Gardens Country Club v. Palm Beach County, 712 So.2d 398 (Fla. 4th DCA 1998), the court concluded that a takings claim was ripe for consideration on the merits despite the fact that the owner had not applied for development approval under a new comprehensive plan. The owner had submitted a development proposal consistent with a 1980 comprehensive plan which allowed a density of up to five units per acre. Though the 1980 plan was still in effect, the County refused to consider the owner's application because it was about to enact its 1989 comprehensive plan which would reduce the allowable density to one unit per twenty acres. (Before adoption of the 1989 plan, the County had passed an ordinance directing staff not to consider any applications which

would be inconsistent with it.) Based on these facts, the court concluded that submission of the owner's development plan under after adoption of the 1989 comprehensive plan would have been futile.

Similarly in Taylor v. City of Riviera Beach, 801 So.2d 259 (Fla. 4th DCA 2001), discussed *supra*, the court also rejected Riviera Beach's argument that the landowner needed to submit an application for amendment to the comprehensive plan. The earlier Shillingburg decision required only a meaningful application for intended use of the land, not a specific application for an amendment. The court went on to analyze that even if an application for amendment were required, any further submissions would be futile under the circumstances of that case.

Monroe County v. Gonzalez, 593 So.2d 1143 (Fla. 3d DCA 1992) presents another interesting fact pattern. There, a landowner's takings claim was deemed ripe after denial of a single request to rezone his .4 acre offshore island lot because all other possible administrative relief would have been futile. Density and open space limitations imposed by the existing zoning precluded any development of the lot, and no variance from the open space requirement was possible under the county code. Further administrative procedures to obtain a "beneficial use" exception would have restored, at most, 40% of the property's value and thus would be futile under the 100% compensation standard of the state and federal constitutions. Thus, a request for rezoning to a category that would allow some development was the only meaningful remedy, and upon its denial, the takings claim became ripe.

Lost Tree Village Corp. v. City of Vero Beach and Town of Indian River Shores, 838 So.2d 561 (Fla. 4th DCA 2002) applied the futility exception in discerning which of several as-applied claims were ripe. The court held that certain of the owner's as-applied claims could proceed to the merits because it would have been futile to pursue comprehensive plan amendments. For example, the owner's claim that interrelated regulations of the City and Town (one forbidding development without bridge access and the other forbidding any bridgeheads on the nearby mainland) effectively prohibited development of certain islands was deemed ripe because the regulations were so absolute in their terms, the municipalities had defended the provisions for over a decade in state administrative proceedings, and officials had made express statements that they would deny development. Further application by the owner to amend the comprehensive plan would therefore have been futile.

Similarly, the court in Golf Club of Plantation v. City of Plantation, 847 So.2d 1028 (Fla. 4th DCA 2003) found that the futility exception had been satisfied where the City had denied four applications for residential use of land designated as golf course. A written City land use policy prohibited conversion of all golf courses to any other use. The City defended by arguing that the landowner should have sought a comprehensive plan amendment. In light of these facts, the court held that no further applications would be required, stating:

The City has made it clear beyond doubt that its ban against converting golf courses is absolute and that it will not approve conversions of any kind. Its position does not depend on the nature of any proposed alternative use. City bans *all* golf course conversions to *any* other uses. Hence City's protest that Owner should first make full application for a specified, other residential or recreational use amounts to an insistence that Owner perform a futile (not to mention expensive) and (in this case) duplicative act.

Id. at 1031 (emphasis in original).

D. Facial Claims

As with federal takings, there is generally no ripeness requirement for a facial claim because the takings inquiry focuses on the "mere enactment" of the statute and not how it is applied or administered. Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990). The ability to challenge a land use regulation on its face may often depend on whether any variance procedure is available. For example, compare Joint Ventures Inc. v. Dept. of Transportation, 563 So.2d 622 (Fla. 1990) and Palm Beach County v. Wright, 612 So.2d 709 (Fla. 4th DCA 1993). For a good discussion contrasting as-applied and facial claims, see Lost Tree Village Corp. v. City of Vero Beach and Town of Indian River Shores, 838 So.2d 561 (Fla. 4th DCA 2002).

E. Prior Exhaustion of Administrative Remedies

Florida law contains an additional ripeness wrinkle which applies if a landowner seeks to challenge both the propriety of an agency action and alternatively contend that the action effects a taking. To preserve both claims, a landowner generally must first exhaust administrative remedies available to challenge the propriety of the agency action.³ The

³ It is important to note here that "final decision" for ripeness purposes and "exhaustion of administrative remedies" are not synonymous. "Final decision" in the ripeness context is less a

underlying policy is to give the executive branch the opportunity to fully consider the issue of propriety before any judicial intervention.

The clearest articulation of this doctrine is found in Key Haven Ass'd Enter., Inc. v. Board of Trustees of Internal Improv. Trust Fund, 427 So. 2d 153 (Fla. 1982). According to Key Haven, in the context of takings claims arising from regulatory decisions, an aggrieved landowner in Florida may *either*:

- 1.) concede the propriety of the regulatory decision and sue immediately in the trial court for inverse condemnation (compensatory takings claim); *or*
- 2.) first challenge the propriety of the agency action through administrative remedies and, if necessary, direct appeal; and *either*
 - a.) bring forward the takings claim as part of the direct appeal of the propriety issue (if the record is sufficient to support the alternative takings claim); or
 - b.) bring a takings claim in the trial court if the appellate court upholds the agency action.

See also, Atlantic Int'l Investment Corp. v. State, 478 So.2d 805 (Fla. 1985); Janson v. City of St. Augustine, 468 So.2d 329 (Fla. 5th DCA 1985); Dept. Environmental Protection v. Youel, 787 So.2d 923 (Fla. 5th DCA 2001); Fla. Fish & Wildlife Conservation Comm'n v. Pringle, 838 So.2d 648 (Fla. 1st DCA 2003).

Bringing a takings claim in the trial court first has the effect of waiving any challenge to the propriety of the offending regulation. In other words, the landowner who does so admits the agency action was authorized and for a public purpose, and merely argues that it causes a loss of all economically viable use of the property. *See, e.g., Youel, supra*.

However, while an owner is estopped from denying the propriety of the agency action once it chooses the circuit court forum, an owner is not estopped from bringing an inverse condemnation claim in circuit court if the propriety of the offending agency action is upheld in the administrative appeal process. Albrecht v. State, 444 So. 2d 8, 13 (Fla. 1984) (neither res judicata nor estoppel by judgment applied to a circuit court claim of an

requirement than "exhaustion of administrative remedies" because it does not always require further appeal of agency action. Bowen v. Department of Env'tl. Reg., 448 So. 2d 566, 569 (Fla. 2d DCA 1984), *aff'd*, 472 So. 2d 460 (Fla. 1985)

uncompensated taking commenced after the district court's denial of a petition alleging facial unconstitutionality of a statute).

The Florida Legislature has codified exhaustion requirements for agency permitting decisions involving state lands, § 253.763 Fla.Stat., water resources § 373.617 Fla.Stat., and environmental control §403.90 Fla.Stat.. These statutes require "final action" by an agency before resorting to the circuit court. Upon a permit denial, an owner can contest the validity of the permit denial in the Florida District Court or file suit in the circuit court claiming that the denial was proper, but resulted in an unconstitutional taking of property. *See, e.g., Bowen v. Department of Env'tl. Reg.*, 448 So. 2d 566, 569 (Fla. 2d DCA 1984), *aff'd*, 472 So. 2d 460 (Fla. 1985). The practitioner should consult these statutes for applicable filing periods.

The practitioner should also note that the Florida Supreme Court distinguishes between a facial challenge to a statute as opposed to an agency rule. When challenging the unconstitutionality of an agency rule, there must be an exhaustion of administrative remedies in order to afford the agency an opportunity to remedy a constitutional problem. *Lee County v. New Testament Baptist Church of Fort Myers, Fla. Inc.*, 507 So. 2d 626 (Fla. 2d DCA 1987) and *Pringle*, *supra*.

Finally, the practitioner should be aware that this common law exhaustion requirement is subject to a common law exceptions. Case law in this area hold that the administrative remedies must be both available⁴ and adequate to justify withholding the exercise of circuit court jurisdiction. Administrative remedies are "inadequate" if the remedy would be "too little, too late" to prevent the alleged harm. *See generally, UState ex rel. Dept. of General Services v. Willis*, 344 So. 2d 580 (Fla. 1st DCA 1977).

F. Ripeness and Related Statutory Claims

The Florida Legislature has curbed some of the potential agency abuse of the ripeness doctrine through its 1995 enactment of the Bert J. Harris Private Property Rights Protection Act (§70.001, Florida Statutes) and the Land Use and Environmental Dispute Resolution Act (§70.051, Florida Statutes).

Provisions of these acts require agencies to come forward with their determination(s) of allowable use within reasonable time frames, in contrast to the common law framework

⁴ For example, no administrative remedy is available if there is no procedural "point of entry" for a landowner to challenge administrative action.

(particularly prior to Palazzolo) which promoted agency gamesmanship. *See, e.g.*, § 70.001(5)(a) Fla. Stat. (2005)(requiring involved agency to issue a written decision “identifying the allowable uses to which the subject property may be put” within 180 days of receiving the landowner’s presuit claim letter.

Statutory pre-requisites to these requirements must however be met. For example, the requirement that an agency provide written identification of allowable use under § 70.001(5)(a) Fla. Stat. is not triggered unless the aggrieved landowner first submits an appraisal-supported claim letter, according to § 70.001(4)(a).

Likewise, there must be a “development order” sufficient to trigger the 165 day period within which the agency must appoint a special master provided in § 70.51 of the Land Use Dispute Resolution Act. An agency letter relaying results of a field inspection to delineate wetlands does not constitute a sufficiently formal “development order.” Hanna v. Environmental Protection Commission, 735 So.2d 544 (Fla. 2d DCA 1999).

These new statutory ripeness procedures not only reduce hardship on owners, but they further the policies of the ripeness doctrine by facilitating administrative resolution of disputes and clear delineation of use.

Some agencies have argued that the “ripeness decision” required by § 70.001(5)(a) Fla. Stat. (2005) constitutes a legislative encroachment on the judicial branch in that the determination ripeness is a judicial function. Read in context, however, the provision merely establishes an administrative deadline for response to a claim. The written identification of allowable use is then available to a court of law for its determination of ripeness.

CONCLUSION

The United States Supreme Court has in recent years significantly refined its ripeness doctrine by limiting the administrative lengths to which owners must go to ripen a takings claim. A resulting trend toward more realistic requirements of owners is now discernable in the state courts, including Florida. That notwithstanding, ripeness remains an elusive concept which courts address on a case by case basis. Further guidance from the U.S. Supreme Court may be forthcoming on the extent to which (and procedures by which) takings claimants may effectively ripen a federal takings claim and have a day in federal court on alleged Fifth Amendment violations.