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PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

H.R. 4772

JUNE 8, 2006

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PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 2005

THURSDAY, JUNE 8, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:03 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order.

This is the Constitution Subcommittee of the Judiciary Committee, and we welcome everyone here this afternoon. We will have some other Members probably coming here shortly on both sides.

The Constitution Subcommittee convenes today to discuss H.R. 4772, the "Private Property Rights Implementation Act," which I introduced earlier this year, along with the Democratic principal sponsor of the bill, Bart Gordon, to help all Americans defend their constitutional property protected rights.

Most Americans are familiar with one recent decision involving all Americans property rights, the case of *Kelo v. City of New London,* in which the Supreme Court held that the Constitution allows the Government to take private property from one citizen and give it to private companies or other private individuals.

The House of Representatives acted to correct that notorious decision by passing a bill, H.R. 4128, by the overwhelmingly bipartisan margin of 376–38. However, the Supreme Court, during its last term, handed down another—what many of us consider us to be bad decisions—that fails to protect the private property rights of all Americans. And correcting that decision through the legislation we will be discussing today should have the same bipartisan support, we hope.

Here is what the problem is. Strange as it sounds, under current law, property owners are now blocked from raising a Federal fifth amendment takings claim in Federal court.

And here is why. The Supreme Court's 1985 decision in *Williamson County v. Hamilton Bank* requires property owners to pursue, to the end of all available remedies, for just compensation in State court before the private property owner can file suit in Federal court under the fifth amendment.

Then, just last year, in the case of *San Remo Hotel v. City and County of San Francisco,* the Supreme Court held that, once a property owner tries their case in State court and loses, the legal doctrine of claim preclusion requires Federal courts to dismiss the

claims that have already been raised in State court, even though the property owner never wanted to be in State court with their Federal claims in the first place.

The combination of these two rules means that those with Federal property rights claims are effectively shut out of Federal court on their Federal takings claims. These decisions set them unfairly apart from those asserting any other kind of Federal rights, such as those asserting free speech or religious freedom rights, who nearly universally enjoy the right to have their Federal claims heard in Federal court.

The late Chief Justice Rehnquist commented directly on this unfairness, observing in his concurring opinion in the *San Remo* case that, "The *Williamson County* decision all but guarantees that claimants will be unable to utilize the Federal courts to enforce the fifth amendment's just compensation guarantee."

The Second Circuit Court of Appeals also noted that, "It is both ironic and unfair if the very procedure that the Supreme Court required property owners to follow before bringing a fifth amendment takings claim, a State court's taking action, also precluded them from ever bringing a fifth amendment takings claim in Federal court."

H.R. 4772, the "Private Property Rights Implementation Act," will correct the unfair legal bind that catches all property owners in what is effectively a Catch-22. This bill, which is based on Congress's clear authority to define the jurisdiction of the Federal courts and the appellate jurisdiction of the Supreme Court, would allow property owners raising Federal takings claims to have their cases decided in Federal court without first pursuing a wasteful and unnecessary litigation detour, and possible dead end, in State court.

H.R. 4772 would also remove another artificial barrier blocking property owners' access to Federal court. The Supreme Court's *Williamson County* decision also requires that, before a case can be brought for review in a Federal court, property owners must first obtain a final decision from the State government on what is an acceptable use of their lands.

This has created an incentive for regulatory agencies to avoid making a final decision at all by stringing out the process, and thereby forever denying a property owner access to courts. Studies of takings cases in the 1990's indicate that it took property owners nearly a decade of litigation, which most property owners can't afford, before takings claims were ready to be heard on the merits in any court.

To prevent that unjust result, H.R. 4772 would clarify when a final decision has been achieved and when the case is ready for Federal court review. Under this bill, if a land use application is reviewed by the relevant agency and rejected, a waiver is requested and denied, and an administrative appeal also rejects the application, then a property owner can bring their Federal constitutional claims in a Federal court.

The bill would change the way agencies resolve disputes. Rather, H.R. 4772 simply makes clear the steps the property owner must take to make their case ready for court review.

H.R. 4772 also clarifies the rights of property owners raising certain types of constitutional claims in the following ways.

And I recognize myself for 1 additional minute, without objection.

First, it would clarify that conditions that are imposed upon a property owner before they can receive a development permit must be proportional to the impact the development might have on the surrounding community.

Second, it would clarify that, if property units are individually taxed under State law, then the adverse economic impact of a regulation—excuse me—then the adverse economic impact of a regulation has on a piece of property should be measured by determining how much value the regulation has taken away from the individual lot affected, not a whole collection of lots grouped together.

Third, the bill would clarify that due process violations involving property rights should be found when the Government has been found to have acted in an arbitrary and capricious manner.

I think we all look forward to discussing this legislation with our witnesses here this afternoon. We want to, again, thank them for appearing.

And at this time I will yield to the gentleman from New York, Mr. Nadler, who is the Ranking Member of the Constitution Subcommittee, for the purposes of making an opening statement.

Mr. NADLER. Thank you, Mr. Chairman. I want to join you in welcoming our witnesses today.

I think we all agree that the Constitution's protection of property rights must be preserved. The Constitution provides for just compensation when Government takes property, but nowhere does it spell out exactly what a taking is. That has been left to those unelected Federal judges who, just yesterday, we were trying to strip of all authority to hear cases involving the Pledge of Allegiance.

We were told by the sponsors of this legislation that Congress has the power to strip the Federal courts of their jurisdiction to hear a particular constitutional claim, so long as the State courts remained available to hear the claim. What a difference a day makes.

Today, we have legislation that removes the most fundamentally local issues—zoning, environmental protection, infrastructure costs, development, sprawl—and plucks them out of the States and into the arms of those unelected Federal judges we didn't trust yesterday. It is enough to make your head spin.

Whatever dangers to the environment this legislation may pose, it is green in at least one respect: It is an outstanding example of recycling, taking us all back to those memorable days of Newt Gingrich's contract on America.

Later versions of that effort, which have been called kindler and gentler—and gentler, by at least one legal scholar, focused on procedural issues, a euphemism for forum shopping.

This bill is a little less kind and a little less gentle. It greatly expands the definition of a taking. It appears to require the Government to provide compensation in many cases where the Constitution would not. It would allow developers to game the system by arbitrarily dividing their lots to squeeze money out of our communities.

Let us remember what is involved in many of these so-called regulatory takings cases. What is involved is the protection of the environment and local planning areas.

Should we have to pay off someone to keep them from degrading our water supply? That seems to be the claim of some developers who want to fill in wetlands at will.

What shall we tell the communities devastated by Hurricane Katrina who are bracing for the next hurricane season and need remaining wetlands to protect them? Who pays for the damage caused by wetlands devastation? Other taxpayers. They are the ones who—who will have their taxes raised to build new water purification plants.

Should we have to pay off people if we want to control sprawl? How about if we make them pay for some or all of the costs of the new roads, sewers, water lines and schools that will be needed when they are done with their development?

My friends on this Committee have often railed against trial lawyers who engage in forum shopping. Now this Committee appears prepared to legislate forum shopping to benefit one particular group: real estate developers.

This legislation provides a new and preferential standard for one group asserting its rights under section 1983, real property owners, not other property owners, not people who have been denied the right to counsel, not the descendents of former slaves, or any of the other myriad groups who look to the courts to vindicate their rights and for whom section 1983, which deals with depravation of civil rights under color of law, was written.

By all means, we should protect property rights. But we should not so distort the process to give some developers virtual immunity from legitimate land use and environmental legislation, as I very much fear that this bill would do.

I look forward to the testimony of the witnesses, and I yield back the balance of my time.

Mr. CHABOT. I thank the gentleman.

And the chair would just note—I am sure it was a slip of the tongue—but it was the "Contract with America," not the "Contract on America."

Mr. NADLER. It was most certainly not a slip of the tongue. [Laughter.]

Mr. CHABOT. I stand corrected, as so does the Ranking Member.

Do any of the other Members of the Committee present wish to make an opening statement?

Okay, we will go right into introducing the distinguished witness panel that we have here this afternoon.

Our first witness is Joseph Trauth. Mr. Trauth is a member of the Cincinnati law firm of Keating, Muething and Klekamp, where he practices zoning, planning and land use law. Mr. Trauth is a graduate of Xavier University and the University of Cincinnati's School of Law.

Prior to practicing law at his current—excuse me—Mr. Trauth served in the U.S. Peace Corps as assistant to the director of economic development in Western Samoa, as assistant to U.S. Congressman W.J. Keating, and as chairman of the Volunteer Lawyers

for the Poor Foundation. He was also listed as Ohio's "Super-Lawyer" in 2004.

And we welcome you here this afternoon, Mr. Trauth.

Our second witness is Franklin Kottschade.

Am I pronouncing that correctly, Mr. Kottschade? Thank you.

Representing the National Association of Home Builders, a federation of more than 800 State and local associations, whose mission is to enhance the climate for housing in America.

Five years ago, Mr. Kottschade was named party in a case called *Kottschade v. City of Rochester* that sought to overrule the Supreme Court's *Williamson County* decision, but the Supreme Court ultimately decided not to hear his case.

And we welcome you here this afternoon.

Our third witness is Daniel L. Siegel. Mr. Siegel is the supervising deputy attorney general, in charge of the California attorney general's land law section. He represents various State agencies in complex State and Federal land use lawsuits, including many taking factions.

In this capacity, he has authored amicus curiae briefs on behalf of the California attorney general in takings cases such as *Brown v. Legal Foundation of Washington* and *San Remo Hotel v. City and County of San Francisco.* Mr. Siegel is graduate of the New York University School of Law.

And we welcome you here this afternoon, Mr. Siegel.

Our fourth and final witness is Professor Steven Eagle of George Mason Law School. Excuse me. Professor Eagle is an expert in regulatory takings and other aspects of property law, who has appeared before this Subcommittee many times.

He is the author of a leading property law treatise and many other scholarly and popular articles on the subject. He also teaches a variety of programs for judges and the practicing bar. Professor Eagle received his J.D. from Yale Law School.

We thank all our witnesses for taking their time out of very busy schedules, as we know, to appear before us this afternoon.

And, Professor Eagle, congratulations, by the way, on a tremendous basketball season this year. We were all watching, and hoping, and praying. Since the University of Cincinnati in my district didn't quite make it this year, we were pulling for you all. And we had staff people that were attending almost all your games. So a job well done.

It is the practice of the Committee to swear in all witnesses appearing before us, so if you would all please stand and raise your right hands.

Do you swear that, in the testimony you are about to give, you will tell the truth, the whole truth, and nothing but the truth, so help you God?

Thank you. All witnesses have indicated in the affirmative.

Finally, I would like to just explain to you what we call the 5-minute rule here. Each of the witnesses will have 5 minutes. And each of the Members who are asking questions up here will also have 5 minutes.

We even have a lighting system up there. When you begin speaking, the green light will come on. That will be on for 4 minutes. A yellow light will come on after 4 minutes to let you know you

have about a minute to wrap up. And then the red light will come on.

We would appreciate it if you would wrap up within that time, if at all possible. I won't gavel you down immediately, but we are keeping pretty close track of time. So if you could stay within that, we would very much appreciate that.

And, Mr. Trauth, you are recognized for 5 minutes.

TESTIMONY OF JOSEPH TRAUTH, JR., PARTNER, KEATING, MUETHING & KLEKAMP, PLL

Mr. TRAUTH. Thank you, Chairman Chabot, Ranking Member Nadler, Members of the Subcommittee.

My name is Joseph L. Trauth, Jr. I am an attorney with the law firm of Keating, Muething & Klekamp in Cincinnati, Ohio, full service law firm. I am licensed to practice both in Ohio and Kentucky, and I have specialized during that period in land use law and real estate law.

The primary purpose of H.R. 4772 is to simply and expedite access to the Federal courts for parties injured under the 5th and 14th amendment of the United States Constitution. The bill is primarily concerned with regulatory takings.

We often hear about the eminent domain cases, which are very high-profile, but every day we have regulatory takings, and I have seen it over the past 32-plus years.

The following details the significant impact the bill would have, as well as the reasons its passage is necessary. My testimony focuses primarily on section II and section V of the bill.

And I would like to say that this is not a developers' bill; it is not a builders' bill. It is a personal property rights bill, and those are the people that I represent every day. These are the personal; these are the people who own property personally, farmers, people who have held land in their family, people who have put all of their money into property.

Section II of the bill is primarily aimed at granting property owners with Federal takings claims access to the Federal courts system. Currently, an aggrieved party must file suit in State court when municipalities or other governmental agencies violates his or her 14th amendment or fifth amendment property rights. Even if the property owner brings a purely Federal claim, he or she will be barred from filing in Federal court.

The *Williamson County* case that was talked about early strips property owners of protected rights. *Williamson County* created three harmful effects for property owners.

First, by requiring that fifth amendment takings cases to originate in State court, States have developed different standards interpreting what constitutes a taking and when a taking is unconstitutional.

The second consequence of *Williamson County* is that the costs associated with litigating a taking claim have dramatically increased.

And, finally, after *San Remo Hotel v. San Francisco* was decided in 2005, property owners were left with the possibility of never being able to bring their takings claims under the fifth amendment in a Federal court.

The problem is with different State standards. There is no logical reason why the fifth amendment should mean different things depending upon which State you reside in. However, as a result of *Williamson County,* this is exactly what has happened.

State courts, such as Ohio, have elevated themselves above the Supreme Court of the United States in regards to interpreting the Federal Constitution.

The Supreme Court has established a two-part disjunctive test to prove unconstitutionality. Does the ordinance substantially advance the legitimate State interests? Or does it deny the owner with economically feasible use of his land?

Unfortunately, in Ohio, back in 1990, Ohio created a conjunctive test. You had to prove both, and you had to prove both beyond fair debate, which was interpreted under case law as to mean beyond a reasonable doubt.

So to protect your constitutional fifth amendment right in Ohio, you have a criminal prosecution standard to meet in order to protect your federally granted fifth amendment property rights. That is just wrong; it is inappropriate.

Kentucky and Indiana, who are in our region, have slightly different standards. Passing H.R. 4772 solves the problem of differing State standards. Its passage is necessary for Ohioans to fully enjoy their constitutional rights.

Ohio essentially seceded from the fifth amendment and the 14th amendment for 8 years. And they still today require a criminal conviction standard for property owners to prove that his or her Fifth and 14th amendment rights have been trampled. Passing of this bill will reunite Ohioans with their 5th and 14th amendment rights.

The exhaustion requirement of *Williamson County* can prohibitively increase litigation costs. I have two stories. One was a case that I had in Ohio, where an intersection next to an expressway was zoned for single-family housing. We fought it for 8 years in a State court before we got to a damage claim, and at that point in time my clients had to settle, because it had just gone on too long and was too costly.

The second one is two parties, the township and the developer and the property owner, had signed a consent decree and the judge refused to sign the consent decree. This case is still going on today after 3 years, with no remedy in sight.

San Remo preclusion is a problem. And as I said, the fifth section of the bill, I think, clarifies and defines multiple constitutional standards. It does not make a dramatic shift in the law.

Finally, H.R. 4772 will provide uniformity to fifth amendment regulatory takings and eminent domain takings cases and ensure property owners rights throughout the United States as being adequately protected by the Federal courts.

Again, this is not for Fortune 500 companies. This bill is not for developers. This is for citizens of the United States who own property and have a right to have that protected in the Federal court, and I think this bill will do that. And we urge its passage.

Thank you.

[The prepared statement of Mr. Trauth follows:]

PREPARED STATEMENT OF JOSEPH L. TRAUGH, JR.

Testimony of Joseph L. Trauth, Jr.
Regarding H.R. 4772: "Private Property Rights Implementation Act of 2005"
The United States House of Representatives
Subcommittee on the Constitution, Committee on the Judiciary

My name is Joseph L. Trauth, Jr. I am a partner at Keating, Muething, & Klekamp, a full service law firm located in Cincinnati, Ohio. I have practiced law in the land use and zoning areas for over 32 years. I am licensed to practice law in both Ohio and Kentucky. From 1967-1969, I served in the United States Peace Corps in Western Samoa as Assistant to the Director of Economic Development. From 1971-1973, I served as an Assistant to United States Congressman William J. Keating. I have practiced law at Keating, Muething & Klekamp since 1973.

H.R. 4772 (titled "Private Property Rights Implementation Act of 2005;" hereafter "the bill") has been submitted to the House of Representatives by Congressman Steve Chabot. Its primary purpose is to simplify and expedite access to the Federal Courts for parties injured under the Fifth and Fourteenth Amendments of the United States Constitution. The bill is primarily concerned with regulatory takings. The following details the significant impact the bill will have as well as reasons why its passage is necessary. My testimony focuses primarily on Section II and Section V of the bill.

I. Section II of H.R. 4772

Section II of the bill is primarily aimed at granting property owners with federal takings claims access to the federal court system. Currently, an aggrieved property owner must file suit in state court when a municipality violates his or her Fifth or Fourteenth Amendment property rights. Even if the property owner brings a purely federal claim, he or she will be barred from filing in federal court.

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In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Supreme Court granted certiorari to address whether federal, state, and local governments must pay money damages to a property owner whose property had been temporarily taken due to government regulations. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985). Hamilton Bank, the property owner, alleged that stricter density requirements passed by the Williamson County Planning Commission denied them any economically viable use of their property. The initial suit claiming a regulatory taking under the Fifth Amendment was filed in a federal district court. *Id.* at 182.

The case proceeded on the merits of Hamilton Bank's arguments through the federal court system until it reached the United States Supreme Court. There, the Court held that Hamilton Bank's claim was premature and refused to address the merits of the case. *Williamson County*, 473 U.S. at 185. The Court stated that "because [Hamilton Bank] has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, [Hamilton Bank's] claim is not ripe." *Id.* at 186.

In regards to a final decision, the Court held that Hamilton Bank should have sought variances from the planning commission prior to suing in federal court. The court held "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186.

A. *Williamson County* Strips Property Owners of Protected Rights

Williamson County created three harmful effects for property owners. First, by requiring Fifth Amendment takings cases to originate in state court, states have developed different standards interpreting what constitutes a taking and when a taking is unconstitutional. The second consequence of *Williamson County* is that the costs associated with litigating a taking have dramatically increased. Finally, after *San Remo Hotel v. San Francisco* was decided in 2005, property owners were left with the possibility of never being able to bring their Fifth Amendment takings case in federal court. 545 U.S. 323 (2005).

1. The Problem of Different Standards

There is no logical reason why the Fifth Amendment should mean something different depending upon which state one resides. However, as a result of *Williamson County*, this is exactly what has happened. State courts, such as Ohio, have elevated themselves above the Supreme Court in regards to interpreting the federal constitution.

Before reviewing different state standards, a brief understanding of the federal standard for when a zoning ordinance is unconstitutional is necessary. The Supreme Court has established a two part disjunctive test. The application of a zoning law will be deemed an unconstitutional taking if the ordinance (1) does not substantially advance legitimate state interests or (2) denies an owner economically viable use of his land. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). The government has the burden of proving a substantial interest is served by the zoning regulation. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). By establishing a disjunctive test, a property owner need only satisfy one of two burdens to show a zoning regulation is unconstitutional.

In *Lingle v. Chevron U.S.A., Inc.*, the United States Supreme Court threw out the "substantially advances" test for takings claims. 544 U.S. 528 (2005). The Court held that the "failure to substantially advance a legitimate government interest" formula from Agins "has no proper place in our takings jurisprudence" because it "prescribes an inquiry in the nature of a due process . . . test . . . ." *Lingle*, 544 U.S. at 540. Passing H.R. 4772 will assure that this new standard is applied uniformly throughout the states.

As I will now demonstrate, not all states follow the above standard pronounced by the United States Supreme Court.

a. The Ohio Standard

In 1990, Ohio adopted its own test for applying the Fifth Amendment takings clause to zoning challenges. Rather than the disjunctive federal test, Ohio adopted a conjunctive test. In order to invalidate a zoning ordinance on constitutional grounds, a property owner had to show, beyond "fair debate," that the zoning classification denied them "the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community." *Ketchel v. Bainbridge Twp.*, 557 N.E.2d 779, 783 (Ohio 1990). "Fair debate" has been analogized to the criminal probative standard of "beyond a reasonable doubt." *Central Motors Corp. v. Pepper Pike*, 653 N.E.2d 639, 642 (Ohio 1995). The federal standard places the burden of proof on the government.

In applying this two-part test, the court would first determine whether the zoning ordinance allowed the landowner an economically feasible utilization of his land. Next, the court would determine whether the ordinance permissibly advanced a legitimate interest of the city. *Columbia Oldsmobile, Inc. v. Montgomery*, 564 N.E.2d 455, 457-458 (Ohio 1990).

In 1998, Ohio realigned itself with the *Agins* disjunctive test. After reconsidering *Agins* and its own prior cases on zoning challenges, the Ohio Supreme Court held that a zoning ordinance may be found unconstitutional if it is "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare regardless of whether it has deprived the landowner of all economically viable uses of the land." *Goldberg Cos. Inc. v. Richmond Heights*, 690 N.E.2d 510, 514 (Ohio 1998). Despite adopting the disjunctive *Agins* test, the property owner challenging the zoning ordinance maintained the burden of proof, and the standard of proof remained beyond fair debate. *Id.* at 515. This same burden of proof remains Ohio law today.

Current Ohio law is less protective of constitutionally guaranteed property rights than current federal law. By placing a high burden on the aggrieved property owner, i.e. "beyond a reasonable doubt," to show a zoning ordinance either serves no legitimate government interest or denies himself or herself of the economically viable use of his property, the Ohio Supreme Court has made it easier to pass unconstitutional zoning ordinances. Ohio is essentially depriving property owners of constitutionally protected rights. This is a fundamental violation of constitutional law. Passing H.R. 4772 would solve this problem by allowing an aggrieved property owner in Ohio to immediately sue under the Fifth and Fourteenth Amendments in federal court.

b. The Kentucky Standard

Kentucky adopts a similar approach to the federal courts in applying the *Agins* disjunctive test. The only minor difference is found when analyzing whether the government has proven its legitimate interest. Kentucky uses a "reasonable connection" test which states that the

burden for public improvements must bear a reasonable relationship to the benefits conferred on the subject development, to the overall benefit to the surrounding neighborhoods, and to the need for improvement necessitated by the development. *Lexington-Fayette Urban County Gov. v. Schneider*, 849 S.W.2d 557, 560 (Ky. Ct. App. 1992). While this technically differs from the rough proportionality test established in *Dolan*, it fundamentally answers the same question of whether the conditions and exactions placed on the landowner are fair. *Dolan v. Tigard*, 512 U.S. 374 (1994). However, it is different than the federal standard.

c. The Indiana Standard

Similar to Kentucky, Indiana follows the Supreme Court standard regarding the constitutionality of zoning regulations. See *Board of Zoning Appeals, Bloomington, Indiana v. Leisz*, 702 N.E.2d 1026 (Ind. Ct. App. 1998), *Georgetown v. Sewell*, 786 N.E.2d 1132 (Ind. Ct. App. 2003).

As can be seen with Ohio, differing interpretations of the Fifth Amendment takings clause can have a dramatic effect on a property owner's constitutional rights. While the simple solution appears to be for the aggrieved Ohio property owner to file suit in federal court under 42 U.S.C. § 1983, *Williamson County* has made this impossible. Passing H.R. 4772 makes this problem obsolete. Its passage is necessary for Ohioans to fully enjoy their constitutional rights. Ohio had essentially seceded from the Fifth and Fourteenth Amendments for eight years and requires today a criminal conviction standard for a property owner to prove that his or her Fifth Amendment property rights have been trampled. Passing H.R. 4772 will reunite Ohioans with their Fifth and Fourteenth Amendment Rights.

By bringing their case in a federal district court, property owners throughout the country will be ensured that their claim is going to be decided by the precedent established by the Supreme Court. This bill eliminates the problem of the Fifth Amendment meaning something different state by state. The constitution should be applied equally to every citizen, and this bill reflects that logic.

2. The Exhaustion Requirement of *Williamson County* can Prohibitively Increase the Litigation costs of an Aggrieved Property Owner

Williamson County requires a property owner with a federal takings claim to exhaust all state remedies prior to suing in federal court. As a result, property owners are unable to seek immediate redress from a federal court for a federal claim. They must first exhaust all state administrative remedies. This can become prohibitively expensive if the state agency or state court unnecessarily delays its decision.

One example of the unfairness that occurs currently is in Ohio where there is pending a case in which the township and the property owner agreed to settle a zoning state court litigation by a consent decree indicating that the current zoning on the property was unconstitutional and that the proposed zoning was reasonable. A state court judge refused to sign the consent decree stating that he felt there was a statutory right to referendum that was being abrogated.
The judge has effectively held up any development of this particular property owner's property for well over three years and still has not agreed to sign the consent decree which was agreed to by both interested parties. This inaction and cost of state court litigation has essentially taken away all of the property owner's Fifth Amendment property rights. Passing H.R. 4772 will prevent this from happening in the future.

H.R. 4772 will dramatically decrease the cost associated with litigating a Fifth or Fourteenth Amendment claim. The bill precisely defines, in a three-part standard, when a claim is ripe for judicial review. Without this bill, as detailed above, it is very easy for a state agency or court to drag out the property owner's case for years and years. At some point, the litigation costs become too high and the property owner is forced to drop their suit due to financial hardship. This affects the small property owner more than it does the large scale developers and Fortune 500 companies. The Constitution should protect citizens without regard to an individual's financial position.

Section II of H.R. 4772 states that a claim is ripe when the following three conditions are met:

> (1) the property owner submits and is denied a meaningful application to use property that is consistent with local land use and zoning requirements;
>
> (2) the property owner then applies for but is denied a waiver from applicable land use requirements that caused the initial application to be rejected and;
>
> (3) after the waiver is denied, the property owner then pursues but is denied an administrative appeal on the waiver.

It is important to note that the bill would not change the way agencies resolve disputes – it merely instructs the court when a "final agency action" has taken place.

3. *San Remo* and Preclusion

The third problem *Williamson County* poses for property owners was not created until the Supreme Court decided *San Remo Hotel v. City and County of San Francisco* in 2005. In *San Remo*, San Francisco enacted the Hotel Conversion Ordinance which, when applied to the San Remo hotel, resulted in the hotel having to pay $567,000 for a permit to continue its operation as

a tourist hotel. *San Remo Hotel*, 545 U.S. at 323. The hotel objected, claiming the ordinance effected a taking of their land. After the California courts rejected the hotel owner's state claims, he sued San Francisco in federal district court on their Fifth Amendment claim. Upon hearing the case, the Supreme Court held that the hotel owner was precluded from suing in federal court because his claim had already been exhausted in state court. The consequence of this decision was that the San Remo Hotel was never heard on its Fifth Amendment takings claim.

After *Williamson County* and *San Remo Hotel*, property owners are in an untenable situation whereby they may never get heard in federal court on their Fifth Amendment takings claims. *Williamson County* forbids property owners from bringing their claim initially in federal court and *San Remo* says that after state court proceedings, the property owners is precluded from bringing a Fifth Amendment claim in federal court. This catch-22 has effectively prevented property owners from raising a Fifth Amendment takings claim in federal court. By providing immediate access to federal courts on a Fifth Amendment takings claim, H.R. 4772 addresses and cures this problem.

II. Section V

Section V clarifies and precisely defines multiple constitutional standards. It does not, however, make a dramatic shift in the law. The provisions stated in Section V simply restate and clarify what the Supreme Court has already established in case law.

Subsection I of Section V clarifies that conditions or exactions imposed upon a property owner in order to receive a permit must be roughly proportional to the impact the development might have. This section restates the principles established in *Nollan* and *Dolan*. *Nollan*, 483 U.S. 836., *Dolan*, 512 U.S. at 374 (1994).

Subsection II of Section V addresses what is commonly referred to as the "denominator question" in cases concerning subdivided lots. The bill requires that federal courts look at the impact of a takings claim on each individual lot, not the subdivision as a whole. This is a question of fairness. After subdivisions are approved, the government will often later impose restrictions on certain lots. However, when challenging an action as unconstitutional, the courts tend to look at the subdivision as a whole and not the individual lot. The court reasons that if the property owner can still develop some lots, his rights are protected. The property owner is left with the unusable lots which he is paying a higher tax burden on. This provision reflects the notion that it is unfair for the government entity to both receive the higher tax revenue on individual lots while simultaneously denying the property owner use of that lot.

Finally, subsection III of Section V defines the standard for due process claims in a takings case as "arbitrary and capricious." This ensures that the constitution will be applied uniformly throughout the country. Currently, some courts are using a "shocks the conscience" standard for all due process claims. Land use decisions seldom shock the conscience, making this an unreachable standard. The appropriate standard for a due process claim in a land use matter is whether the government has no rational basis for its decision and makes and arbitrary and capricious decision. This provision of the bill reflects the appropriate standard for a due process claim in a land use matter.

III. Conclusion

H.R. 4772 will provide uniformity to Fifth Amendment regulatory and eminent domain takings cases and ensure that property owners' rights throughout the country are being adequately protected by the federal courts. The Supreme Court, through *Williamson County* and

San Remo, have created a system where it is all but impossible for a property owner to have their Fifth Amendment takings case heard in federal court. States, such as Ohio, have broken from Supreme Court precedent and dramatically decreased property owners' constitutional rights.

Under 42 U.S.C. § 1983, it is the role of the federal judiciary to oversee and correct actions taken by municipalities "under color of state law" that violate federal civil rights. Congress intended for Section 1983 to provide immediate access to federal courts for individuals deprived of their constitutional rights. Passing H.R. 4772 will provide this federal access and assure property owners across America their Fifth Amendment rights will be protected.

Mr. CHABOT. Thank you very much.

Mr. Kottschade, you are recognized for 5 minutes.

TESTIMONY OF FRANKLIN KOTTSCHADE, PRESIDENT, NORTH AMERICAN REALTY

Mr. KOTTSCHADE. Mr. Chairman, before I start, I would like to claim personal privilege to introduce my wife.

Mr. CHABOT. Go right ahead.

Mr. KOTTSCHADE. My wife, Bonnie, who is—we have been married 39 years. Thank you.

Mr. CHABOT. We welcome you here, also, Mrs. Kottschade.

Mr. KOTTSCHADE. Chairman Chabot, Ranking Member Nadler, Members of the Subcommittee, my name is Franklin Kottschade. I am a builder-developer from Rochester, Minnesota. And I am pleased to testify on behalf of the National Association of Home Builders in support of H.R. 4772, the "Private Property Rights Implementation Act."

Last year, the House took decisive and swift action in response to the United States Supreme Court's *Kelo* decision. Unfortunately, misuse of eminent domain powers is not the only abuse of the fifth amendment protections.

A more persuasive and subtle abuse of private property rights can occur when Government regulates the property as if they condemned it. When Government entities take private property rights through excessive regulation and then refuse to pay just compensation, property owners should be able to protect their constitutional rights in Federal court, just as has been done with other constitutional rights.

H.R. 4772 levels the playing field in the regulatory takings context by allowing owners to bring takings claims directly to Federal court. I am one of the many litigants who attempted without success to address the violations of my constitutional rights in Federal court.

In 1992, I embarked on a 14-year legal battle. I applied for approval of 104-unit development, consistent with existing zoning regulations. The city said yes, but imposed nine owners conditions that rendered the number of townhouses I could build to 26, and made the project economically infeasible.

The city's conditions would have added $70,000 to each townhouse, a 300-percent increase in an area where the average townhouse market was $125,000.

Every effort I made to negotiate or appeal the decisions of the zoning board and the city common council was flatly denied. After 9 years of negotiations with the city, I filed suit in Federal court in 2001. And 5 years after filing that suit, I still do not—I still don't know if my fifth amendment rights were violated because a court has never heard the merits of my case.

Federal courts refuse to hear my case, ruling that I must first defend my constitutional rights in State court, and yet the recent Supreme Court decision in *San Remo* confirms that once a takings plaintiff goes to State court, he will be unable to later access the Federal courts.

As a result, property rights claims under the fifth amendment bear the unfortunate and unique distinction of never being heard

in Federal court, unlike the protection of other provisions by the Bill of Rights.

Accordingly, various studies show, undertaken by the National Association of Home Builders, over the past 15 years, only 19 out of 161 taking cases brought to Federal court were considered on its merits. Of course, this was before *San Remo* completely shut the door to the Federal court.

And of 18 Federal appellate cases where the merits were reached, it took property owners on an average of 9.1 years to have a Federal court reach its final determination. This is wrong.

Ironically, if my case were involved in building of a church instead of townhouses, I could have gone directly to Federal court, because Federal courts will hear the first amendment land use cases. Only property owners with fifth amendment claims are denied ever the specter of justice.

Currently, municipalities and local governments hold all the cards. I learned recently of a case that clearly shows the system is broken, *Koscielski v. City of Minneapolis.* The property owner filed a claim in State court. Minneapolis had the case removed to Federal court, which the federal—which the Supreme Court rules under its ruling in the *College of Surgeons*.

Once in Federal court, the city of Minneapolis argued that Mr. Koscielski's takings were not ripe because he had not gone to State court. Yet it was the city of Minneapolis that requested the removal to Federal court in the first place.

And this is not an isolated situation. The exact same thing happened in the Fifth Circuit.

The Government's abuse of the system in these cases is egregious. It wastes the court's time and forces property owners on an expensive, wild goose chase through our courts. Congress must restore the balance between Government and property owners by passing this important legislation which will put the fifth amendment back on par with the rest of the Bill of Rights.

Mr. Chairman, Members of the Committee, thank you for the opportunity to testify today.

[The prepared statement of Mr. Kottschade follows:]

PREPARED STATEMENT OF FRANKLIN P. KOTTSCHADE

Before the Subcommittee on the Constitution
Of the Judiciary Committee,
U.S. House of Representatives

Testimony of Franklin P. Kottschade
On Behalf of the National Association of Home Builders
In Support of H.R. 4772,
Private Property Rights Implementation Act of 2005

Chairman Chabot, Ranking Member Nadler, and Members of the Subcommittee, my name is Franklin P. Kottschade. I am a home builder and developer from Rochester, Minnesota, and a member of the National Association of Home Builders (NAHB). I am pleased to provide testimony on NAHB's behalf in support of H.R. 4772, *the Private Property Rights Implementation Act of 2005*.

I. Background on NAHB and its Support for Property Rights.

Founded in 1942, NAHB is a federation of more than 800 affiliated state and local building industry associations. It is the voice of the housing industry in the United States. NAHB represents over 225,000 builder and associate members throughout the country, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB's builder members will construct about 80 percent of the more than 1.9 million new housing units projected for 2006, making housing one of the largest engines of economic growth in the United States.

NAHB supports a sensible balance between growth to meet the Nation's housing demands, and protection of the environment and natural resources for future generations of Americans. To achieve that balance, NAHB's members must cooperate with land use officials at all levels of government so that growth proceeds in a planned and orderly manner.

Sometimes land use regulators go too far in placing demands on property owners. It is all too common for government officials to single-out the development community to shoulder the burden of civic improvements which, in all fairness and justice, the public as a whole should bear. Property owners face unfair legal barriers that undercut 42 U.S.C. § 1983 of the Civil Rights Act, which was specifically designed to protect all Americans from actions taken by municipalities "under color of state law" that violate federal constitutional rights. Congress intended for Section 1983 to provide *immediate access* to the federal courts for individuals deprived of their constitutional rights, but this is currently not the case for property owners. NAHB thus has a long tradition of advocacy, before Congress and in the Nation's courts, to establish a judicial system where the federal courts are free and open to robust debate under the Takings Clause—just as they are available to address other fundamental protections in the Bill of Rights.

II. Personal Background

A copy of my résumé is attached at Appendix 1 to this testimony.

I was born and raised on a farm 40 miles north of Rochester, Minnesota. My formal education includes attending a one room country school for eight years, high school, and college, where I paid my way by working highway construction jobs. I met my wife, Bonnie, in college. Bonnie is a retired public health nurse who was employed as a School Nurse by the Olmsted County Public Health Department for thirty-two years. For

the past 39 years, Bonnie and I have lived and raised our family in Rochester (1 boy and 2 girls). Our children attended the Rochester Public Schools before going on to college.

My professional successes have instilled in me a strong commitment to give back to my community, and my résumé provides a list of my civic and charitable activities. These include volunteer participation at the local government level to ensure that municipal services and infrastructure are provided throughout the greater Rochester area. In particular, I have served as Chairman of the Olmsted Facilities Commission, responsible for the development of a new joint City of Rochester/Olmsted County government center. In that capacity I was responsible for every aspect of the public project for over 4½ years, from initial site planning through final construction, which included selection of architects, construction plan review, and management of the competitive bidding process. I was also responsible for site acquisition and land assemblage, where we acquired over 45 separate parcels through eminent domain and conducted individual negotiations with each affected property owner in the condemnation process. I am particularly proud of the fact that not a single property owner resorted to litigation, as they all received fair market value for their land. Additionally, I have served as Chairman of the Olmsted County Physical Development/Infrastructure Focus Group for Strategic Planning, as well as Chairman of the Design and Construction Committee for Rochester School District #535, where I managed capital improvements and renovations for our children's schools. These volunteer opportunities have provided me first-hand knowledge and respect for the challenges faced by local governments to manage growth, while ensuring adequate, available infrastructure to benefit all citizens.

In my professional capacity, I am the President of North American Realty, Inc., a small, Rochester-based development and real estate brokerage company that I incorporated in 1972. During my stewardship at North American Realty, all aspects of the local land use and development process have come across my desk including approvals for site plans, zoning, annexation, layout and engineering, grading plans, service roads, and building construction. North American Realty has provided over 1400 homes for Minnesotans across the economic spectrum, ranging from subdivisions, apartment rentals, seniors housing, mobile homes, to affordable townhouses.

I take very seriously my responsibility to provide the dream of home ownership to the citizens of greater Rochester, and I aspire to build communities that I would want my own children and grandchildren to call home. Indeed, I have always been willing to provide more than my fair share to ensure that the houses I build are integrated with the environment and are completely serviced by all essential infrastructure. Yet, unfortunately, I have been a victim of government abuse in the land-use approval process on occasion. In those circumstances I will do whatever it takes to protect my family's well-being and my economic investment—and that includes litigation.

Filing a lawsuit to safeguard property rights is never a developer's first response. As the adage goes, "Your first lawsuit is your last permit." It is simply a bad business decision to blithely resort to litigation, which creates substantial out-of-pocket costs such as counsel and expert fees, as well as untold projects delays and uncertainty. From my

perspective, initiating suit is the last resort when the development approval process comes to a stalemate, and it is never a winning proposition. I would much prefer to negotiate with local land use officials to ultimately build a project than to sue over it. But sometimes, a property owner has no choice, and litigation may be the final option to protect an investment.

As the Supreme Court stated in *Dolan v. City of Tigard,* 512 U.S. 374, 392 (1994), there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth, should be relegated to the status of a poor relation." It is important to stand firmly on this principle. When I have been a casualty of overly-zealous government regulation that has gone "too far," the federal courts should be available to hear my grievance. My own first-hand experiences, however, have proved to me that this is not the case. Many courts have demeaned property rights as the "poor relation" to which *Dolan* referred.

Accordingly, I strongly urge Congress to enact legislation ensuring that the liberties safeguarded by the Takings Clause can be vindicated in the federal courts. In my opinion, passage of H.R. 4772 is absolutely essential to restore the fundamental rights in private property that have been a bulwark of our democracy since the Nation's founders enacted the Bill of Rights.

III. Recent House of Representatives Efforts to Protect Private Property Rights.

The House of Representatives must be commended for the solid endorsement it recently exhibited towards private property rights when it passed H.R. 4128, *the Home, Small Business, and Private Property Defense Act.* That Act passed the House on November 3, 2005, by an overwhelming margin of 376-38. The first three congressional findings set forth in H.R. 4128 are:

> (1) The right of individuals to own their own homes, farms, small businesses and other types of private property is a fundamental right recognized by the U.S. Constitution and our common law heritage of liberty.
>
> (2) The Fifth Amendment to the U.S. Constitution protects this fundamental right by limiting the condemnation of private property to instances where "just compensation" is provided and independently, where the taking is for "public use."
>
> (3) History demonstrates that protection of property rights is essential to securing other rights and liberties, and violations of property rights often lead to violations of other fundamental rights. The Supreme Court noted that "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972).

These same findings, endorsed with tremendous bipartisan support only a few months ago, could be lifted verbatim to describe H.R. 4772. The catalyst for passing H.R. 4128 last year was the U.S. Supreme Court's decision in *Kelo v. City of New London* (2005). *Kelo* concerned infringements on Fifth Amendment rights when government initiates formal condemnation proceedings to take land from private property owners, in the context of economic development opportunities. The far more pervasive and insidious infringements on property rights occur not when government takes land to *allow* development (as in *Kelo*), but when government regulates land to *stop* development with excessive demands (as in my own and countless other cases). Congress is obviously and rightfully concerned about protections afforded to private property, as evidenced by H.R. 4128's passage. However, Congress is not finishing the job if it ignores the far more common situation of Fifth Amendment takings when government over-regulates private property and treats land as if it were actually condemned, but denies the property owner just compensation.

The very same concerns that mobilized the House to enact H.R. 4128 last year are critical—indeed, more so—with regard to H.R. 4772.

IV. A Brief Overview of the Barriers Preventing Property Owners from Accessing Federal Court

To set the stage for my personal experiences that bring me to support H.R. 4772, it is helpful to provide a brief summary of the legal theories that government agencies have used against me and other property owners to bar federal court hearings on takings claims. Section VII of my testimony beginning on page 18 provides more detail, but an overview is warranted here.

In 1985, the Supreme Court decided the *Williamson County* case, which has been interpreted to require property owners to file and pursue litigation for just compensation in *state* court before filing suit in *federal* court on a Fifth Amendment taking. While *Williamson County* requires initial state court litigation to make a takings claim "ripe" for federal review, the Supreme Court's conflicting *San Remo* (2005) decision provides that takings plaintiffs who bring their claims in state court are precluded from later obtaining federal adjudication. In short, the effect of both *Williamson County* and *San Remo* is: (1) property owners must litigate their constitutional takings case in state court first (under *Williamson County*); but (2) after litigating in state court, they can never have their case heard in federal court (under *San Remo*). Thus, the federal courts are not available to consider, much less protect, private property rights.

While *Williamson County* and *San Remo* effectively block a property owner from bringing a takings claim to federal court, another Supreme Court case, *City of Chicago* (1997), allows local government agencies to remove cases to federal court when they are sued in state court by a takings plaintiff. If government agencies have the option to remove takings cases to federal court, then private property owners, alleging violations of their constitutional rights, should have equal access to a federal forum.

The late Chief Justice Rehnquist, joined by three other concurring Justices, recognized in *San Remo* that there is no sound reason for blocking property owners from federal court because "the affirmative case for the state-litigation requirement has yet to be made." Moreover, the U.S. Supreme Court has never explained "why federal takings claims…should be singled out to be confined to state court, in absence of any asserted justification or congressional directive." In fact, a church, or even an adult book store owner, who challenges a municipal land-use regulation based on the First Amendment's protections has direct access to federal court, while a property owner challenging the same regulation, but raising a Fifth Amendment takings claim, does not. The late Chief Justice also recognized in *San Remo* that "*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." As many property owners have learned, takings claims bear the unfortunate, but unique, distinction of never being heard in federal court, unlike any other Bill of Rights guarantee.

As a result, H.R. 4772's jurisdictional reforms are of paramount constitutional importance. They would resolve many of the unfair dichotomies created by the Supreme Court's cases, and ensure that Fifth Amendment property rights are fundamental liberties that the federal courts must address.

V. The City of Rochester Infringed My Constitutional Rights—And the Federal Courts Denied Me the Right to Hear My Case.

One of my particular projects shows all too clearly the problems property owners encounter as they attempt to develop their land. My project's residential component, discussed in greater detail below, contemplated higher-density townhome units that would have added to the City of Rochester's inadequate stock of affordable housing. But the disproportionate and excessive demands sought by the regulators, as pre-conditions to approve my proposal, would have made these lower-priced units economically infeasible to build. My story provides the perfect illustration of why H.R. 4772 is such an important piece of legislation, to ensure that landowners have access to federal courts to vindicate their Fifth Amendment rights when all else fails.

A. The City Imposed Financially Ruinous Demands on My Project.

In 1992, I acquired a 220-acre parcel of land with the intent to develop it. Fourteen years later, I remain entangled in an administrative and legal quagmire with no end in sight. In all this time, I have not been able to build on my property.

Even before I closed on the property back in 1992, I met with City of Rochester planning staff to discuss plans for a shopping center on the parcel's eastern side. Representatives of the Rochester-Olmsted Council of Governments asked me to postpone the plan while they studied traffic needs. Staff was concerned that the premature announcement of the shopping center would trigger land speculation in the area around the development. I obliged, putting my project on hold. My concession here delayed the project for 2½ years.

In 1994, I applied to rezone the eastern part of my property to accommodate the proposed shopping center, but the City denied the application. Staff claimed that the roads were inadequate and could not handle anticipated traffic. Also during this same period, I applied for approval of a townhome development on a 16.4-acre segment of the property, consistent with existing zoning to permit single-family residences and townhomes. Indeed, the City's general land-use plan identified my property as being appropriate for higher density townhome development.

I developed and submitted a General Development Plan to construct 104 townhomes on the 16.4-acre parcel, as the current zoning allowed. Planning department staff recommended approval of the townhome development—but they attached nine excessive, onerous conditions. In a word, these conditions amounted to extortion. Among other things, the City's onerous demands included that I provide a man-made lake, which it thought would be a nice aesthetic enhancement to the site. The problem was that manufacturing such a lake was not the most environmentally sensitive move, because I would have to dredge a low area on the property. While I agreed that I could fabricate the lake as the City requested, the State Department of Natural Resources objected. The State DNR would not agree to any plan that submerged an existing creek into the lake. Thus, between the City's demands for the lake and the State's refusal to let me build it, I wound up in a classic Catch-22.

In addition, the City's planning staff tried to compel me to construct an entirely new frontage road along Highway 63 to accommodate the planned townhomes, resulting from the State's denial of permits for two vehicular access points to my project's commercial component. Because the state denied those access permits, the City now required me to build the new road. I put the project on hold again so I could study whether my proposed townhomes were compatible with the existing road system, and whether a brand new road was truly necessary. I concluded that, out of my original 220 acres, only this 16.4-acre parcel was suitable for a residential project and it was compatible with both existing zoning and the road system. In other words, the current road system could already accommodate the traffic needs generated by the townhomes. The new frontage road the City wanted me to build was excessive and unnecessary. Moreover, while I had a study to prove my position, the City did not, nor did it ever, develop a study to justify its exaction for a new road.

The City's demands did not end there; planning staff continued to focus on traffic patterns and flows. Staff determined that my proposed townhomes *might* be within the right-of-way that the City would need *if* it decided at some point to double the width of an existing road, 40th Street, from two lanes to four. Yet, the City did not have any existing expansion plans for 40th Street. Undaunted, the City notified me that it would require a 50-foot dedication of my property, including the 33 feet already being used as part of the street, to upgrade the roadway. I objected to the additional dedication because the demand was not in proportion to the traffic my project would generate. And, the City had produced no plan or study showing that the dedication was needed from me to accommodate the impacts from my proposed development. I agreed, however, to wait

until the City completed its plans and studies for the putative 40th Street road-widening project.

At this juncture, about eight years had elapsed since I first purchased the land. So in early 2000 I submitted another application, this time for a conditional use permit for the townhome development. As part of my application, I requested information from the City regarding the right-of-way for 40th Street, but the City replied that no road expansion plans were yet available. Although the planning department continued to lack any traffic plans to prove a need or intent to widen the road, staff still insisted it needed a 50-foot dedication from me. Eventually, I obtained a set of plans from the State Department of Transportation. These plans showed the projected roadway as being only 41 feet wide, not the 50 feet as the City insisted. Although my studies showed that my proposed project could be accommodated within the capacity of the existing road system, I acquiesced to a 41-foot dedication for any possible future widening of 40th Street just so I could finally move forward with the townhome plan. But the City held fast to its demand that I dedicate 50 feet, still with no plans or justification whatsoever.

More exactions were thrown at me. The City further conditioned approval on grading the project site to suit its still nonexistent plans for the proposed 40th Street widening. Grading the site as the City demanded would result in a loss of more than three-quarters of the proposed townhomes. Still another condition involved excessive storm water management. While I was fully prepared to meet all regulations to control storm water runoff during my development, the City really wanted ponds for the purpose of a *regional* storm water management facility, so it could address runoff far beyond my project's impacts. Its plan was for me to construct these ponds *for free* and then turn them over to the City, to drain approximately 3,000 acres of nearby lands slated for other construction. The City's scheme was to charge *other* developers of *other* projects about $2,000 per acre for runoff into the ponds that *I* constructed and financed for the community's benefit. The City never intended to reimburse me for the ponds. It simply demanded that I give them away—as a gift—because it wanted them.

At no time did the City or its planning staff provide me with information showing that any of these required conditions were proportional to my project's impacts. As an experienced developer, I was aware of the U.S. Supreme Court's *Dolan* (1994) decision, which allows cities to impose conditions on permit approvals only if they bear a rough proportionality to the burdens that the proposed development would place on the community. Accordingly, I asked the City to explain the nexus of the conditions to my project, and their proportionality to my project's impacts. Indeed, I sent repeated, written requests for this information to the City. The best the City could muster was sheer speculation: its written responses state nothing more than my project "could" possibly generate hypothetical impacts, so the conditions *might be* necessary. Such supposition, without fair studies to back them up, does not satisfy *Dolan*'s requirement that a regulatory body demanding exactions bears the burden to prove rough proportionality between its requested conditions and the nature and extent of the proposed development.

In May 2000, the Planning and Zoning Commission recommended approval of my project subject to the nine onerous conditions sought by staff, even though I demonstrated that those exactions rendered the project economically non-viable. Essentially, all of the City's onerous conditions killed my project. For example, the City's grading and street dedication requirements alone reduced the property's development potential by more than 75%, shrinking the number of townhomes I could build from 104 down to 26. The townhome site backed-up to a floodway, so it was impossible for me to propose design alternatives that would reconfigure placement of the townhomes at different locations. The grading requirements would have increased my per unit costs from $22,378 to nearly $90,000, an over 300% increase in development costs for each townhome. Significantly, the average price for similar units in the Rochester townhome market was $125,000 in 1999 and 2000. The City's conditions also reduced the buildable area of the project from 8.93 acres to 4.93 acres. My plans to construct affordable, workforce housing were destroyed; the City's exactions made it impossible for me to reach the middle income and workforce housing market that I was trying to serve.

The City Council granted my permit with all of the ruinous conditions proposed by the Planning Commission. The Council then denied my requests for variances from the conditions. Months of additional reviews and appeals, to the Common Council and Zoning Board of Appeals, did not change the City's position.

Piled one on top of the other, the City's nine exactions were like Shylock's demands for a pound of flesh. They were grossly out of proportion to impacts my project would have had on existing infrastructure and resources. Such exorbitant development costs meant that I was either forced to elevate home prices out of the relevant market to recoup my expenses, or I would have to absorb the total cost myself. Either way, the nine conditions collectively rendered my project economically infeasible.

Nine years after I purchased the land, I was finally at a stalemate. I truly believed my constitutional rights were violated. I had one option left: in 2001, I filed suit in the U.S. District Court for the District of Minnesota, seeking just compensation for an unconstitutional taking under the Fifth and Fourteenth Amendments.

B. The Federal Courts Refused to Consider My Constitutional Rights.

Even with all I had been through up until this point, I did not undertake litigation cavalierly. I knew that ultimate success on the merits would be a long shot, because the U.S. Supreme Court has set a high bar for property owners to win a takings claim. But I did not want to abandon my project, and at least I thought I'd receive a fair hearing on the merits of my case. I was wrong.

With the federal civil rights statute (42 U.S.C. § 1983) as the vehicle for my suit, in May 2001 I challenged the constitutionality of the exactions the City attached to my permit and requested just compensation under the Fifth and Fourteenth Amendments. The City never even answered my complaint, but responded by filing a motion to dismiss based on two grounds from the Supreme Court's 1985 *Williamson County* decision: (1)

that I failed to get a final decision on the type of development that the City would allow on the property; and (2) that I failed to pursue available state compensation remedies. The overriding legal issue came into focus rather swiftly, and it centered on whether my claims were ripe under *Williamson County* prong 2 because I went to federal court without an initial state court detour. The *merits* of my case, as to whether the City's extortionate demands failed under the U.S Constitution and *Dolan*'s "rough proportionality" standard, were never addressed.

On January 22, 2002, the U.S. District Court for the District of Minnesota agreed with the City and dismissed my case. The court held that until I sought relief in state court, my takings claim was beyond federal court review.

I filed an appeal to the U.S. Court of Appeals for the Eighth Circuit in February 2002, arguing that the Supreme Court's 1997 *City of Chicago* decision modified *Williamson County* so that the doors of the federal courthouse must be open to my complaint. In *City of Chicago,* the Court concluded that government *defendants* could remove constitutional land-use cases from state court to federal court, as a matter of course. Indeed, the premise of the federal removal statute at issue in *City of Chicago* is that cases can be removed from state to federal court, but only if they could be brought in federal court *originally.* The inexorable conclusion from *City of Chicago* is that because a municipal defendant could remove a takings case to federal court, then a takings plaintiff—such as myself—must be allowed to bring a Fifth Amendment claim in federal court *originally.*

Thus, before the Eighth Circuit I argued that if government had the right to remove a constitutional land-use case to federal court, then as the aggrieved party, I should be able to bring my case to federal court in the first instance without going to state court first. My claim obviously arose under federal law, and the federal courts exist precisely to hear and decide federal claims. Moreover, I filed initially in federal court because I wanted to avoid the inevitable trap that other takings plaintiffs routinely face when they sue in state court first. If I had initially brought my claim in state court and lost, I *never* would have been able to access the federal courts because they would have afforded full faith and credit to the prior state judgment. A subsequent federal judge would have invoked the doctrines of claim preclusion (res judicata) and/or issue preclusion (collateral estoppel) to bar relitigation following any state judgment I would have received. I explained this conundrum in my litigation papers to the Eighth Circuit.

The court was not sympathetic. The decision it reached in my case is captioned *Kottschade v. City of Rochester,* and is reported at 319 F.3d 1038 (8th Cir. 2003). The Eighth Circuit affirmed the district court's previous dismissal, holding that, because I did not exhaust my state court remedies, I could not bring my takings claim in federal court. The Eighth Circuit acknowledged that the interplay between *Williamson County* and *City of Chicago* created an "anomalous gap" in takings case law that only the U.S. Supreme Court could fill, "not us." In its opinion dismissing my case, the Eighth Circuit clearly recognized that claimants such as me, who are required to seek a remedy in state court, are "altogether denied a federal forum for what is undoubtedly a federal right."

With regard to the dilemmas I would have faced under claim and issue preclusion had I initially filed in state court, the Eighth Circuit acknowledged my argument "has the virtue of logic and is tempting," but declined to accept it. The appeals court stated, "The point is this: it is simply too early to say now exactly [how a] res judicata or collateral estoppel argument might be appropriate in the future, and exactly what the answers to any such argument might be." But the handwriting was clearly on the wall. The Eighth Circuit knew my chances for federal adjudication would be doomed if I repaired to state court initially. I would have become another hapless victim of the preclusion doctrines, like the long line of takings plaintiffs both before me and since.

Recognizing the anomaly between the Supreme Court's holdings in *Williamson County* and *City of Chicago,* the Eighth Circuit remarked, "We understand that deferring a decision on this point is frustrating to the plaintiff, but the federal courts do not sit to decide questions in the abstract. If the plaintiff goes to the state courts and loses, and then files a 42 U.S.C. § 1983 action in a federal court, that court, subject to appropriate appellate review, will be in a much better position to determine the effect of the prior state-court adjudication."

The Eighth Circuit noted that if I lost at the state court level, I could obtain Supreme Court review on the merits that would afford me a federal forum to address this issue. However, during the appellate oral argument, even one of the circuit judges acknowledged that getting the U.S. Supreme Court to accept my case would be like winning the lottery, given the minuscule fraction of petitions that the high Court grants each year. In any event, with no place left to go, after I lost at the Eighth Circuit I did, in fact, seek U.S. Supreme Court review.

In my petition for certiorari, I asked the Supreme Court to resolve the conflict created by its previous takings decisions. *Williamson County* bars landowners – the aggrieved parties – from bringing federal claims in federal court. Standing in stark contrast is *City of Chicago,* which allows defendants, *in the exact same cases,* to force landowners into federal court on the theory that plaintiffs *could have sued there first*, despite the *Williamson County* barricade. Unfortunately, in October 2003, the Court denied my petition, thereby refusing to clarify its own decisional anomaly.

C. The Ironic Aftermath.

1. The Eight Circuit Has Locked the Federal Court House Doors, and Thrown Away the Key.

In an ironic twist of fate, the Eighth Circuit did indeed receive another opportunity to examine a federal takings claim several years after mine, in a 2006 case captioned, *Koscielski v. City of Minneapolis.* Unlike me, that other Minnesota plaintiff filed his takings suit *initially in state court* challenging a zoning ordinance that restricted the use of his property as a firearms dealership. In other words, Mr. Koscielski's case arose precisely in the procedural posture that the Eighth Circuit sought in my case in terms of initial state court litigation with federal access sought thereafter.

À la *City of Chicago,* the City of Minneapolis removed the action from state court to federal court. Once in federal court, the City filed a motion for summary judgment to dismiss the case. The federal district court granted the City's motion, finding that the plaintiff's takings claim was not ripe for adjudication. The district court found it unripe because the plaintiff did not exhaust state court compensation procedures as required by the *Williamson County* decision. The district court case is reported at 393 F. Supp. 2d 811 (D. Minn. 2005).

Like me, Mr. Koscielski filed an appeal to the Eighth Circuit. In its January 2006 opinion, not only did the Eighth Circuit rule *against* Mr. Koscielski, but it cited *my* case as one of its bases for dismissal because the plaintiff did not pursue litigation in state court. But how could he? He started in state court, the city next removed to federal court—and then the city had the nerve to ask for dismissal of the federal action because there was no prior state ripening suit. And most shockingly, the Eighth Circuit had even more nerve to grant the dismissal! The caption for this case is *Koscielski v. City of Minneapolis,* and is reported at 435 F.3d 898 (8th Cir. 2006).

Please recall that, as I mentioned above, the Eighth Circuit refused to entertain my arguments because it did not know how it would address a situation where a takings plaintiff started suit in state court. I filed originally in federal court, and the Eighth Circuit's decision in my case appeared to leave the federal court door open just a crack, allowing the possibility for ultimate federal review after state takings litigation comes to a close. The *Koscielski* decision obliterated any of those delusions. Simply put, under the current case law it is utterly impossible for any property owners within the Eighth Circuit—covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota—to ever vindicate their Fifth Amendment property rights in a federal court, regardless of whether they file suit initially in federal or state court.

Our judicial system is supposed to be based on fairness, yet the system is decidedly not fair to property owners. Americans should not be put through the judicial wringer only to learn that the federal courts have abdicated their traditional role as guardians of the Constitution. Now, property owners are being forced on wild goose chases through our courts, with no meaningful recourse. Certainly, municipalities realize that gaming the system, as was done in Mr. Koscielski's case, will serve to deter property owners from ever bringing takings claims anywhere, in state or federal court. While some property owners may have the will and financial resources to persevere with litigation in the face of these obstacles, most Americans will have no choice but to give up. Perhaps that is exactly the hope of the government—to misuse jurisdictional rules so their conduct is immune from judicial scrutiny under the Fifth and Fourteenth Amendments.

2. *Kelo* Meets *Kottschade.*

The twists don't end quite yet. There is an epilogue to my own case. Call this next phase, *Kelo* meets *Kottschade.* Like Mrs. Kelo, the government's eminent domain authority has further chipped away at whatever property rights I may have left.

While I was waiting to see if the U.S. Supreme Court accepted my case, in March 2003 the Minnesota Department of Transportation (MnDOT) filed formal condemnation proceedings against my property in state court, under its eminent domain powers. Not only did MnDOT condemn part of the 16.4-acre parcel I had attempted to use for the townhomes, it included additional acreage as well, with the total amount of condemned land about 28 acres. MnDOT then took title to all of it.

The State valued my land that it had condemned at about $875,000, or roughly ten cents on the dollar of its actual value. My experts and I disagreed with MnDOT's appraisal; we believed that costs of filling the site alone will exceed $875,000 (in order to match the new elevations of the road.) With the relocation of road, filling, other site changes and the value of land, we believe that just compensation should be in the range of $8 million. When we asked MnDOT to explain the basis for its lowball figure, the State freely admitted that my property values were depressed due to *the very same development limitations imposed by the City of Rochester to begin with.*

In other words, the City had first imposed unconstitutional conditions on my property to limit its development potential, but conditions were immune to federal court review. Then the State used those same conditions against me—which I wanted to challenge as unconstitutional, but was deprived that opportunity in federal court—as a condemnation windfall to snatch-up my land at a bargain basement price. As a property owner who has worked for years within the rules of the land development arena, how could the Fifth Amendment's Takings Clause countenance such an abuse? And why am I not able to have a federal court consider these gross injustices?

I have reserved my rights to challenge MnDOT's valuation of my property. But I am still waiting, some three years later, to appear before the court appointed commissioner who will "hear testimony" from all sides regarding valuation. I must still go through the trial phase after that. Essentially, the State of Minnesota is claiming that my property has minimal value because I cannot develop it anyway. What better way for government to acquire land cheaply than to condemn it after its development potential is destroyed by regulatory conditions? It's as if the government is clipping coupons as it drags its feet through this whole process, but meanwhile, it has wrested land title away from me. None of this can be heard or decided by a federal court under the Supreme Court's current case law.

There's still more. It gets better or worse depending on your perspective. If I am yet to use my property for a mixed residential and commercial project, the City will require me to enter into a Development Agreement. Essentially, such an agreement would be a contract between me and the City setting forth the terms and conditions of the project, and the Agreement becomes final only after it is authorized by the Rochester City Council and executed by the Rochester Mayor and City Clerk. Improvements to and rights-of-way for 40th Street and its connector roads remain an issue. One of the terms of the draft agreement that the City itself has proposed is that, should I receive

condemnation dollars from MnDOT, I would then have to give some of that money back to the City because it would have required me to dedicate the land to it in the first place.

Let me repeat that: Assuming I receive money from the State to compensate me for the value of my land in the eminent domain proceedings—which has been lowballed because the City imposed excessive conditions that reduced the land's development potential—the City wants *me* to pay *it* some of those compensation dollars because it would have required me to dedicate that land anyway—*even though the dedication it demanded is excessive, extortionate, lacks proportionality, violates Fifth Amendment standards and escapes federal court review.* I invite the Subcommittee to ground truth all of this by reference to pages 7-8, sub¶ (c) of the latest Draft Development Agreement proposed by the City, excerpts of which are attached at Appendix 2.

Yes, the City wants me to pay *it* for land that it has taken from *me.* I could not conjure more blatant government disregard for the U.S. Constitution. The scheming between the City of Rochester and the State of Minnesota has reduced the Takings Clause to a funneling mechanism that diverts just compensation from the coffers of one regulatory body to another. That is simply utter disdain for the Bill of Rights.

Meanwhile, the City of Rochester has levied a property tax assessment against my land for over $1.7 million dollars. The City claims that, because MnDOT initially denied my driveway permits, the new road construction (for which my land has been condemned in the MnDOT eminent domain proceedings) will now provide access to the site, and therefore my property should be assessed at a higher value. So, in a perverse new twist, my property is under siege as the result of a tax assessment which, if I don't pay, will cause me to forfeit the land altogether. And while the City claims my land has increased in value because the State's condemnation will provide road access to my site, the State claims my land has fallen in value because the City's excessive conditions drastically reduced the site's development potential. It's hard to figure out which was is up and which is down, but it is clear that two different levels of government are wielding their regulatory authority and playing off each other so as to impair my land's productive value. In any event, I am challenging the City's property tax assessment in state court, where we are in the midst of discovery.

Thus, my case did not end nine years after I first purchased the land, when the Supreme Court denied my petition, which was bad enough. Rather, with the commencement of the state condemnation proceedings and continued negotiations on the Development Agreement, my case has now lasted *more than 14 years,* with no end in sight. I'm lucky if I receive "just" compensation for my devalued property without giving some of it back to the City, whether in the context of the condemnation or as a result of its tax assessment.

And I will *never* have the chance for a federal court to consider any of this. That is, unless Congress enacts H.R. 4772.

VI. An Exhaustive Survey of Takings Cases Reveals the Federal Judiciary's Contempt for Fifth Amendment Takings Cases.

While I do believe my ordeal is extreme, I am not unique. Studies undertaken by NAHB have shown that, for many years, property owners have been objects of disdain in the lower federal courts. As discussed below, Congress has overwhelming evidence exhibiting the serious problem in the federal judiciary with regard to its hostile treatment of property rights claims. H.R. 4772 is desperately needed to ensure that the Takings Clause is not effectively stricken from the Bill of Rights.

NAHB has compiled data on lower federal court cases decided from January 1990 to May 2006, wherein a regulatory takings claim was brought by a property owner or developer against a local land use regulatory agency. This compilation is attached at Appendix 3 to this testimony. The ultimate goal was for NAHB to draw conclusions about the extent to which the U.S. Supreme Court's decision in *Williamson County* has limited or completely eliminated merits adjudication by the lower courts of Fifth Amendment takings claims.

The compilation shows that over the last 15½ years, the U.S. district and circuit courts have vilified property rights cases. In that time period, an overwhelming majority of regulatory takings cases have been dismissed on jurisdictional grounds and most property owners have been denied the opportunity to have the merits of their federal constitutional claims heard in federal court. While a few takings cases overcome jurisdictional hurdles, it is clear that the confusion about access to federal courts has caused many years of expensive and duplicative litigation. The compilation of cases shows that the *Williamson County* ripeness rules have indeed changed the face of Fifth Amendment litigation for the worse.

A. Compilation Methodology

The research for this compilation was conducted in two parts. The first survey was completed by the law firm of Linowes & Blocher, LLP in 1998 and 1999, and provided case data from 1990 – 1998. The results of that survey have been published. *See* John Delaney and Duane Desiderio, *Who Will Clean Up the Ripeness Mess? A Call for Reform So Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195 (1999). NAHB presented this information during the hearings and discussions that ultimately led to the House of Representatives' passage of H.R. 1534, the Private Property Rights Implementation Act of 1997 in the 105th Congress, and H.R. 2372, the Private Property Rights Implementation Act of 2000 in the 106th Congress. Both of those bills would have removed the requirements that a property owner must first repair to state court for a takings claim, and would have confirmed that the federal courts must assert jurisdiction in Fifth Amendment property rights cases.

As a supplement to the 1999 survey, a second survey was completed in May 2006 by the law firm of Shipman & Goodwin, LLP. The 2006 survey sought to replicate the search terms and methodology of the 1999 survey, as closely as possible. The May 2006

study excludes any cases from the 1999 study that continued to proceed through the federal courts after research for the first survey had concluded.

The number of cases brought over the last 15 years in lower federal courts that include some form of Fifth Amendment takings claim is in the thousands. However, for purposes of this compilation, "regulatory takings cases" were defined as those cases where property owners sought some kind of approval or permit from a non-federal land-use regulatory agency to allow development or construction on their property—such as for a retirement home, low-income housing project, home remodeling, residential subdivision, and related infrastructure—but were unable to do so based on action or inaction by the government entity. In short, the cases cited in the compilation are limited to as-applied challenges to land use regulation under the federal takings clause. Additionally, to determine whether *Williamson County* has had any impact on the ability of property owners to reach federal courts, the compilation does not include cases in which there was an independent basis for federal court jurisdiction, such as adult-use cases brought through the First Amendment, cases in which the District of Columbia was a defendant, Lake Tahoe Interstate Compact cases, and cases where the taking claim was clearly incidental to the other federal claims.[1]

Research for the compilation was conducted in Westlaw and Lexis, two major legal research engines. Even though district courts frequently dismiss relevant cases without publishing their decisions in the official reporters, the cases in this compilation include both published and unpublished decisions for the purpose of tabulating results, not for citing unpublished cases as precedent.

B. Compilation Data Summary

161 cases met the criteria outlined above. Federal courts failed to reach the merits of the regulatory takings claim in 132 of the 161 cases. ***In other words, 82% of the time, property owners are unable to get any federal court to even look at whether their 5th Amendment rights have been violated.***

The reasons cited by the courts for dismissing the regulatory takings claims confirm that *Williamson County* is in fact responsible for the inability of property owners to have their federal claims heard in federal court. Of the 132 dismissed cases, 91% of them were on the grounds directly from the *Williamson County* decision: (1) failure to exhaust state compensation remedies, particularly state court litigation on an inverse condemnation claim; (2) no final agency action; or (3) both of these reasons. While not directly

[1] Takings cases were excluded from the compilation if they: (1) lacked a request for approval or permit for development, construction or rehabilitation (for example, a request to change the use of an existing building or business operation); (2) concerned facial challenges to land use regulations; (3) related only to physical takings; (4) arose in the context of eminent domain proceedings or where valuation was in question and liability was not at issue; (5) related to actions by the federal government, an interstate agency, or the District of Columbia; (6) did not involve real property (such as IOLTA cases involving lawyer trust fund monies); and (7) arose in the context where the federal court did not rule on the takings claim, either as to jurisdiction or merits (even though other constitutional provisions, such as the Due Process Clause, the Equal Protection Clause, or the First Amendment, may have been decided).

addressed under the Supreme Court's ripeness requirements, 9% of the dismissed cases were dismissed as a direct result of having litigated in state court as required by *Williamson County*, or having the specter of state court litigation looming, either: (1) on abstention grounds; (2) by applying the preclusion doctrines of res judicata or collateral estoppel; or (3) based on the Rooker-Feldman doctrine.

Table 1

Circuit	Claims Dismissed	% of Claims Dismissed in Circuit	Claims Decided on Merits	% of Claims Decided in Circuit	Case Totals	Circuit% of Total Cases
1st	9	82%	2	18%	11	6.8 %
2nd	16	89%	2	11%	18	11.2 %
3rd	6	60%	4	40%	10	6.2 %
4th	9	90%	1	10%	10	6.2 %
5th	13	81%	3	19%	16	9.9 %
6th	20	87%	3	13%	23	14.3 %
7th	16	89%	2	11%	18	11.2 %
8th	4	57%	3	43%	7	4.3 %
9th	13	72%	5	28%	18	11.2 %
10th	12	92%	1	8%	13	8.0 %
11th	14	82%	3	18%	17	10.6 %
DC	0	0%	0	0%	0	0.0 %
Total Cases	132		29		161	
% of Total Cases	82.0%		18.0%			100%

Looking at the data from a different angle, the surveys sorted the cases in terms of federal district and appellate courts. One major concern is that property owners and developers can have financial difficulty merely surviving the first round of takings litigation in district courts. Only 6.8% cases (11 out of 161) were decided on the merits at the district court level.

An even fewer number of takings litigants have the financial wherewithal to pay for more legal fees to fund an appeal—only to gamble that a federal appellate judge will simply find their claim ripe and require more litigation before reaching the merits and awarding damages. In fact, even though an overwhelming number of cases were dismissed by the district court, only 57% of the total cases (91 out of 161) were appealed. And the gamble paid off for only 20% of the property owners (18 out of 91)—the merits

were still not reached in 80% of cases (73 out of 91) that made it to the federal appellate courts.

Only 18% of regulatory takings cases (29 out of 161) found either a district or appellate court dealing with the merits of a property owner's takings claim. It is difficult to discern a pattern or reason for why these cases reached the merits and the other 82% did not after *Williamson County*. In general, it appears that: (1) the property owner had reserved its federal claim in prior proceedings and the court honored that reservation; (2) the governmental defendant, for whatever reason, did not object to consideration of the merits; or (3) the court addressed the merits of its own volition because it thought the claim was especially strong or especially weak. However, as has been pointed out previously in this testimony, under the U.S. Supreme Court's 2005 decision in *San Remo*, these merits adjudications *should not occur in the future*. *San Remo* held that both state and federal takings claims must now be brought "simultaneously" in state court; federal claims may not be reserved during state court proceedings; and once a state law claim has been decided, state law preclusion rules apply to the federal claim.

While having an inverse condemnation case actually decided on the merits is a primary goal of property owners and developers, the histories of these cases provide a second concern about *Williamson County*'s effect on 5th Amendment litigation. Inverse condemnation cases can take many years to litigate because it is not clear to either property owners or the courts whether or how to adjudicate federal regulatory takings claims. And even though an appellate court finds that a claim is ripe after being dismissed by a district court, a property owner may be forced to underwrite additional litigation to determine whether or not a taking occurred on the merits—in other words, to litigate in the federal trial court, bring an appeal, and then *return* to the federal trial court to decide whether any compensation would be due.

Of those 18 appellate cases where takings claims were found ripe or where the merits were reached, it took property owners, on the average, approximately 9.1 years to have a federal court reach its final determination. These landowners thus endured almost a decade of negotiation and litigation to obtain a judicial determination that their takings arguments could be heard on the merits.

Looking to the overall picture of regulatory takings litigation since *Williamson County*, one striking difference between the 1999 survey and the May 2006 survey is the speed with which federal courts are dismissing federal claims. The 1999 survey clearly revealed property owners fighting for years for an adjudication of their Fifth Amendment taking claims, simply not believing it was possible for their federal claim to be premature before they went to state court but extinguished after they had been to state court. Only 4 of the 85 cases in the May 2006 survey reflect a litigant starting in state court under state law, losing, and then trying to proceed in federal court—the scenario prescribed by *Williamson County*. It seems that a majority of property owners are opting either to proceed in state court only, dispensing with their federal claims altogether, or to proceed in federal court with claims other than regulatory takings when dismissed by the court.

The compilation of data from NAHB's surveys speaks for itself. There is no question that constitutional property rights are being ignored by the federal courts. This data provides a clarion call for Congress to act now. It must pass H.R. 4772 before the Takings Clause is excised from the constitutional landscape.

VII. Congressional Action is Needed to Clean-Up the Ripeness Mess.

Takings law, in all its dimensions, is notoriously chaotic. The Supreme Court itself has issued takings decisions that are difficult if not impossible to reconcile. With lack of coherence and guidance from the high Court, rampant confusion in the lower federal courts has been the predictable result. The time is ripe for Congress to clean up the ripeness mess.

As opportunities have arisen I have urged the federal courts to confront the glaring injustices that flow from *Williamson County*'s doctrine requiring initial state court litigation for Fifth Amendment claims. As discussed above, on June 19, 2003, I requested the Supreme Court to tackle the problem in my own case, through a petition for writ of certiorari in *Kottschade v. City of Rochester,* No. 02-1848, which is attached as Appendix 4 to this testimony. I was proud to have received tremendous support from a number of amicus briefs, including one filed by Chairman Chabot, as well as from other small property owners, think-tanks, and a broad spectrum of trade associations representing a wide array of constituents. In addition, Daniel R. Mandelker from the University of Washington at St. Louis, perhaps the pre-eminent land use professor in the United States, submitted an amicus brief on my behalf. Indeed, Professor Mandelker has previously testified before Congress urging the need to reform takings jurisdictional rules stemming from *Williamson County*. Unfortunately, on October 6, 2003, the Supreme Court denied my petition.

I next assumed the role as an amicus myself, to support other property owners confronting the same jurisdictional dilemmas. At my own expense, I submitted an amicus brief before the U.S. Supreme Court in the *San Remo* case, which is part of the docket for Case No. 04-340. Most recently, I supported the property owners in an appeal before the First Circuit in *Torromeo, et al., v. Town of Fremont,* Civil No. 04-2547. This written testimony is the next step in my advocacy efforts to ensure that property owners have fair access to federal courts.

While more detail is provided in my attached Supreme Court petition, I take this opportunity to summarize some of the more perplexing and unfair facets of the current case law which impedes federal court jurisdiction over Fifth Amendment claims.

A. The *Williamson County* and *San Remo* Decisions Contradict Each Other.

Williamson County held that exhaustion of state compensation procedures is a first step to ripen federal takings claims: "*[U]ntil* [plaintiff] has utilized [state] procedure[s],

its takings claim is *premature.*" *Williamson,* 473 U.S. at 197 (emphasis supplied).[2] However, the full Court's opinion in *San Remo* declares that federal takings claims could, in fact, be asserted *during* a state lawsuit:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" . . . does not preclude state courts from hearing *simultaneously* a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

San Remo, 125 S.Ct. at 2506 (citing *Williamson County,* 473 U.S. at 194) (emphasis supplied). Thus, while *Williamson County* rules that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* rules that federal claims can be brought *simultaneously* with state claims in state court.

How do these rules square with each other? How is it that a Fifth Amendment claim can be brought simultaneously with a state inverse condemnation claim in state court, if that federal claim is not ripe until after the state denies compensation? What happens in those state courts that refuse to entertain federal takings claims until compensation is finally denied under state law? *See, e.g., Breneric Assoc. v. City of Del Mar.* 81 Cal Rprtr. 2d, 324, 338-339 (Cal. App. 4th 1998); *Melillo v. City of New Haven,* 732 A.2d 133, 138 n. 28 (Conn. 1999). How does the simultaneous claim rule work in states whose law provides that a federal takings claim simply can not be joined with a state law claim in state court? See *Blue Jay Realty Trust v. City of Franklin,* 567 A.2d 188 (N.H. 1989).

There is no realistic opportunity that the federal and state courts will suddenly bring order to the chaos they have created. Congress must act by promulgating H.R. 4772 to clarify the rules of federal court jurisdiction over takings claims.

B. The Court's Rules on Removal Jurisdiction Load the Deck Against Property Owners.

As discussed above, *Williamson County*'s state-litigation rule is irreconcilable with *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson County*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of the federal district courts." *Id.* at 528-

[2] *See also Williamson County,* 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek compensation through the procedures the state has provided for doing so"); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available State] procedure and been denied just compensation").

529. Under the federal removal statute,[3] a case can be removed from state to federal court only if it could have been brought in federal court originally.

Under *Williamson County,* federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. *San Remo* confirms that there is no original federal court jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state inverse condemnation claims in state court. Yet under *City of Chicago,* federal courts *do* have original jurisdiction over federal takings claims because a municipality has the right to remove them to federal court. The upshot is that federal courts decide federal takings claims at the whim of a municipal defendant who decides to exercise the removal option.

At least two federal circuits have taken *Williamson County* and *City of Chicago* to their illogical extreme. Earlier in my testimony, I discussed a recent decision where the Eighth Circuit held it lacked jurisdiction over a federal takings claim that a municipal defendant removed to federal court, precisely because no original state proceedings ripened the federal claim. The stunning aspect of this case is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court upon the city's removal motion. *Koscielski v. City of Minneapolis,* 435 F.3d 898, 903-904 (8th Cir. 2006). The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court—and then argue for dismissal because *Williamson County's* state-litigation rule went unsatisfied. The court elevated form over substance to absurd heights and dismissed the case. *See Sandy Creek Investors, Ltd. v. City of Jonestown,* 325 F.3d 623, 626 (5th Cir. 2003).

"[C]onsiderations of fairness and justice" are at the heart of the Takings Clause. *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. Congress must enact H.R. 4772 to correct the mockery that municipal defendants have made of the federal statutes governing removal jurisdiction and district court jurisdiction over constitutional claims.

C. Some Lower Courts Apply the State-Litigation Rule to Other Constitutional Claims.

The lower federal courts have clashed as to whether the state-litigation rule applies to due process and equal protection claims, in addition to takings claims. In many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. Some circuits restrict

[3] "[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction,* may be removed by the defendant . . . to the district court." 28 U.S.C. § 1441(a) (emphasis supplied.)

Williamson County's state remedies requirement to takings claims only.[4] However, the Seventh Circuit, in parsing a land owner's §1983 claims, held that *Williamson County* state procedures apply to takings and due process, but not equal protection. See *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). The First Circuit has held that state inverse condemnation claims must be exhausted for *either* a federal takings *or* a due process claim, without opining on equal protection. *See Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987). The Second Circuit has extended *Williamson* to its outer limits, requiring ripening state litigation for all three types of claims. See *Dougherty v. Town of No. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002).

Accordingly, the state-litigation rule has reached beyond the Takings Clause and has infected the Due Process and Equal Protection Clauses as well. To avoid any further damage to property owners' constitutional rights, I urge Congress to eradicate the state-litigation rule once and for all by enacting H.R. 4772.

D. Impact on Seventh Amendment Rights to a Jury Trial.

The state-litigation rule also generates friction with *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). There, the Supreme Court held that takings plaintiffs in Section 1983 litigation have a 7th Amendment right to a jury trial on issues of government liability. That is in stark contrast to the practice in state courts generally, which do not submit regulatory takings liability issues to juries. *Id.* at 719. If *Williamson County* truly compels state litigation to ripen Fifth Amendment claims, and *San Remo* allows simultaneous litigation of federal and state takings claims in state court, then the 7th Amendment rights confirmed by *Del Monte Dunes* are illusory in states that do not provide jury trials on takings liability.

Unlike the Fifth Amendment, which was the first guarantee in the Bill of Rights to apply to the states through the Fourteenth Amendment, *see Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), "[i]t is settled law that the Seventh Amendment does not apply" to "suits decided by state court." *Del Monte Dunes*, 526 U.S. at 719. Congress's attention is thus required not only to protect property owners' rights under the Takings Clause, but also their 7th Amendment guarantee to jury trials. H.R. 4772 will ensure that all of those fundamental rights are preserved.

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[4] *See, e.g., County Concrete Corp. v. T'ship of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellant's facial [substantive due process] and [equal protection] claims"; citations omitted). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

E. Because of the State-Litigation Rule, the Takings Clause is the Only Bill of Rights Provision Barred from Federal Court Review.

The opinion for the Court in *San Remo* "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. . . ." *San Remo,* 125 S.Ct at 2509 (Rehnquist, C.J., concurring.). This is exactly what has transpired. As shown earlier in Section VI and in the survey attached at Appendix 3, the lower federal courts overwhelmingly invoke the state-litigation rule to avoid adjudicating the merits of Fifth Amendment takings claims. As Professor Mandelker previously testified to Congress, the lower federal courts have exhibited "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoiding the vast majority of takings cases on their merits." Testimony of Daniel Mandelker on H.R. 1534, Before the House Judiciary Comm., Subcomm. on Courts and Intellectual Property, reprinted at 31 Urb. Law. 234, 236 (Spring 1999). Adding insult to injury, once a property owner sues in state court, any hope for ultimate federal court review is dashed because the preclusion doctrines afford full faith and credit to the prior state judgment:

> Thus, as a reward for following the rules and trying to ripen their federal claims in state court as spelled out by *Williamson County,* property owners have the rug yanked out from under them by federal courts saying the door to that courthouse is now closed, because the very act of "ripening" the case actually sounded its death knell.

Michael Berger and Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases At Long Last Reaches The Self-Parody Stage,* 36 Urb. Law. 671, 687 (Fall 2004).

With Fifth Amendment claims consigned to state court, whether by virtue of *Williamson*'s state-litigation rule or *San Remo*'s concurrent claims rule, the result is that citizens are denied *substantive* protections of the United States Constitution. Many state courts decline to rely upon or adhere to Fifth Amendment standards to adjudicate property rights claims. *See, e.g. Santini v. Conn. Hazardous Waste Mgmt. Serv.* 739 A.2d 680, 688 n. 20 (Conn. 1999), *cert. denied,* 539 U.S. 1225 (2000) (U.S. Supreme Court precedent is "irrelevant" to adjudicate takings claimant's property rights, and rejecting the argument that the Fifth Amendment establishes a minimum, national standards for adjudicating a takings claim brought under the Connecticut Constitution); *State v. Ball,* 471 A.2d 347, 351-352 (N.H. 1983) ("[T]he right of our citizens to the full protection of the New Hampshire Constitution requires that we consider State constitutional guarantees"; any federal precedent is "merely . . . guidance" and "our results [are not] bound by those decisions"). *See generally* R. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?* 6 Fordham Envtl. L.J. 523 (1995). Thus, the state-litigation rule has not simply denied takings plaintiffs a federal forum, but also *adjudications that employ federal standards.*

Furthermore, in denying Fifth Amendment claimants access to federal courts, *Williamson* has gutted the critical role of the federal judiciary under 42 U.S.C. § 1983, to oversee and correct actions taken by municipalities "under color of state law" that violate federal civil rights. The "central purpose" of Section 1983 "is to provide compensatory relief to those deprived of their federal rights by state actors," *Felder v. Casey*, 487 U.S. 131, 141 (1988), by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Congress intended for Section 1983 to provide "*immediate access* to the federal courts" and "throw open the doors of the United States courts" for individuals deprived of their constitutional rights. *Patsy v. Fl. Bd. of Regents*, 457 U.S. 496, 504 (1982) (emphasis supplied).

Congress's intent behind Section 1983, in allowing immediate federal court access for constitutional claims, has been eviscerated by *Williamson County* and *San Remo*. I urge Congress to enact H.R. 4772 swiftly to put the federal courts back on the constitutional track of protecting property rights.

VIII. Conclusion

I firmly believe that *Williamson County*'s state litigation requirement voids the Fifth and Fourteenth Amendment protections for property owners. I note with irony that on the website for the U.S. federal courts, www.uscourts.gov, it reads that "[t]he federal courts often are called the guardians of the Constitution because their rulings protect rights and liberties guaranteed by the Constitution." Unfortunately, I know this is not true, from my own person experience, when it comes to property rights—the federal courts, wrongly so, have abdicated their responsibility to protect property owners. The data compiled in NAHB's 1999 and 2006 surveys unequivocally backs-up my belief.

Moreover, there is no constitutional basis for the state-litigation requirement. It is a prudential standard, as affirmed by the Supreme Court in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997). Regardless, this prudential standard has spun out of control. The late Chief Justice Rehnquist, who was joined by three other Justices, wrote in his concurrence in *San Remo* that "I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic."

If you follow the argument by some that our Fifth Amendment rights are not violated until we are denied just compensation in state court, then this same rationale should also apply to our other civil rights. For example, if a municipal police officer conducts an illegal search, are our Fourth Amendment rights not infringed until we go first to state court to determine whether the police officer had probable cause? We know the answer is no, because no such standard exists for Fourth Amendment cases, and rightfully so. As the late Justice Brennan, both a defender of property rights and a protector of local government authority, wrote: "After all, a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego*, 451 U.S. 621, 661 n. 26 (1981) (Brennan, J., dissenting). H.R. 4772 does not provide

special rights for Fifth Amendment claims. It merely puts Fifth Amendment takings claims on par with the rest of the Bill of Rights.

Looking at the mess that has been created in the takings jurisdiction arena, Congress must pass this legislation to restore the U.S. District Courts as the appropriate venue to adjudicate federal constitutional issues. I urge Congress to pass H.R. 4772.

Appendices

NOTE: This draft Development Agreement for the Property does not constitute an Official Document of the City of Rochester until approved as to form by the City Attorney and authorized by the Rochester City Council for execution by the Rochester Mayor and City Clerk.

DRAFT DEVELOPMENT AGREEMENT

Willow Commons Development
GDP #03-214

5/28/04

THIS AGREEMENT, is made as of this ____ day of _____, 2003, by and between SJC Corporation a Minnesota corporation, B & F Properties LLC a Limited Liability Company, Willow Creek Commons LLC a Limited Liability Company, Frank and Bonnie Kottschade husband and wife, (hereinafter jointly referred to as "Owner"), and the **City of Rochester**, a Minnesota municipal corporation (hereinafter referred to as the "City").

WHEREAS, Owner owns and desires to develop real property within the City of Rochester, Olmsted County, Minnesota, as a residential and commercial development, which property is described and shown on **Exhibit 'A' attached hereto and incorporated herein**, and is hereinafter referred to as the "Project" or the "Property," depending on the context in which it is used; and

WHEREAS, Owner and City agree that a development agreement will serve to facilitate the orderly and efficient development of the Property to the mutual benefit of the Owner, the City, and abutting property owners; and

WHEREAS, the Owner acknowledges that the proposed Project may impact the adjacent, and in some cases, inadequate public infrastructure controlled by the City, the County, and the State.

WHEREAS, the City, County, and State have outlined certain public improvements and/or facilities which in part provides needed infrastructure for the development of the Owner's Property.

WHEREAS, the City has outlined, planned, or constructed certain public improvements and/or facilities which, in part, provide needed infrastructure for the development of the Property; and

WHEREAS, Owner desires to begin the Project prior to many of the necessary improvements to the existing infrastructure being in place; and

WHEREAS, City agrees to allow the development of the Property to proceed subject to the execution of this agreement and other permits and approvals as may be required by City Ordinances that addresses the impacts of the Project on the public infrastructure.

NOW, THEREFORE, in consideration of the mutual benefits to the parties set forth herein, and other good and valuable consideration, the adequacy of which is hereby acknowledged, Owner and City agree as follows:

OWNER'S OBLIGATIONS

1) **Annexation. NA**

2) **Property Development**. By execution of this Agreement Owner agrees to proceed and may complete the platting/project approval process including plat recording for the Property prior to the construction of the infrastructure being completed as provided for in Sections 61.246 - 61.254 of the Rochester Zoning Ordinance and Land Development Manual. Owner agrees to plat and complete the construction of the entire Project as shown on the approved General Development Plan #03-214 and the Conditional Use Permit #03-46, or as may be amended on the Final Plat for this Property, within five (5) years of execution of this Agreement. Owner also agrees to the following provisions:

   a) To extend the public infrastructure to the adjoining property as reflected on General Development Plan or as directed by the City Engineer within five (5) years of the date of this Agreement, or

   b) If Owner does not extend the public infrastructure as outlined in 2a. above Owner agrees to escrow sufficient funds with the City of Rochester, in an amount determined by the City Engineer, within five (5) years from the date of this agreement for use by the City to extend the public infrastructure to the adjoining property, or

   c) In the event City of Rochester receives a petition to extend public infrastructure through Owner's Property to serve adjoining properties, Owner agrees to execute a City prepared Contribution Agreement detailing Owners proportional cost for the extension within 30 days of written notification by the City, and

   d) Dedicate to the City, within five (5) years of the date of this Agreement or within 90 days of written request of the City Engineer, utility and roadway easements as determined by the City Engineer necessary to extend the public infrastructure to the adjoining properties as reflected on the General Development Plan for the Property.

City/Owner Contract. Owner shall execute a "City/Owner Contract" with the City prior to constructing any public infrastructure (including but not limited to grading of public storm water facilities, roadways, watermain, sanitary sewer and storm sewer to serve the Property), and prior to the final grading of the Property. Owner shall pay for all public improvements authorized for construction by the City/Owner Contract unless otherwise stated in the City Owner Contract.

3) **Grading and Drainage.** Owner agrees to have a Drainage Report and Grading Plan prepared by a professional engineer and to submit these documents to the City Engineer for approval prior to the commencement of any grading activity on the Property. Owner also agrees to the following additional provisions:

   a) Owner agrees to grade the Property to match the future grades of the abutting 40th Street SW and TH 63 roadways, needed for the phase of development abutting the roadways.

   b) Owner also agrees to match the existing or otherwise City approved grades of the abutting property to the south and west unless other documented arrangements are made with the abutting landowner and approved by the City on the Grading Plan. A copy of the written agreement between the Owner and an abutting property owner(s) shall be provided to the City Engineer prior to the City's final approval of the Grading Plan.

   c) Owner agrees to provide to the City surety for the restoration of the disturbed areas in a form and amount acceptable to the City Engineer for any work requiring a Substantial Land Alteration Permit prior to the City's final approval of the Grading Plan.

4) **Stormwater Management Plan Area Charges.** Owner acknowledges that the development of the Property results in the need for storm water management due to requirements to manage the increase in the stormwater run-off rate/volume and potential degradation of surface water quality attributable to the increase of impervious area within the Project. The following specific terms and conditions shall apply to the Property for storm water obligations:

   a) The City Engineer has determined the Owner shall provide both ***onsite Storm Water Management facilities and payment of Storm Water Management Plan Area Charges in lieu of onsite construction*** for managing the increased storm water runoff from the a portion of the Property.

   b) Owner agrees to pay a Storm Water Management Plan Area Charge (SWMPAC) for the entire Property. The base rate for the SWMPAC shall be (Project Specific) per developable acre. This rate is representative of low-density residential type development with an impervious area of 25% and a Land Use Factor (LUF) of 1.00. The actual SWMPAC will be calculated by multiplying the base rate times the Land Use Factor for the Property times the number of developable acres.

      SWMPAC = S (Project Specific) x LUF x Developable Acres. This payment is a one-time charge for the availability of connection to the regional stormwater facilities, representing the proportional fair share payment of connection to and use of existing and prospective stormwater facility capital cost obligations of the City.

   c) Owner may request the approval of the City Engineer to design and construct permanent public onsite stormwater management facility(s) in lieu of payment of all or some of the Storm Water Management Plan Area Charge (reimbursable costs/credits may include construction and/or land costs). Owner may request the approval of the City Engineer to construct permanent private on site storm water management facilities to serve non-residential development. Private ponds do not receive any credit against the SWMPAC.

All storm water management facilities shall be designed by a licensed professional engineer and approved by the City Engineer.

i) Each facility approved by the City Engineer to be designed and constructed to serve as a regional storm water management facility(s) will be a City owned and maintained storm water management facility.

(1) Approved onsite public stormwater management facilities are not eligible to receive Credits toward the Storm Water Utility Fee attributable to each parcel of the Property.

(2) The developable acres of the Property will be reduced by the area occupied by the public storm water facilities.

ii) Private facilities designed and constructed to serve non-residential development will be private and will require a Declaration and Maintenance Agreement (Exhibit B).

(1) City Engineer approved onsite private stormwater management facilities maybe eligible to receive Credits toward the monthly Storm Water Utility Fee attributable to each developed parcel of the Property that discharges stormwater to the private stormwater management facilities.

(2) The developable acres of the Property will not be reduced by the area occupied by the private storm water facilities.

d) Owner agrees to construct temporary onsite stormwater facilities including storm water quantity and/or quality ponds, discharge lines, storm sewer and manholes as may be needed to manage stormwater runoff during construction/restoration activities. The facilities shall be constructed in conformance with the City approved drainage plan, grading plan and specifications, and NPDES Stormwater Permit Standards.

e) Owner agrees to design (subject to City of Rochester approval), size, and construct onsite stormwater facilities including storm water quantity and/or quality pond(s), discharge lines, drainageways, storm sewers and manholes, as well as other necessary appurtenances in conformance with the City standards and the approved drainage plan, grading plan and specifications.

f) Owner acknowledges that the development of the entire Property may be limited due to inadequate downstream public stormwater management facilities. In the event inadequate downstream facilities exist, the Owner may select one of the following options:

i) Improve/upgrade existing public or private downstream stormwater management facilities as necessary for development of the Property at Owner's sole cost.

ii) Limit the development so as not to further damage or overload the inadequate downstream stormwater management facilities or properties.

iii) Provide temporary onsite improvements so as not to further damage or overload the inadequate downstream stormwater management facilities or properties until such time as the City Engineer determines that downstream facilities are adequate

iv) Petition the City for a public improvement project to provide the adequate public stormwater management facilities, provided the improvements to the inadequate downstream stormwater management facilities are consistent with the goals and City's Capital Improvement Program and the City's Storm Water Management Plan. If, after the acceptance by the City Council of the feasibility report on the petition,

the Council approves the project for construction, the Owner shall first execute a Contribution Agreement for the Owner's share of the project cost as identified in the feasibility report and then shall be allowed to file an application for a final plat.

g) Should the City need to construct a regional stormwater management facilities to serve the storm water discharge from the Property the City may require a portion of the total Storm Water Management Area Charges, calculated for the Property, to be paid up front at the time of the first phase of development.

h) Owner agrees to allow the City to contribute to the funding for construction of incremental stormwater facility improvements on the Property for regional stormwater management facilities provided the City notifies Owner, within 90 days of the grading plan approval for each phase of development, of City's intent to participate in the construction of the regional stormwater management facilities

i) Owner agrees to obtain the necessary permits for floodway / flood fringe modifications for the Property including those portions of the Property to be dedicated to the City. Owner as part of the floodway modifications and filling of the flood plain is providing flood storage in storm water ponds, in excess of the storm water plan requirements, to offset the loss of flood storage.

j) Owner acknowledges the City has implemented a Storm Water Utility. Owner understands that the Storm Water Utility requires a Storm Water Management Plan at the time of development of the Property

k) Drainage for the Property will be accommodated in a number of proposed stormwater ponds. Future design will provide for ponds that meet National Urban Runoff Program (NURP) standards and City of Rochester standards. A portion of runoff from the Property will be directed in the MnDOT stormwater pond to be constructed by MnDOT's contractor in the southwest quadrant of TH 63 and 40th Street. Stormwater runoff from the Property into the MnDOT ponds will be restricted to the existing (pre-development) site runoff conditions from the Property as identified in the Conditional Letter of Map revision (CLOMR) analysis prepared for MnDOT for the TH 63 / 40th Street roadway improvement project. The remainder of the stormwater runoff calculated for the proposed (post-development) site runoff conditions will be treated in a storm pond or ponds designed with the future site development and these pond(s) will discharge into Willow Creek. Detention and treatment requirements shall be defined at the time of specific site development plan(s) and associated grading plan(s) for the Property.

l) Temporary sedimentation treatment for the graded portions of the Property will be provided in the existing wet pond in the previously mined area on the north side of the Property prior to discharging site runoff into Willow Creek. A swale shall be graded along the west side of the proposed West Frontage Road to capture site runoff and convey it into the existing wet pond for sediment removal. Other erosion and sediment control measures will be implemented as illustrated on the approved Grading Plan. Erosion and sediment controls are required for each site development plan submitted for the Property.

m) Owner acknowledges that portions of the Property lie within the 100-year floodfringe and are subject to the additional standards of the "floodprone" overlay district and Shoreland District. Owner agrees that any filling of or development in the floodprone areas is subject to compliance with all applicable federal, state and local requirements and requires the issuance by the City of a separate conditional use permit.

n) Owner agrees to provide the City, within 10 days of City's written request, the opportunity to review data, reports, studies and other information in Owner's possession relating to wetland delineation, floodway / flood fringe modifications, stormwater management studies and pond design calculations, hydrological studies and soil borings on the Property as they may relate to and assist the City in its review of proposed stormwater facilities proposed to serve the Property.

o) All temporary and permanent stormwater facilities shall be designed and constructed in a manner that provides access for maintenance.

5) **Private Storm Water Management District. (PSWMD)** Owner may create a private Stormwater Management District (SWMD) to address cost sharing for regional stormwater improvements to serve the Property and other adjacent properties. Owner shall provide to the City, prior to the City's approval of the final the Grading Plan for the Property, a copy of an executed agreement with the adjoining property owner(s) outlining each parties respective cost participation in the construction and maintenance of stormwater management facilities, necessitated by future development within the private PSWMD, including the Property. In addition:

a) All adjacent property owners participating in the PSWMD shall execute a Declaration and Maintenance Agreement (Exhibit C) for storm water management facilities constructed as part of the private SWMD.

b) All stormwater management facilities proposed for the PSWMD shall be constructed in conformance to City requirements.

c) Owner may request the City Engineer accept the PSWMD facilities as public facilities and to take over ownership and maintenance for those facilities. City acceptance of the PSWMD facilities shall be based on the following criteria:

i) The dedication of the PSWMD stormwater management improvements to the City shall be after all development of the Property and adjoining property that is within the PSWMD is complete.

ii) The maintenance of the PSWMD required by the Ownership and Maintenance Agreement (Exhibit C) shall have been performed by Owner. Owner shall provide written record of the maintenance activities provided while under the PSWMD control.

iii) The land upon which the PSWMD facilities have been constructed by Owner shall be dedicated by warranty deed to the City as an Outlot, or series of connected Outlots.

iv) The PSWMD area or portions thereof shall be provided at no cost to the City; such warranty deed to be subject to any obligations of Owner pursuant to the Grading Plan and Drainage Plan. Owner shall be responsible for payment of all deed taxes as well as any current year and back taxes.

v) Owner agrees to grant, at no cost to the City, easements for access to maintain the stormwater facilities.

6) **Avigational Easement.** NA

7) **Noise Abatement.** Owner will incorporate noise abatement designs into any permanent habitable buildings to be constructed on the Property consistent with the Housing and Urban Development interior noise levels established at no more than 45 dBA for interior spaces. Owner also waives all future rights to request government provision of any noise abatement to serve the Property.

   Owner agrees to dedicate a Noise/Air Space Easement (Exhibit D) for those areas proposed for residential dwellings, if any, of the Property lying within a distance of 1/4 mile of TH 63. Owner agrees to pay a document preparation and recording fee of $70.03 for the Noise/Air Space Easement if the document is executed separate from this Development Agreement.

8) **Willow Creek Transportation Improvement District(s)**. Owner acknowledges that the City of Rochester Substandard Street Policy applies to the Property. The City Council has endorsed the creation of the Willow Creek Transportation Improvement District (WCTID) and the Willow Creek Interchange(s) Transportation Improvement District (WCITID) to address cost sharing for new street construction and existing street reconstruction and roadway capacity improvements to serve this area of the City.

   a) Owner acknowledges that the City Council may created a Willow Creek Transportation Improvement District (WCTID) to address cost sharing for street reconstruction/construction and capacity improvements to serve developing areas of the City in which the Property is located. Owner shall pay the adopted WCTID charges for the Property within 30 days of invoicing after City / Owner Contract approval for the Property. If the WCTID charges have not been adopted by the City Council prior to the approval of the final plat, the charges shall be based upon a current estimate of the costs for the projects needed in the area and prorated across the benefiting property in the WCTID at a rate of $0.75 / developable square foot of commercially zoned property and $0.25 / developable square foot for residentially zoned property (rate for 2004/2005).

   b) Owner acknowledges that the City Council may create of a Willow Creek Interchange(s) Transportation Improvement District (WCITID). The WCITID charge will be apportioned to area properties based on the portion of the cost of the interchange that would equate to the cost of signalized expressway intersections with TH 63 at 40th Street and 48th Street that would be assessed to properties in the District, and the balance of the project cost to the City. The City will use distance / proximity increments to apportion the WCITID Charges with property closer to the interchange paying the higher charges / rates. Owner shall pay the adopted WCITID charges for the Property within 30 days of invoicing after City / Owner Contract approval for the Property. If the WCITID charges have not been adopted by the City Council prior to the approval of the final plat, the charges shall be based upon a current estimate of the costs for the projects needed in the area and prorated across the benefiting property in the WCITID.

   c) If Owner receives compensation for any portion of the 40th Street SW and/or 11th Avenue SW right-of-way that would have been dedicated pursuant to City standards by Owner at the time of platting, but instead has been purchased by MnDOT for the City under provisions of the TH 63 Project Joint Powers Agreement between the City and MnDOT, then Owner agrees to reimburse the City within 30 days of invoicing by the City, those costs the City paid to MnDOT for Owner's Property needed to construct 40th Street and/or 11th Avenue SW.

The Substandard Street Capacity Charge (SSCC) component of the WCTID attributable to Owner's Property will be roughly proportional to the percentage of additional design year Peak Hour traffic generated by GDP #03-214 as compared to the total design year Peak Hour traffic within the WCTID. The baseline for calculating Owner's roughly proportional share of the SSCC will be projected use of the Property and associated trip generation information contained in the Trunk Highway 63 Traffic Technical Memorandum dated March 2001 prepared for MnDOT by Edwards and Kelcey, Inc. for the Project Consultant Yaggy Colby Associates all as part of the Trunk Highway 63 Environmental Assessment.

d) Any unpaid WCTID or WCITID charges shall be payable no later than 5 years from the date of the Development Agreement.

e) Owner agrees to pay the WCTID and WCITID Charges at the time of development of any portion of the Property subject to GDP #03-214. The Charges applicable to any request for platting shall be calculated by determining the proportionate share of non-residential or residential land in the plat as compared to the total amount of non-residential or residential land, respectively, in the WCTID and WCITID, and applying the proportionate percentage of land to either the total non-residential or residential Peak Hour trip generation estimated for the WCTID and WCITID to determine the proportionate share of the total Substandard Street Capacity Charge applicable to the development. For example, if the site being platted comprises 25% of all non-residential land in the WCTID, and the non-residential land in the Willow Creek TID generates 75% of all trips, then the proportionate share for the proposed development would be 18.75% (0.25 x 0.75) of the total estimated WCTID charges.

f) Payment is required within 30 days of invoicing after City's approval of each Site Development Plan proposed for the Property, but in no event will the City issue building permits for construction on that respective site on the Property until payment has been received.

g) WCTID and WCITID Charges shall be based upon an estimate of the City's share of the total project costs for the transportation projects, including preliminary and final design engineering, right-of-way, construction and construction engineering, needed in the area of the WCTID and WCITID proportional allocated to the benefiting properties at a rate set by the City Council

h) Owner agrees the City may adjust the estimated cost of Owner's proportional share of the WCTID and WCITID costs based on final project costs for Stage 1 and Stage 2 of the TH 63 Project. Owner acknowledges that Owner's final payment will based on the City Council's formal adoption of the Charges attributable to the Property. This final payment adjustment may require reimbursement by the City or additional payment by the Owner. The adjusted payment/reimbursement adjustment shall be made within 30 days after invoicing and written notice to Owner of the final WCTID and WCITID project costs and calculation and final approval of the Charges by the City Council

* * *

[REMAINDER OF DRAFT AGREEMENT DELETED]

Dated this ____ day of _____, _____.

IN WITNESS WHEREOF, the parties set their hands and seals as of the date and year first above written.

City of Rochester, a Minnesota

Municipal Corporation

By_____
Its Mayor

Attest:_____
Its City Clerk

To be revised. SEE FRONT OF DOCUMENT

By _____
Its President

_____

STATE OF MINNESOTA)
) SS
COUNTY OF OLMSTED)

The foregoing instrument was acknowledged before me this _____day of _____, 2003, by Ardell F. Brede and Judy Scherr, the Mayor and City Clerk, respectively, of the City of Rochester, a Minnesota municipal corporation, for and on behalf of the municipal corporation.

_____
Notary Public

STATE OF MINNESOTA)
) SS
COUNTY OF OLMSTED)

The foregoing was acknowledged before me this _____ day of _____, 2003, North American Realty personally known to me to be the persons who executed the foregoing instrument and acknowledged that they executed the same as their free act and on their own behalf.

_____

Notary Public

[EXHIBITS FROM DRAFT AGREEMENT DELETED]

Appendix 3 to Testimony of Franklin P. Kottschade

Compilation of Federal Takings Decisions from 1990 - 2006

Dismissed
Abstention

Hankin Family P'ship v. Upper Merion Township

State Court: No. 99-16287, 2001 WL 34084818 (Pa. Ct. Comm.Pl. Apr 12, 2001), related proceeding 799 A.2d 938 (Pa. Cmwlth. 2002), appealed granted 572 Pa. 716, 813 A.2d 847 (Pa. 2002), order reversed 576 Pa. 115, 838 A.2d 718 (Pa. 2003) No. CIV. A 01-1622, 2002 WL 461794 (E.D. Pa. Mar 22, 2002) (NO. CIV. A. 01-1622), order vacated by sub nom. Timoney v. Upper Merion Township, 66 Fed. Appx. 403 (3rd Cir. 2003)

Landowners challenged township's longstanding refusal to rezone or otherwise allow development of land for purposes similar to surrounding parcels.

State Court 2000-2002; Federal Court 2001-2003

Bannum, Inc. v. City of Columbia

1999 U.S. App. LEXIS 20836 (4th Cir. 1999)

Construction company sued city and zoning board for denying its petition for a special exception permitting construction of a prison halfway house within the city limits.

Federal Court 1997-1999

Slyman v. City of Willoughby

1998 WL 24990 (6th Cir. 1998)

Plaintiff's plan for multi-family development complied with all applicable zoning requirements. City officials asked that plaintiff delay the proposed project in any event because the property was near an airport; plaintiff acquiesced twice. "Plaintiffs were further induced to defer their proposal by the City's representation that it would find suitable property with which to 'swap' with Plaintiffs." The promised land swap never occurred, and the City re-zoned the property to prevent the multi-family project. Sixth Circuit dismissed all federal claims and invoked Pullman abstention, on grounds that the effect of a court of common pleas order from 25 years earlier could only be interpreted by a state court.

More than four years elapse from plaintiff's application for site plan approval, to court's decision.

(continued)
Dismissed
Abstention

Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal

708 F.Supp. 1477 (W.D. Va) (summay judgement phase), 749 F.Supp. 1439 (W.D. Va. 1990) (trial phase), vacated and remanded, 945 F.2d 760 (4th Cir. 1991), on remand, 922 F.Supp. 1131 (W.D. Va. 1996), rev'd and remanded, 135 F.3d 275 (4th Cir. 1998)

In 1990, the U.S. district court found that a taking occurred. After the federal trial court awarded compensation to plaintiff for a taking, the Fourth Circuit decides that district court should have exercised Burford abstention, because remedies were presumably available under state law. Plaintiff then pursued state remedies. After state proceedings were completed, plaintiff went back to the U.S. district court, which reinstated its finding seven years earlier that a taking had occurred. On second appeal, the 4th Circuit acknowledges that "[t]his case has already passed through procedural purgatory and wended its way to procedural hell." 135 F.3d at 284. The 4th Circuit nonetheless remanded back to district court "for whatever proceedings may remain." Id. at 290. The 4th Circuit held that, even though nine years of litigation had ensued, plaintiff should still be kept out of federal court on its takings claim. The appeals court reasoned that plaintiff should have sought to reconvene a state annexation court that had been out of existence for over ten years which, in any event, was powerless to award the monetary relief plaintiff sought through its takings claim. In any event, 4th Circuit addressed merits of claim and found no taking on the merits occurred.

About 20 years elapse between time of court order to provide sewer service to plaintiff's lot, to most recent appeals court decision.

Dismissed
Res Judicata/Collateral Estoppel

Trafalgar Corp. v. Miami County Bd.

State Court: 2001 Ohio App. LEXIS 3946 (Sept. 7, 2001); 2004 Ohio 177 (Ohio Ct. App., Miami County Jan. 16, 2004); aff'd 819 N.E.2d 1040 (2004); Federal Court: 2006 U.S. Dist. LEXIS 14574 (S.D. Ohio Mar. 11, 2006).

Plaintiffs sought to change the zone of their property from general agricultural to single-family residential. The zone change was approved by the Miami County Planning and Zoning Commission in the years 1995, 1997, 1999, 2000, 2001, 2002, 2003, and 2004. However, each time the Commission granted approval, voters defeated the changes by referendum. Plaintiffs alleged that the repeated refusals to rezone constituted a taking of their property.

1999-2006

Torromeo v. Fremont

State Court: Unreported (Rockingham, Dec. 27, 1999; (Rockingham, Jan 31, 2000; Rockingham, Mar. 19, 2001; Unreported (Sept. 26, 2001); reconsideration denied Superior Court Unreported (Oct. 15, 2001), rev'd 148 N.H. 640 (2002), cert. denied 539 U.S. 923 (2003) Federal Court: 2004 DNH 184 (2004); 438 F.3d 113 (1st Cir. 2006)

Plaintiff developers sought damages for delay in issuance of municipal development permits.

1999-2002

Saboff v. St. John's River Water Management District

State Court: Circuit Court unreported, aff'd 681 So. 2d 757 (Fla. Dist. Ct. App. 1996); Federal Court: Unreported, rev'd 200 F.3d 1356 (11th Cir. 2000), cert. denied 531 U.S. 823 (2000)

Landowners sued agency that granted permit for construction with condition of deed restriction prohibiting construction on portion of property.

1991-2000

Wilkinson v. Pitkin County Bd. of Comm'rs

142 F.3d 1319 (10th Cir. 1998)

Landowner submitted three different development applications to county commissioners, all of which were rejected. Thereafter, landowner filed two separate state court actions alleging, among other claims, inverse condemnation and taking of all reasonable economic use of property. State court eventually dismissed all claims. Subsequently, landowner filed § 1983 action to vindicate federal constitutional claims, but federal court dismisses case on res judicata and collateral estoppel grounds in light of prior state court litigation. Court ordered dismissal while "not[ing] our concern that [Williamson County's] ripeness requirement may, in actuality, almost always result in preclusion of federal claims....It is difficult to reconcile the ripeness requirement of Williamson with the laws of res judicata and collateral estoppel." 142 F.3d at 1325, n. 4.

Timing unclear from decision.

Dodd v. Hood River County

59 F.3d 852 (9th Cir. 1995), following remand, 136 F.3d 1219 (9th Cir. 1998)

Plaintiffs sought only to build a single retirement home on the 40 acres they owned. On initial appeal, plaintiffs submitted to the following five-year process to ripen their takings claim: (1) file multiple permit applications with local zoning bodies, which denied each application; (2) appeal each denial to Oregon's Land Use Board of Appeals; (3) seek review of those administrative denials in state court; and (4) seek state court appellate review of the state trial court decisions. However, even after exhausting their takings remedies through inverse condemnation in state court, federal courts refused to hear the merits of the as-applied takings claim and dismissed the case on collateral estoppel grounds.

Eight years elapse from initial submission of development plans to build retirement home, to 9th Circuit's second opinion.

Treister v. City of Miami

893 F.Supp. 1057 (S.D. Fla. 1992)

Owner sued in state court challenging city's refusal to rezone property. After removal, owner amended complaint to include § 1983 claim, which was stayed pending resolution of state law claims in state court. State granted summary judgment to city, which then moved for dismissal of federal action on ripeness grounds. The district court found the Williamson test satisfied. Owners had made numerous zoning applications to determine the extent of permissible zoning, and had thus satisfied the finality prong. At the time of the alleged taking, no monetary compensation was available in the state courts, so there was no state remedy to exhaust. In any event, federal court invokes res judicata to dismiss takings claim.

Litigation alone, in federal and state courts, spanned at least six years.

Dismissed
Rooker-Feldman

Anderson v. Charter Twp. of Ypsilanti

71 F.Supp.2d 730 (E.D. Mich. 1999), aff'd 266 F.3d 487 (6th Cir. 2001)

Landowner sued township claiming that the denial of his application to rezone his property resulted in a taking without just compensation.

State Court 1988-1994; Federal Court 1994-2001

Zealy v. City of Waukesha

State Court: 194 Wis. 2d 701, 534 N.W.2d 917, 1995 Wisc. App. LEXIS 643 (Wis. Ct. App. 1995), review granted 540 N.W.2d 200 (Wis. 1995), reversed 201 Wis. 2d 365, 548 N.W.2d 528, 1996 Wisc. LEXIS 63, 42 Env't Rep. Cas. (BNA) 2179 (Wis. 1996); Federal Court: 153 F.Supp.2d 970; 2001 U.S. Dist. LEXIS 12102 (E.D. Wis. 2001)

Plaintiff developer granted an easement to the City after being told that the property could be developed for residential purposes if the easement was granted. The City then rezoned a portion of Plaintiff's property as a conservancy.

1990 - April 2001

Dismissed
WC Both Prongs

R-Goshen, LLC v. Village of Goshen, et al.

Federal Court: 289 F.Supp.2d 441 (S.D.N.Y. 2003), aff'd in unpublished decision 115 Fed. Appx. 465 (2d Cir. 2004)

Plaintiff corporation sued defendant village, planning board and architectural consultant after application to construct retail pharmacy was denied.

October 29, 2003 - October 6, 2004

The Seventh Regiment Fund v. Pataki

179 F.Supp.2d 356 (S.D.N.Y. 2002)

Plaintiffs had an interest in a state armory pursuant to a lease agreement with the state. Defendants issued requests for proposals to develop the armory. Plaintiffs sued state officials and proposed developers for interfering with their property rights.

Timing unknown

RKO Delaware, Inc. v. City of New York

Federal Court: Unreported, 2001 WL 1329060 (E.D.N.Y. 2001)

Theatre owner challenged NYC Landmarks Preservation Commission over failure of Commission to issue renovation permits for 128,000 square foot building where landmark occupied 2,000 square foot lobby.

Federal Court May 5, 2000 - August 30, 2001

Stutchin v. Town of Huntington

71 F.Supp.2d 76 (E.D.N.Y. 1999)

Property owners brought suit against town because the town denied their permit to build a 115 foot dock behind their property.

May 1998 - September 1999

Pond Brook Development, Inc. v. Twinsburg Township

35 F.Supp.2d 1025 (N.D. Ohio 1999)

Property owner sued township that amended zoning maps to reclassify its property.

Timing unknown

Dakota Ridge Joint Venture v. City of Boulder

1998 WL 704694 (10th Cir. 1998)

Property owner's allegation of regulatory taking dismissed because all state inverse condemnation remedies had not been pursued.

Timing unclear from opinion.

Forseth v. Village of Sussex

1998 WL 681469 (E.D. Wisc. 1998)

Plaintiff submitted at least three preliminary plats for approval by local officials. Eventually all county and state authorities approved the final plat except the Village Board. Tews, a neighboring landowner, objected to the plan throughout the application process. Subsequently, Tews was elected as President of the Village Board. In his capacity as President, Tews "engaged in a series of actions to prevent and obstruct the [project]" and "insist[ed] upon modifications and concessions" for his own personal benefit. 1998 WL 681469 at *11. For example, the Village Board (with Tews as President) agreed to the final plat only on the condition that Plaintiff conveyed to Tews about 2 acres of land on the border between Tews's and Plaintiff's property. Plaintiff reluctantly acquiesced; the 2-acre buffer was valued at $55,000, and Tews offered $1,500 but then agreed to pay $6,000. In dismissing case on finality ripeness grounds, court stated: "Is it that [property owners] have omitted the steps necessary to obtain review in state court and hope for the best in a second-chance forum? Well, we are not cooperating. Litigants who neglect or disdain their state remedies are out of court, period." 1998 WL 681469 at *5 (citing River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994) (procedural due process zoning case; no takings claim raised)). Forseth court recognized that "this interpretation of Williamson goes too far" but it is nonetheless "binding" in the 7th Circuit.

Six years from initial request of preliminary plat approval, to court's decision.

Hallco Environmental, Inc. v. Comancher County Bd. of Comm'rs

1998 WL 339460 (10th Cir. 1998)

Property owner initially pursued state court litigation challenging constitutionality of moratorium up to state supreme court level. Applicant incurred a nonrefundable landfill application fee of $90,000 in navigating the permit process. Ultimately, no federal court reached the merits of any of plaintiff's constitutional claims; due process, equal protection, and other constitutional claims were "subsumed" within the takings claim and all dismissed as unripe.

Eight years elapse from application to construct a landfill, the appeals court's decision.

Hallco Texas, Inc. v. McMullen County

934 F.Supp. 238 (S.D. Tex. 1996)

Plaintiff received permit from environmental commission to develop a solid waste disposal facility. After receipt of this approval, county commissioners adopted an ordinance to specifically prohibit the proposed development.

Four years elapse from submission of initial development application, to court decision.

Bateman v. City of West Bountiful

89 F.3d 704 (10th Cir. 1996)

With full knowledge of and inspection by city officials, plaintiff constructed his residence. Twelve years later, city determined the property did not comply with side yard and set back requirements, thus rendering the property unsaleable and unmortgageable. Takings claim was found not ripe because Certificate of Noncompliance "left open the possibility" that Plaintiff could obtain a variance, even though he had been told his project was out of compliance.

Twelve years elapse from point plaintiff completed construction of residence, to city's determination that building did not comply with the zoning ordinance.

Specialty Malls of Tampa v. City of Tampa

916 F.Supp. 1222 (M.D. Fla. 1996)

Property owners challenged denial of special use permit to operate exotic dance club.

At least six years elapse between plaintiff's request to city to interpret zoning ordinance, to court decision.

Emory v. Twiggs County

883 F.Supp. 1546 (M.D. Ga. 1995)

In zoning letter, county initially responded that the property was not subject to any official land use plan. Subsequently, zoning was adopted to apply to the plot in question; a moratorium was imposed by resolution to prevent landfill uses proposed by plaintiff; and the county adopted another resolution to close a road to plaintiff's property leaving the land without public access. Despite the moratorium, court believed plaintiff should have applied for a variance or lobbied to legislatively amend the resolution. With regard to the road closing, the court found "no affirmative act" by the county to close the road—even though the road had actually been closed for at least a year prior to the court's decision.

Four years elapse from plaintiff's request for a "zoning letter" from county officials, to court decision.

Herrington v. City of Pearl

908 F.Supp. 418 (S.D. Miss. 1995)

Despite the fact that plaintiff alleged violations of several constitutional rights, "the City's regulation of land use within its boundaries....should seldom be the concern of a federal court."

Six years elapse from first attempts to obtain permits, to court decision.

Quality Refrigerated Services, Inc.

908 F.Supp. 1471 (N.D. Iowa 1995)

City officials specifically contacted plaintiff to locate his business in the area. Plaintiff entered into a development agreement with the city to renovate the facility. City adopted a resolution to expedite Plaintiff's ability to lease a portion of the facility. City re-zoned the property from industrial to commercial, but encouraged the leasing transaction so plaintiff thus entered into a 10-year lease with tenant. Plaintiff applied for a building permit to remodel the building, but the city denied the application in light of the re-zoning. Plaintiff then filed an action to re-zone the property back to industrial, the planning commission approved the re-zoning, but the city council denied the re-zoning. Court nevertheless found takings claim unripe despite city's efforts to attract the use in question.

Six years elapse from date that city entered into development agreement with plaintiff, to court decision.

Glendon Energy Co. v. Borough of Glendon

836 F.Supp. 1109 (E.D. Pa. 1993)

No final decision because developer failed to appeal a rezoning, that was adopted in a behind-closed-doors session of the local legislature specifically to prevent the project at issue.

Six years elapse from submission of first plan, to court's decision.

W. Birkenfeld Trust v. Bailey

827 F.Supp. 651 (E.D. Wash. 1993)

Landowners challenged management plan for Columbia River Gorge National Scenic Area. Court dismissed takings claim for failure to pursue all state remedies.

Timing unknown

Villas of Lake Jackson, Ltd. v. Leon Country

796 F.Supp. 1477 (1992), further proceedings, 884 F.Supp. 1544 (1995), on rehearing, 906 F.Supp. 1509 (N.D. Fla. 1995), aff'd, 121 F.3d 610 (11th Cir. 1997)

Plaintiff seeks to build multifamily apartment complex. After plaintiffs submitted initial application, county enacts moratorium that prohibits approximately 95% of the proposed development plan. Subsequently, an ordinance is passed to keep the moratorium in place indefinitely. Plaintiffs thereafter submit another proposal, but county refuses to issue a permit because of the use restrictions under the ordinance. Plaintiffs then submit another plan to develop adjacent areas outside of the moratorium lands. County issues building permit for these areas, but then re-zones property and revokes them. Nonetheless, court finds no final decision because plaintiff failed to submit yet another proposal after the rezoning.

Four years elapse from submission of first development application, to court's initial decision on the takings claim. Six more years of litigation on other constitutional counts.

Seguin v. City of Sterling Heights

968 F.2d 584 (6th Cir. 1992)

City installed sewers and water lines to service the proposed development and charged plaintiffs for the installation of these facilities. Plaintiffs then entered into contracts to sell the parcels, but the city re-zoned the property to prohibit the commercial development even though it already provided the public facilities for the project.

Three years elapse from re-zoning, to court's decision.

Executive 100, Inc. v. Martin County

922 F.2d 1536 (11th Cir. 1991)

Property owners brought suit because of county's denial of a request for zoning change.

Four years elapse from application for rezoning, to court's decision.

Southview Associates, Ltd. v. Individual Members of the Vermont Environmental Board

782 F.Supp. 279 (D. Vt. 1991)

State officials openly declared they would oppose the development plan. Nonetheless, no final decision for takings purposes because developer did not submit alternative proposals. Court does not indicate how many other applications would be needed to ripen the takings claim.

Six years elapse from submission of first development application to court's decision.

Milne v. Township of Oregon

777 F.Supp. 536 (E.D. Mich. 1991)

Appeal from denial of variance request was ripeness prerequisite to takings claim in federal court, even though owner received notice of violation threatening criminal prosecution. Court concludes this is simply a "run-of-the-mill" zoning dispute.

Timing unknown

Southern Pacific Transportation v. City of Los Angeles

922 F.2d 498 (9th Cir. 1990)

Property owners challenged zoning ordinance that limited abandoned railroad rights of way to surface parking. Court held takings claim not ripe absent showing that state procedures had been exhausted.

Five years elapsed from rezoning to court's decision

Martinez v. Junta de Planificacion de Puerto Rico

736 F.Supp. 413 (D.P.R. 1990)

Zoning rendered property unsaleable and unmortgageable. Nonetheless, court finds takings claim unripe, even though landowners opposed the zoning regulations at public hearings, and even though Puerto Rico condemnation statutes did not expressly permit damages for temporary taking.

14 years elapse from zoning classification rendering plot off-limits to development, to court's decision.

Dismissed
WC Prong 1 (No Final Decision)

Hanna v. City of Chicago

212 F.Supp.2d 856 (2002), 65 Fed. Appx. 565 (2003)

Property owner sues City for City's adoption of height limitations on certain residential properties.

1-2 years (ordinance enacted in 2000, and first trial held in 2001)

Currier Builders, Inc. v. Town of York

Federal Court: 2002 U.S. Dist. LEXIS 9942 (D. Me. May 30, 2002), aff'd in part 2002 U.S. Dist. LEXIS 12494 (D. Me. July 8, 2002) (reviewing magistrate judge's earlier decision and holding that plaintiff could not invoke futility exception in takings claim)

Developers sued town on an ordinance that, inter alia, limited the number of dwelling units authorized per month and prohibited persons from submitting more than one residential building permit application per month for lots not within a subdivision.

Federal Court approximately May 30, 2002 - July 8, 2002

Dougherty v. Town of North Hempstead Board of Zoning Appeals

Federal Court: 282 F.3d 83 (2d Cir 2002)

Landowner sued zoning board of appeals when he was denied a permit to add to a nonconforming dwelling.

Federal Court 1999-2002

Kittay v. Giuliani

U.S.D.C. for the Southern District of New York, 2001 U.S. App. LEXIS 11985; aff'd 252 F.3d 645 (2d Cir. 2001)

Claimant brought action claiming that water regulations promulgated by the State of New York were so expensive to comply with that they hindered residential and commercial development.

Federal Court 1999-2001

Goldfine v. Kelly

80 F.Supp.2d 153 (S.D.N.Y. 2000)

Landowner sued city, several Department of Environmental Protection employees, and a member of a civic association because of their hostility towards and delay in approving the landowner's residential subdivision.

Timing not clear

Garamella v. City of Bridgeport

Federal Court: 63 F.Supp.2d 198 (D. Conn. 1999)

Property owners challenged the City's designation of their property as within a runway protection zone.

Timing not clear

Hidden Oaks Limited v. The City of Austin

Federal Court: 138 F.3d 1036 (5th Cir. 1998), 1998 U.S. App. LEXIS 13675 (5th Cir. 1998)

Apartment owners sued the City when, in the course of negotiations on bringing the complex up to compliance with the housing code, the City placed a two year utility hold on their buildings.

Federal Court 1995-1998

Cedarwood Land Planning v. Town of Schodack

State Court: removed to Federal Court by defendants; State Court action unreported (brought Dec. 1, 1995 in New York State Supreme Court in Rensselaer County) Federal Court: 954 F. Supp. 513, (N.D.N.Y 1997), aff'd 1998 U.S. App. LEXIS 22157 (2d Cir. Aug. 24, 1998)

Land developer sued town, its planning board, and the town board after they passed a new zoning law that rescinded a previously-available "density bonus provision" that would have permitted plaintiff to build residential lots below the square footage requirement if he connected to acceptable central sewer and water systems.

State Court 12/1/95-12/22/95 (removed to federal court); Federal court December 1995 - August 1998

The Landing at Macadam LLC v. Hales

152 F.3d 926 (9th Cir. 1998), 1998 U.S. App. Lexis 16949)

Landowner sued when Design Commission denied a request for design review approval.

Federal Court 1996-1998

Vorhees v. Brown, et al.

Federal Court: Unpublished, 1996 U.S. Dist. LEXIS 3637 (N.D. Ill. 1996), aff'd in unpublished decision 1998 U.S. App. LEXIS 1728 (7th Cir. 1998), cert. denied 525 U.S. 824 (1998)

Plaintiff landowner sued members of the Illinois Department of Transportation, County, two cities and Aero Club, claiming that a statute that precluded plaintiff from "creating or constructing an airport hazard which obstructs a restricted landing area or residential airport" on his land, constituted a taking.

Federal Court 1995-1998

Virgin Islands Conservation Society, Inc.

857 F.Supp. 1112 (D. V.I. 1994)

After eight years of navigating the zoning process, fighting community opposition, and litigating, "the court [was] back to the same point as in 1989—poised to review the granting of the permits." Although land use agencies granted permits for the proposed development, the takings claim was found not ripe. Remanded for more proceedings and environmental reviews.

Eight years elapse from first permit applications, to court decision.

Restigouche, Inc. v. Town of Jupiter

845 F.Supp. 1540 (S.D. Fla. 1993)

Plot downzoned to prevent a previous use, approved by town staff and earlier permitted under special exception.

Four years elapse from submission of initial development application, to court's decision.

Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm'rs of El Paso County

972 F.2d 309 (10th Cir. 1992)

Although plaintiff was granted a mining permit in 1988, and began mining the property, agency decided that a predecessor to plaintiff abandoned its permit in 1974, thus requiring plaintiff to commence the permit process anew under current and more strict regulations.

Owners and predecessors had unsuccessfully applied for mining permits for 19 years until court's decision.

Medina Corp. v. City of Charleston

959 F.2d 231 (4th Cir. 1992)

After property was re-zoned specifically to halt the development at issue, plaintiff filed suit in state court for a taking. The city (apparently) then removed the action to federal court.

Six years elapse from rezoning of plaintiff's land, to court's decision

Langley Land Co. v. Monroe County

738 F.Supp. 1571 (M.D. Ga. 1990)

Owner sought to enjoin county's threatened use of eminent domain power. No final decision even though county already decided plaintiff's land would be condemned.

Timing unknown

Dismissed
WC Prong 2 (Failure to Exhaust State Remedies)

J-II Enterprises, LLC v. Board of Commissioners

Federal Court: Unreported, aff'd 135 Fed. Appx. 804 (6th Cir. 2005)

Developer sued county board of commissioners after it refused to release the subject property for sanitary sewer services despite the planning commission's approval of the developer's proposed subdivision.

Timing unknown

J.D. P'ship v. Berlin Township Bd. of Trustees

State Court: No. 00CAH01002, 2000 WL 1074302 (Ohio App. Ct. Aug 02, 2000), appeal not allowed by 90 Ohio St. 3d 1484, 738 N.E.2d 1256 (Ohio 2000) Federal Court: No. 2:00-CV-787, 2005 WL 1523775 (S.D. Ohio June 28, 2005)

Property owners sued municipal officials that denied applications to rezone property from farm residential to planned residential.

State Court 1999-2002; Federal Court 2000-2005

Petoskey Investment Group, LLC v. Springvale-Bear Creek Sewage Disposal Auth.

Federal Court: No. 1:03-CV-378, 2005 WL 2899451 (W.D. Mich. Nov 02, 2005)

Developer sued authority that refused to allow developer to connect to authority's sewer system.

Federal Court 2003-2005

Mikeska v. City of Galveston

Federal Court: 328 F.Supp.2d 671 (S.D. Tex. 2004); vacated and remanded 419 F.3d 431 (5th Cir. Tex. 2005) (note: the portion of the district court decision that concerned the dismissal of the takings claim was not appealed)

Plaintiff property owners of beachfront property brought § 1983 action against defendant city alleging taking after city disconnected plaintiff homes from town services because homes were deemed beyond vegetation line after tropical storm and therefore in violation of state Open Beaches Act.

3 years (January 2002-January 2005)

Gabhart v. City of Newport

State Court: 19 S.W.3d 789 (Ct. App. Tenn. 1999) Federal Court: 208 F.3d 213 (6th Cir. 2000), 17 Fed. Appx. 268 (6th Cir. 2001), 2005 U.S. App. LEXIS 26290 (6th Cir. 2005)

Landowner who was subdividing property sued to enjoin the City from enforcing its regulations, which would have required the plaintiff to pave the gravel road running across the property. District Court characterized federal action as a takings claim.

November 30, 1999 - November 29, 2005

Fourth Quarter Properties IV, Inc. v. The City of Concord

2004 U.S. Dist. LEXIS 1534 (M.D. N. C. 2004), aff'd 2005 U.S. App. LEXIS 6148 (4th Cir. 2005).

Landowners purchased property south of an airport with the intention of constructing a shopping center. The plaintiffs sued after the City redesignated a portion of the property as a runway protection zone, which prevented plaintiffs from building in this area.

January 22, 2004 - April 13, 2005

Reeves v. St. Mary's County

268 F.Supp.2d 576 (D. Md. 2003), 113 Fed. Appx. 551 (2004) (remanded), 2005 U.S. App. Lexis 8386 (4th Cir. Md. 2005) (affirmed)

Plaintiff developer who wanted to construct an Alzheimer's facility on her property sued agency for denying a conditional use permit.

2 suits filed in federal court. One: July 2001; Two July 2002; Final appellate decisions on claim 2 in 2005

Mackenzie v. City of San Marcos

U.S.D.C. for the Western District of Texas, San Antonio Division, 2005 U.S. Dist. LEXIS 3199

Developer sued alleging that the city violated the takings clause when it refused to "untable" a zoning request to allow the construction of multi-family housing on developer's property.

State Court 1987-1994; Federal Court 2003-2005

Flores v. Village of Bensenville

2001 U.S. Dist. LEXIS 13953 (N.D. Ill. 2001); 2003 U.S. Dist. LEXIS 4693 (N.D. Ill. 2003); 2005 U.S. App. LEXIS 23442 (7th Cir. 2005)

Landowners sued village for denying them a permit to rebuild a fire-damaged house.

August 28, 2001 - October 28, 2005

SFW Arecibo Limited Partnership S.E. v. Rodriguez

2004 U.S. Dist. Lexis 28411 (D.P.R. 2004); 415 F.3d 135 (1st Cir.), cert. den. 126 S.Ct. 829 (2005)

Developer sued agency that revoked a land use permit that it previously issued. Developer alleged that the revocation constituted a taking.

2003-2005

North Pacifica, LLC v. City of Pacifica

State Court: Unreported; Federal Court: 234 F.Supp.2d 1053 (N.D. Ca. 2002), 2005 U.S. Dist LEXIS 11442 (N.D. Ca. May 4, 2005); Subsequent history: 366 F.Supp.2d 927 (N.D. Cal. 2005) (denying MTD plaintiff's EP claim), 2005 U.S. Dist. LEXIS 11442 (N.D. Cal. 2005) (after trial on EP claim, court found city liable and awarded damages)

Property owner brought substantive due process claim against city for lengthy delays in processing its application for the construction of residential units, and equal protection claim against city for imposing onerous conditional approval on its development project.

2001-2005

Sudarsky v. The City of New York

2000 U.S. Dist. Lexis 15545 (S.D.N.Y. Oct. 24, 2000) (Jones, J.); 779 F. Supp. 287 (S.D.N.Y. 1991) (dismissing due process claims and equal protection claims); State proceeding: 247 A.D.2d 206 (1st Dept.) (state law claims dismissed), 1990 U.S. Dist. Lexis 16045 (S.D.N.Y. 1990), 969 F.2d 1041 (2nd Cir. 1992); 506 U.S. 1084 (1993), 507 U.S. 980 (1993), 1992 U.S. Dist. Lexis 16557 (S.D.N.Y. 1992), 1993 U.S. Dist. Lexis 53 (S.D.N.Y. 1993), 220 A.D.2d 353 (N.Y.App.Div. 1st Dept. 1995), 247 A.D.2d 206 (N.Y. App. Div. 1st Dept. 1998) (dismissed for failure to file notice with city),92 N.Y.2d845 (1998), 93 N.Y.2d1042 (1999), 92 N.Y.2d 815 (1998), 93 NY.2d 849 (1999), 528 U.S. 813 (1999), 24 Fed. Appx. 28; 2001 U.S.App. Lexis25223 (2nd Cir. 2001), 536 U.S. 918 (2002), 536 U.S. 976 (2002), 540 U.S. 1047 (2003), 540 U.S.1169 (2004)

Developer sued city alleging that the downzoning of his property constituted a taking without just compensation.

Timing unknown

Buckles v. Columbus Municipal Airport Authority

Federal Court: 2002 U.S. Dist. LEXIS 26264 (S.D. Ohio, Jan. 14, 2002), aff'd 90 Fed. Appx. 927 (6th Cir. 2004) [State Court: unreported (but it was appropriation action brought by airport authority, not takings claim)]

Landowner sued municipal airport authority claiming that defendant's conduct going back to at least 1995 constituted an ongoing effort to deprive him of all reasonable economic uses of a 122 acre tract land that he owned near the airport.

State Court October 1998 (appropriation action instituted by airport authority) - 1999?; Federal Court August 2000 (landowner commenced action) - March 2004

Dickinson Leisure Industries, Inc. v. City of Dickinson

Federal Court: 329 F.Supp.2d 835 (2004) (S.D. Texas)

Land at issue was not zoned until 2001, at which time the plaintiff's country club was zoned in a residential district, making plaintiff's planned improvements to the site impossible.

June 2002 - February 2004

Don Jones v. City of McMinnville

2004 WL 848188 (D.Or. 2004)

Plaintiffs sued City for refusing their request to (1) annex their property; and (2) extend public services to their property, both of which limited plaintiffs' ability to develop their land.

State Court 2004; Federal Court 2004

Global ADR, Inc. v. City of Hammond

2003 WL 22533645 (E.D.La. 2004)

Landowner owner successfully obtained conditional use permit to construct a law office on its property, but the permit was invalidated in a lawsuit brought by neighbors due to the City's failure to follow proper procedure in issuing the permit. Landowner sued City for damages.

Federal Court 2003-2004

Jones v. City of McMinnville

State Court: Removed Federal Court: 2004 U.S. Dist. LEXIS 7250 (D. Or. 2004)

Property owners filed suit in state court alleging that the denial of their application to extend public facilities and services to their property by the City constituted a taking. The City removed the case to federal court and the plaintiffs moved to have the case remanded because their takings claim was not ripe.

State Court 2004; Federal Court 2004

Henry v. Jefferson County Planning Comm'n

State Court: 201 W. Va. 289 (1997) Federal Court: 215 F.3d 1318; 2000 U.S. App. LEXIS 12844 (4th Cir. 2000), 148 F.Supp.2d 698 (N.D. W. Va. 2001), 34 Fed. Appx. 92 (2002), cert. denied 538 U.S. 944 (2003)

Plaintiff filed suit after the county denied his conditional use permit to construct townhouse development.

State Court 1995-2000; Federal court 1996-2003

M.D. Hodges Enterprises, Inc. v. Fulton County, Georgia, et al.

U.S.D.C. for the Northern District of Georgia, Atlanta Division, 2003 U.S. Dist. LEXIS 25889

Corporation sued county and others alleging that its constitutional rights were violated when the defendants failed to rezone the subject property.

State Court 2000-2001; Federal Court 2002-2003

Sandy Creek Investors, Ltd. v. City of Jonestown

Federal District Court, unreported, vacated and remanded 325 F.3d 623 (5th Cir. 2003)

Property owner sued city that refused to approve land development permit.

1999-2003

Hazen v. Anne Arundel Cty.

Federal Court: No. CIV. L-01-703, 2003 WL 504864 (D. Md. Feb 13, 2003)

Landowner sued county after it denied applications to build home on unimproved lot.

Federal Court 2001-2003

Ramey v. City of Chicago

2003 U.S. Dist. Lexis. 8451 (N.D. Ill. 2003)

Plaintiff sued city after city agencies erroneously prepared zoning maps that reflected that plaintiff's property had been downzoned.

Timing unknown

Tanners Creek Properties, LLC v. Tremain

Federal Court: 2003 WL 22284569 (S.D. Ind.)

Developers constructing residential and retail units sued City for failing to provide adequate sewers and electricity to property.

Federal Court 2002-2003

Kottschade v. City of Rochester

2002 U.S. Dist. LEXIS 1119 (D. Minn., Jan. 22, 2002); 319 F.3d 1038; 2003 U.S. App. LEXIS 2645, rehearing denied 2003 U.S. App. LEXIS 5515 (8th Cir. Mar. 21, 2003), cert denied 540 U.S. 825 (2003)

Developer claimed that city had taken his property without compensation because nine conditions imposed with grant of permit made the development an economic impossibility.

Federal Court 2001-2003

Lindquist v. Buckingham Township

Federal Court: U.S.D.C. for the Eastern District of Pennsylvania (D.C. Civil Action No. 01-CV-0236), 2003 U.S. App. LEXIS 11351

Landowners sued a township, its governing board, and several officials for alleged violations of the landowners' substantive due process rights and for an alleged regulatory taking of their property by the township.

Federal Court 1998-2003

Tri-Corp Mgmt Co. v. Praznik, et al.

Federal Court: Unreported, aff'd in part, rev'd in part and remanded in unpublished decision 33 Fed. Appx 742 (6th Cir. 2002)

Plaintiff developer sued city after city issued a stop work order that prevented plaintiff from completing its residential construction plans.

Commencement date unclear (1998 or 1999); appeal decided in 2002

Calixto Deniz Marquez v. Municipality of Guaynabo

Federal Court: 140 F.Supp.2d 135 (D.P.R. 2001); aff'd 285 F.3d 142 (1st Cir. 2002)

Landowner, who was trying to sell two parcels of land, entered into a purchase contract with two buyers. The buyers withdrew their offers after municipal officials falsely told them that the municipality intended to expropriate the parcels. One of the parcels contained an office building, and when the tenants learned of the expropriation, they vacated the premises. Landowner sued, claiming damages in the form of lost rent.

2001-2002

Purze v. Village of Winthrop Harbor

2000 U.S. Dist. LEXIS 17160 (N.D. Ill. 2000), aff'd 286 F.3d 452 (7th Cir. 2002), rehearing denied 2002 U.S. App. LEXIS 10268 (7th Cir. Ill. May 29, 2002)

Land owners sued village for refusing to allow variance from zoning code or subdivision code.

1999-2002

Anderson v. Chamberlain

134 F.Supp.2d 156 (D. Mass. 2001)

Landowner sued town for denying his application to install an underground sewage disposal system on his property.

State Court 1998; Federal Court 1998-2001

Boczar v. Kingen

Federal Court: 1999 U.S. Dist. LEXIS 22079 (S.D. Ind. 1999), claim dismissed 1999 U.S. Dist. LEXIS 22080 (S.D. Ind. 1999), judgment entered 2000 U.S. Dist. LEXIS 11615 (S.D. Ind. 2000), aff'd 2001 U.S. App. LEXIS 8833 (7th Cir. 2001)

Landowners sued City of Philadelphia alleging that the City's issuance of a stop-work order and revocation of a construction permit for renovations on their home constituted a taking.

Federal Court 1999-2001

GBT Partnership v. City of Fargo

2001 U.S. Dist. LEXIS 20195 (D. N.D. 2001)

Landowner sued the city when city planner recommended that the landowner address some concerns before he submitted his plat application. The landowner felt that addressing these concerns was too costly, and thus withdrew his application.

Timing not clear

Choate's Air Conditioning & Heating, Inc v. Light, Gas and Water Div. of the City of Memphis

Federal Court: U.S. Dist. Court (W.D. Tenn.), unreported, aff'd 16 Fed. Appx. 323 (6th Cir. 2001)

Plaintiff sued defendant when it allowed telecommunications companies to install, maintain, and operate telecommunications equipment on an easement owned by plaintiff for the purpose of constructing and maintaining an elevated water tank.

Federal Court July 19, 1999 - June 22, 2001

Cowell v. Palmer Twshp.

Federal Court: Unreported, aff'd 263 F.3d 286 (3d Cir. 2001)

Developers of commercial properties sued township after it placed liens on property being developed for an anticipated failure to make municipal improvements to the site.

Federal Court June 25, 1999 - August 27, 2001

Envision Realty, LLC v. Henderson

Federal Court: 2001 U.S. Dist. LEXIS 19651 (Nov. 28, 2001) (D. Meline)

Property owners who applied to subdivide a parcel of land sued the town and its agents for first enacting a moratorium targeting their proposed use, and then enacting regulations to prevent any future development of the property.

Approximately 6 months

Greenspring Racquet Club, Inc. v. Baltimore County

70 F.Supp.2d 598 (D. Md. 1999), aff'd in part, vacated in part 232 F.3d 887 (4th Cir. 2000), cert. denied 532 U.S. 957 (2001)

Property owners sought an exemption from the public approval process required by the Baltimore County development regulations for their plans to construct two office buildings. The Baltimore County Development Review Committee denied the exemption request and the property owners sued raising facial and as-applied takings claims.

State Court 1998-1999; Federal court 1999-2001

Cestero v. Rosa

198 F.Supp.2d 73 (D.P.R. 2002), 996 F. Supp. 133 (D.P.R. 1998), 172 F.3d 102 (1st Cir. 1999), 167 F.Supp.2d 173 (D.P.R. 2001), 204 F.R.D. 31 (D.P.R. 2001) State court proceedings: Municipio de Loiza v. Succesion Suarez, No. CIV. CC-1999-0833, 2001 WL 669629 (P.R., Jun. 11, 2001) (ordering developers to stop the removal of sand)

Developers, who had legally obtained permits to remove sand as part of a residential development project, sued after the municipality physically interfered with construction and brought an action to enjoin the developers from removing sand. (The municipality was ultimately successful in enjoining the sand removal).

Federal claim August 1997 - 2002

Bryan v. City of Madison (companion U.S. District Court case to 213 F.3d 267 (5th Cir. 2000))

Federal Court: 130 F.Supp.2d 798 (S.D. Miss. 1999), aff'd 213 F.3d 267 (5th Cir. 2000), cert. denied 2001 U.S. LEXIS 1127

Developer applied for building permit to construct an apartment complex; sued City, mayor, and two aldermen after repeated denials of his site plan made him unable to purchase the property before the contract expiration period so that he could build apartments on it.

Federal Court 1996-2001

Vigilante v. Village of Wilmette

State Court: Plaintiff sued in state court but was removed to federal court by defendant; Federal Court: 88 F.Supp.2d 888 (N.D. Ill. 2000)

Plaintiff individual sued village for violation of the takings clause based upon denial of a zoning variance.

State claim filed in approximately 1999; federal district court decision rendered 2000

The John Corporation v. City of Houston

State Court: Unreported, appeal dismissed 1998 Tex. App. LEXIS 3043 (Ct. App. Texas 1998); Federal Court: Unreported, aff'd in part 214 F.3d 573 (5th Cir. 2000)

City refused to issue permits to allow developer to renovate building.

May 29, 1998 - June 12, 2000

Geddes v. County of Cane

121 F.Supp.2d 662 (N.D. Ill. 2000)

Landowners sued the director of the county development department when he denied their request for rezoning and subsequently approved rezoning upon condition that landowners dedicate portion of their land as a right of way.

Timing not clear

Simi Investment Company, Inc. v. Harris County, Texas

256 F.3d 323 (5th Cir. 2001), 236 F.3d 240 (5th Cir. 2000), H-96-CV-1603 (S.D. Tex.) (Hughes, J.)

Property owner sued after County denied its request for driveway access to the street adjacent to its property. The County claimed to own a sliver of land that separated the property from the street.

Timing unknown

SGB Financial Servs., Inc. v. The Consolidated City of Indianapolis-Marion Cty.

Federal Court: No. IP 98-977-C-H/G, 2000 WL 680412 (S.D. Ind. Feb 07, 2000), aff'd 235 F.3d 1036 (7th Cir. 2000)

Owner of apartment complex claimed that city and county's designation of complex for condemnation was unconstitutional taking.

Federal Court 1998-2000

Myers v. Penn Township Board of Commissioners

50 F.Supp.2d 385 (M.D.Pa 1999), aff'd 242 F.3d 371 (3d Cir. 2000)

Plaintiff developer sued town commission over, inter alia, town's failure to make certain improvements related to the development, thereby denying developer the use of two of the lots.

1998-1999

McDonald's Corp. v. City of Norton

102 F.Supp.2d 431 (W.D.. Mich. 2000); No subsequent history

McDonald's challenged the city's denial of its application for a building permit.

1999-2000

Seiler v. Charter Township of Northville

53 F.Supp.2d 957 (E.D. Mich. 1999)

Plaintiff sued when the Planning Commission required him to install a public bike path and a bridge on his property as a condition of approving his subdivision application.

1997-1999

Houck v. Tate County, Mississippi

1999 WL 33537173 (N.D. Miss. 1999)

Developer sued county after it denied permit to include single-wide mobile homes in subdivision for single-family homes.

Federal Court 1998-1999

Bell v. American Fork City

State Court: D. Utah (D.C. No.97-CV-697-J) Federal Court: 201 F.3d 447, 1999 U.S. App. LEXIS 36447 (10th Cir. Utah 1999), reported in full 1999 U.S. App. LEXIS 30734, 1999 Colo. J. C.A.R. 6516, 2000 Colo. J. C.A.R. 6438 (10th Cir. Utah 1999)

Plaintiff property owner sued defendant city for failing to act on proposed site plans while condemnation proceedings were pending. The property was eventually condemned.

September 1994 - November 1999

Rau v. City of Garden Plain

76 F.Supp.2d 1173 (D. Kan. 1999)

Property owners sued city for changing zoning classifications, downsizing their property.

1998-1999

Gottlieb v. Village of Irvington

69 F.Supp.2d 553 (S.D.N.Y. 1999)

Property owner sued village and individuals for issuing stop work orders on construction in their driveway.

One year (stop order 1998 - decision 1999)

Frooks v. Town of Cortlandt

997 F.Supp. 438 (S.D.N.Y. 1998)

Property owners claimed denial of rezoning application was a taking. Claim determined to be unripe because New York has an established procedure for pursuing just compensation.

Nine years elapse between initial request for rezoning, to court's decision.

Hynes v. Charter Twp. of Waterford

1998 U.S. App. LEXIS 24987 (6th Cir. 1998)

Owners of partially developed property sued township after the township passed an ordinance limiting future development on their property and refused to grant them building permits.

Federal Court 1997-1998

Bass v. City of Dallas

1998 WL 417772 (N.D. Tex. 1998)

Property owner brought inverse condemnation claim based on city's construction that blocked access to property.

Timing unknown

Jones v. City of Pasadena

1998 WL 121668 (9th Cir. 1998)

Property owner alleged municipality had conspired to deprive him of real property without just compensation in violation of 42 U.S.C. §1983.

Timing unclear from decision.

L.C. Development Co. v. Lincoln County

996 F.Supp. 886 (E.D. Mo. 1998)

Plaintiff sought to construct a solid waste landfill, and spent more than $179,000 in preparation to make the land suitable for that purpose. In 1990, 1994, and 1996, Lincoln County voters all rejected the continuance of County zoning and planning. Nonetheless, County officials refused to cease applying the zoning ordinance to the site and insisted they would not issue any permit until plaintiff complied with zoning regulations—the very same regulations that voters rejected on three occasions. Moreover, the County amended its regulations even after citizens voted them down, to forbid the proposed land fill.

Three years elapse since request for drilling permit from state agency, to court decision.

The San Remo Hotel v. City and County of San Francisco

145 F.3d 1095 (9th Cir. 1998)

No federal claims permitted in federal court at all, where the facial takings challenge was dismissed on Pullman abstention grounds and the as-applied claim was dismissed on ripeness grounds.

More than eight years elapse between property owner's application to convert hotel to tourist use, to court's decision.

Sag Harbor Port Assocs. v. Village of Sag Harbor

1998 WL 603248 (E.D.N.Y.)

In 1994, plaintiff submitted an application to construct a tennis club. It previously submitted applications to build a residential housing project and a nursing home, but withdrew those applications because they "were met with vigorous opposition from community members and groups opposed to development of its land, and it eventually withdrew the applications because the Village's unfounded resistance caused the deals to falter."

Four years elapse from Plaintiff's construction permit application, to court's decision.

Henniger v. Pinellas County

7 F.Supp.2d 1334 (M.D. Fla. 1998)

Property owner sued County when County issued a "stop work" order after plaintiff received a construction permit for a pool house and subsequently began construction on it.

1 year (action was filed the same year)

Macri v. King County

110 F.3d 1496 (9th Cir. 1997)

Property owner sued because of county's denial of subdivision plat. Court found inverse condemnation claim had been properly remanded to state court.

Seven years elapse from initial submission of subdivision application, to court's decision

SK Finance SA v. La Plata County Bd. of Comm'rs

126 F.3d 1272 (10th Cir. 1997)

Property owner sued alleging county's denial of request to build sewage treatment facility resulted regulatory taking.

Six years elapse from submission of request to build sewage facility to serve subdivision, to court decision.

Deepwells Estates, Inc. v. Incorporated Village of Head of the Harbor

973 F.Supp. 338 (E.D.N.Y. 1997)

The Village was "advised" of Plaintiff's "poor financial condition." It then issued to Plaintiff an "ultimatum…to convey to the Village 4.68 acres of certain land and the small building which stood on that property, for no compensation and on the [Mayor's] terms, or [Plaintiff] could wait 'until the cows come home to get an approval on the subdivision map.' " Prior to acquiescing to the "coerced donation," Plaintiff was "harrassed by the Village and by its police department." 973 F.Supp. at 341. The Village later built its Village Hall on the land extorted from Plaintiff. Ultimately, Plaintiff agreed to a reconfigured subdivision imposed upon him by the Village, and signed a Village map to indicate his assent. Next, and without Plaintiff's consent, the Village amended this map and imposed upon Plaintiff's property a 200-foot road setback "[to] be left in its natural state in perpetuity." Id. at 342. Subsequently, the Village demanded more land from Plaintiff, and, after more harassment by the Village and its police department, he conveyed a second deed. Id. The Village then issued several certificates of occupancy for seven homes, but thereafter it "placed a moratorium on the plaintiff's property … and refused to issue any other certificates of occupancy" for 1½ years. Id. The Chairman of the Village Architecture Board attempted to require plaintiffs to make changes to homes which were "built and…occupied," motivated by "her alleged desire to increase the value of her own property, which was located less than one mile away…." Id. Court found that Village made final decisions with regard to property, but nonetheless dismissed takings claim for failure to seek compensation in New York courts.

Nine years elapse since initial request for building application, to court's decision.

Lanna Overseas Shipping, Inc. v. City of Chicago

1997 WL 587662 (N.D. Ill. 1997)

Plaintiff received commercial driveway permit for waterfront packing operation, used land lawfully in accordance with permit's terms, sought for and received a renewed permit—but City revoked permit unilaterally without providing any advance notice to Plaintiff. Court found that final decision was rendered by city, but dismissed takings claim solely on grounds that plaintiff failed to seek compensation in state court. Without discussing res judicata or collateral estoppel problem, court decided that "[o]nce the [state court] relief is denied, a plaintiff's claims are ripe for federal review, providing the federal court with subject matter jurisdiction over the inverse condemnation claims."

Five years elapse between Plaintiff's commencement of lawful and permitted land use, to city's revocation of permit, to court's decision.

Schulz v. Milne

849 F.Supp. 708 (N.D. Cal. 1994), rev'd on takings ripeness issue, 98 F.3d 1346 (9th Cir. 1996)

District court recognizes that plaintiffs spent so much money on seeking zoning approvals and litigation that they had no money left to pay for their remodeling. Each time plaintiffs submitted a remodeling plan "in compliance with applicable zoning laws," local officials nonetheless "refused to approve the plan, and instead informed plaintiffs that there were additional requirements, not found in any zoning or other statutes, which plaintiffs had yet to meet." 849 F.Supp. at 709. Although the district court found the federal takings claim ripe, the Ninth Circuit reversed in an unpublished opinion.

Eight years elapse from owner's application for remodeling permits, to circuit court's decision.

Bensch v. Metropolitan Dade County

952 F.Supp. 790 (S.D. Fla. 1996)

Defendants enacted an ordinance that would have permitted only one residence for every 40 acres.

After ten years of litigation, 5th Amendment issue addressed.

Sinclair Oil Corporation v. County of Santa Barbara

96 F.3d 401 (9th Cir. 1996)

Facial takings challenges were found ripe but court invoked Pullman abstention to avoid them. As for the as-applied challenge under State law, the takings claim was found unripe despite court's acknowledgement that the zoning ordinance applied to plaintiff's land rendered its "use severely restricted and subject to severe limitations."

Not clear from decision.

Covington Court, Ltd. v. Village of Oak Brook

77 F.3d 177 (7th Cir. 1996)

Developer brought action alleging taking resulted from city board of trustee's conditioning of approval on settlement with residential lot owner over lot that had not yet been acquired.

Three years elapse between subdivision request, to court's decision.

Martin v. Jefferson County

78 F.3d 585 (6th Cir. 1996)

Over six-year period, plaintiff repeatedly applied for but was unable to obtain a building permit. Plaintiff was nonetheless required to exhaust remedies in state court, despite existence of Kentucky statute immunizing local governments from liability for failure to issue any permit.

Six years elapse from submission of first applications for building permits, to court's decision.

Bickerstaff Clay Products Co., Inc. v. Harris County

89 F.3d 1481 (11th Cir. 1996)

Applicant also filed state court case that was stayed pending outcome of federal case.

Three years elapse from obtaining mining permit, to court's decision.

Santa Fe Village Venture v. City of Albuquerque

914 F.Supp. 478 (D.N.M. 1995)

After initially filing in federal court, suit dismissed for failure to seek state remedies. Developer then sues in state court, which is dismissed. Second suit in federal court dismissed on ripeness grounds charging that developer was required to raise federal claims in state court--even though the state case was dismissed.

Five years elapse from option to purchase land, to court's decision.

2BD Limited Partnership v. County Commissioners for Queen Anne's County

896 F.Supp. 518 (D. Md. 1995), aff'd following remand 1998 WL 559711 (4th Cir. Sept. 2, 1998)

Plaintiff submitted at least three site plan applications and a permit to develop in wetlands. Plaintiff also sought needed variances. Thereafter, county commissioners enacted an ordinance to preclude the proposed development. One commissioner opposed the project out of fear that it would hurt his business at his nearby restaurant. Plaintiff thereafter sought another variance from this ordinance, which was denied. District court initially denied takings claim on grounds of failure to seek state remedies. District court also initially dismissed other constitutional claims under Burford abstention: "[A] district court should abstain under the Burford doctrine from exercising its jurisdiction in cases arising solely out of state or local zoning or land use law, despite attempts to disguise the issues as federal claims." On initial appeal, 4th Circuit failed to reach merits and vacated entire district court decision, requesting reconsideration of entire case in light of abstention doctrine.

At least seven years elapse between submission of site plan, to final appeals court decision.

New Port Largo, Inc. v. Monroe County

873 F.Supp. 633 (S.D. Fla. 1994), aff'd, 95 F.3d 1084 (11th Cir. 1996)

Property owner challenged the validity of the rezoning in state court and also alleged that the County deprived its property without offering compensation in violation of the Florida constitution. State court found the re-zoning was improper but, because the county acted in good faith, did not award damages. Property owner then filed this suit seeking compensation under the Fifth Amendment. U.S. district court found the takings claim time-barred, but the appellate court reversed. On remand, district court again rejected takings claim on ripeness grounds because property owner did not exhaust state compensation remedies. Court never addressed the impact of the state court proceeding initially filed by the property owner.

Ten years elapse from state judge's determination that re-zoning was invalid, to circuit court's decision.

Hartman & Tyner, Inc. v. Charter Township of West Bloomfield

985 F.2d 560 (6th Cir. 1993)

Although plaintiff sought variances and satisfied final decision prong it still had to pursue state remedies, even though Michigan's highest court had never ruled that a monetary remedy was appropriate to compensate for a taking.

Four years elapse from plaintiff's request for re-zoning, to court's opinion.

Celentano v. City of West Haven

815 F.Supp. 561 (D. Ct. 1993)

Property at issue classified as "open space" upon which no development would be permitted. Nonetheless, court decides that property owner should have submitted a development application.

Timing unknown

Triomphe Investors v. City of Northwood

835 F.Supp. 1036 (N.D. Ohio 1993), aff'd, 49 F.3d 198 (6th Cir. 1995)

Court expressly recognizes that related litigation in state court and associated delays rendered the property owner unable to financially realize the project.

Seven Years elapse from submission of initial development application, to circuit court's decision

First Bet Joint Venture

818 F.Supp. 1409 (D. Colo. 1993)

Property owners sued due to moratorium on processing zoning permits for future development and for the operation of gaming facilities.

Timing unknown

Gamble v. Eau Claire County

5 F.3d 285 (7th Cir. 1993)

Property owner's regulatory taking claim dismissed for failure to pursue state judicial remedies.

Timing unclear from decision.

Christensen v. Yolo County Board of Supervisors

995 F.2d 161 (9th Cir. 1993)

Property owners sued challenging zoning agreement between county and city that prohibited the urban development of owner's land.

Four years elapse requesting zoning opinion from county, to court's decision.

Fitzgerald v. Utah County

963 F.2d 382 (10th Cir. 1992)

Property owners sued because of county ordinance that required restrictive covenants on subdivision property in order to waive the recordation of a plat.

Timing unknown

Anderson v. Alpine City

804 F.Supp. 269 (D. Utah 1992)

Among other delays, 18-month building moratorium prevented any consideration of development application by local officials. No final decision even though city concluded plaintiffs could only develop 2 out of 175 lots.

Five years elapse from submission of initial development application, to court's decision. Court characterizes this delay as "minimal."

Cap'n Hook Auto Parts, Inc. v. Board of Township Trustees of Liverpool Township

773 F.Supp. 71 (N.D. Ohio 1991)

Zoning caused plaintiffs to cease operating their business.

Timing unknown

Eide v. Sarasota County

908 F.2d 716 (11th Cir. 1990)

District court found constitutional claims ripe and jury awarded developer $850,000. Circuit court reversed on ripeness grounds and withdrew compensation award.

Six years elapse from County's adoption of sector plan, to court decision.

Asociacion de Pescadores de Vieques, Inc. v. Santiago

747 F.Supp 134 (D.P.R. 1990)

District court held that landowner had to pursue inverse condemntaiton remedies in Puerto Rico court before bringing an action for 5th amendment taking -- even thought "[n]o damages have ever been awared by the Puerto Rico Supreme Court in inverse condemnation actions. Nonetheless, said court is aware of the existence of an inverse condemnation remedy, and could grant it if the right case came along."

Four years elapse from the public hearings on development project to Court's decision. Applications for development presumably submitted before hearings.

Estate of Himelstein v. City of Fort Wayne

898 F.2d 573 (7th Cir. 1990)

Planning commission recommended the requested re-zoning to the city council, who voted against it in a 5-4 decision. Later, city council attempted to block code-mandated reconsideration of the re-zoning petition by ordering the city clerk to retrieve relevant documents from the local planning commission. Upon reconsideration, planning commission again recommended re-zoning, but city council "tabled the petition and took no further action on the matter." 898 F.2d at 574. The case went up to the Indiana Supreme Court, which held that the property should be re-zoned in Plaintiff's favor; the city council refused to abide by the highest court's decision in any event, by refusing to issue the requested development permits. Thereafter, plaintiffs filed a Section 1983 suit in federal court against the city council. The federal court then dismissed the matter for failing to seek compensation in state court, despite plaintiffs' success in the prior state court proceeding over the illegality of the city council's conduct. The federal courts required this result even though, at that time, the Indiana Supreme Court never decided whether a taking for inverse condemnation under Indiana law was compensable.

Nine years elapse from presentment of rezoning petition, to court's decision.

Adjudication on Merits

Windsor Jewels of Pennsylvania, Inc. v. Bristol Township

State Court: 792 A.2d 726, 2002 Pa. Commw. LEXIS 32 (Pa. Commw. Ct. 2002); Federal Court: 2002 U.S. Dist. LEXIS 12163 (E.D. Pa. Mar. 28, 2002), summary judgment granted, judgment entered 2005 U.S. Dist. LEXIS 2019 (E.D. Pa. Feb. 10, 2005)

Plaintiff land owner was granted building permit to renovate property for business use, but sued because after performing renovations, Township denied use and occupancy permit.

February 2001 - March 2002

Thornberry Noble, Ltd. v. Thornbury Township

Federal Court: 2000 U.S. Dist. LEXIS 13474 (E.D. Pa. 2000), aff'd 112 Fed. Appx. 185 (3d Cir. 2004), cert. denied 125 S.Ct. 1932 (2005)

Plaintiff developer sued township, board of supervisors and individual board members, alleging a temporary regulatory taking during the period in which the Board was considering plaintiff's zoning plan.

2000-2005

Sunrise Corporation of Myrtle Beach v. The City of Myrtle Beach

420 F.3d 322 (4th Cir. 2005)

Developers brought suit against city for denying building permit. Developers also appealed the denial of the building permit and eventually won the appeal and were issued a building permit. Defendants sold the property before being issued the permit.

Timing unknown

W.J.F. Realty Corp. v. Town of Southampton

State Court: 240 A.D.2d 657 (N.Y. App. Div. 2d Dep't 1997); rev'd 261 A.D.2d 609 (N.Y. App. Div. 1999); appeal dismissed 719 N.E.2d 928 (1999); Federal Court: 220 F.Supp.2d 140 (E.D.N.Y. 2002) (denying motion to dismiss); 351 F.Supp.2d 18 (E.D.N.Y. 2004)

Property owners sued town for placing an administrative hold on their subdivision application, and adopted a plan which imposed a permanent development moratorium on their property.

1993-2004

West Linn Corporate Park v. City of West Linn

Federal Court: Unreported, 2004 WL 1774543 (D. Or. 2004)

Developer alleged inverse condemnation, takings, retaliation, equal protection, and breach of contract in connection with conditions of approval for a corporate office park.

Timing unknown

Johnecheck v. Bay Township

Federal Court: Unreported, aff'd 119 Fed. Appx. 707 (6th Cir. 2004)

Township zoning board rejected property owner's permit application to build wind turbine generators on their land.

2001-2004

Santini v. Connecticut Hazardous Waste Management Service

State Court: 1998 WL 422166, aff'd 251 Conn. 121, 739, A.2d 680 (1999), cert. denied 530 U.S. 1225 (2000); Federal Court: District Court unreported, aff'd 342 F.3d 118 (2d Cir. 2003), cert. denied 543 U.S. 875 (2004)

Builder developer sued agency that designated his residential subdivision as finalist for location of low-level radioactive waste disposal facility.

State Court 1994-1999; Federal Court 2000-2004

Rucci v. The City of Eureka

Federal Court I : No. 4:96-CV-2425 (E.D. Mo. Oct. 20, 1997) (dismissing taking claim as unripe); State Court: No. 98CC-004139 (Cir. Ct. of St. Louis County Jan. 7, 2000) (judgment in favor of City on inverse condemnation claim); aff'd 45 S.W.3d 483 (Mo. Ct. App. 2001) Federal Court II: 231 F.Supp.2d 954 (E.D. Mo. 2002)

Developer sued the City after it denied his application to rezone property and construct a housing development.

1997-2002

JSS Realty Co., LLC v. Town of Kittery

U.S.D.C. for the District of Maine, 177 F.Supp.2d 64; 2001 U.S. Dist LEXIS 20694

Developer alleged that a zoning ordinance reduced the developable area on subject property making the project for which the property was purchased economically unfeasible.

Federal Court 2001

Van Horn v. Town of Castine

Federal Court: 167 F.Supp.2d 103 (D. Me. 2001)

Property owner sued Town, alleging that Town's denial of permit to reconstruct porch, based upon restrictions in a historic preservation ordinance, deprived him of the normal use of his property.

Federal Court 2001

Welders Mart, Inc. v. City of Greenville

Federal Court: 2000 WL 246607 (N.D. Tex.)

Owner of welding supply store that was destroyed in a fire sued when he was denied a building permit to replace his store.

Federal Court 1998-2000

John E. Long, Inc. v. Borough of Ringwood

61 F.Supp.2d 273 (D.N.J. 1998, aff'd 213 F.3d 628 (3d Cir. 2000)

Developer sued borough counsel and planning board for rejecting its application to re-zone its property so that it could establish smaller residential lots.

Federal Court 1996-2000

Brian B. Brown Constr. Co. v. St. Tammany Parish

17 F.Supp. 2d 586 (E.D. La. 1998)

Property owner sued alleging that denial of plan to develop property resulted in denial of all economically beneficial uses of the property by taking the property "out of commerce."

One-and-a-half years elapse between subdivision request, to court's decision.

Loreto Development Co. v. Village of Chardon

1998 WL 320981 (6th Cir. 1998)

Property owner sued because of denial of proposal to re-zone property to allow for a Wal-Mart store interfered with reasonable investment backed expectations.

Four and a half years elapse between property owner's variance and conditional use applications, to decision denying compensation.

Mont Belvieu Square, Ltd. v. City of Mont Belvieu

1998 WL 774139 (S.D. Tex. 1998)

Plaintiff applied to build a low- to moderate income, multifamily housing project with special government financing. City, however, issued a moratorium on all permits except for single-family residential units for wealthier customers. As a result, plaintiff lost federal financing for the project. Property owners alleged permit denial constituted a taking, and that the moratorium "was denied with the obvious and discriminatory purpose of preventing…low to moderate income housing which would induce minorities to move into the predominantly white city." In light of these events, court decided it would have been futile for plaintiffs to seek a variance, so it found the takings claim ripe. In any event, court ruled against takings claim on the merits because Plaintiff did not have a protectable property interest under state law vesting principles.

Five-and-a-half years elapse between permit application to build apartment project, to court's decision.

Marshall v. Board of County Commissioners for Johnson County

912 F.Supp. 1456 (D. Wyo. 1996)

Property owner brought action because of denial of subdivision approval destroyed all economically viable use of the property.

Four years elapse since submission of development application, to court decision.

Goss v. City of Little Rock

90 F.3d 306 (8th Cir. 1996), following remand, 151 F.3d 861 (8th Cir. 1998)

Ultimately, appeals court found a taking where county officials conditioned a rezoning by compelling a property owner to dedicate 22% of his land for a highway expansion.

Five years elapse from application for rezoning, to court's decision.

International College of Surgeons v. City of Chicago

91 F.3d 981 (7th Cir. 1996), rev'd, 522 U.S. 156 (1997), on remand, 153 F.3d 356 (7th Cir. 1998)

Litigation history dwells on jurisdictional issues. U.S. Supreme Court decided that a case containing claims that local administrative action violates federal law, as well as state law claims for on-the-record review of administrative findings, is within the federal courts' jurisdiction. On remand, 7th Circuit ruled that district court properly refused invoke either Burford or Pullman abstention. Appeals court recognized that "the doctrine of abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it...." 153 F.3d at 360 (citations omitted).

Eight years elapse since property owners apply for demolition permit, to appeals court's ultimate finding on the merits that no taking occurred.

Kruse v. Village of Chagrin Falls

74 F.3d 694 (6th Cir. 1996)

"One afternoon in June of 1986, the Kruse family of Chagrin Falls returned home to discover, to their intense amazement and dismay, that their backyard was missing. The back of their property has been laid waste, and the family's house was hanging at the edge of a precipice where their lawn, trees and other landscaping had been when they left home that morning. Agents of the Village had been busily at work that day, devastating the Kruses' yard and carting off tons of soil excavated from the property, as well as the family's trees, bushes, and other plantings...When the Kruses protested the destruction of their property, the Village authorities responded that they presumed that the Village owned the vacated street (even though it had granted a building permit to the Kruses' predecessors in title to build an extension on what had been the street, and even though the Village was aware of the Kruses' occupancy). The Village had determined to commence a little roadwork across the Kruses' backyard but had not given the owners any notice of its plan to consume their yard as part of a street-widening program." Nonetheless, the Village refused to pay compensation. The district court found the takings claim unripe, but the circuit court reversed and remanded for further proceeding on the merits.

Ten years elapse since county's destruction of plaintiff's yard, to court case.

Panhandle Eastern Pipe Line Company

898 F.Supp. 1302 (S.D. Ind. 1995)

Interstate natural gas pipeline sued to prevent county from widening of public drain that would cause substantial economic consequences to the company by requiring it to modify pipelines at its own expense.

Three years elapse between submission of proposal, to court decision.

Resolution Trust Corporation v. Town of Highland Beach

18 F.3d 1536 (11th Cir. 1994)

Town initially adopted ordinance allowing for ultimate build-out of a planned unit development ("PUD") within ten years, or by August 8, 1990. Mayor issued letter to confirm completion date, and developer invested $8 million to prepare the site and begin construction in reliance on the city's determination. Four years later, on December 12, 1984, county decided to re-interpret ordinance and ruled that the completion date should be July 1, 1985, five years earlier than the original deadline. To no avail, developers argue repeatedly to the town board that it relied on the 1990 deadline, but the town informed that the PUD project was "dead." When developer could not meet the 1985 deadline, town downzoned its property to permit only lower densities compared to the initially approved PUD. Town argued takings claim wasn't ripe because it made no final decision on the project, but court rejected this argument and found a taking.

Fourteen years elapse since town granted first construction permit, to court's decision.

Christopher Lake Development Company v. St. Louis County

35 F.3d 1269 (8th Cir. 1994)

Plaintiff forced to litigate in both state and federal courts. Federal district court initially determined takings claim was not ripe, but circuit court remanded for further proceedings on the merits.

Seven years elapse between hearing on plaintiff's site plan, to court's decision. Date of submission of initial application not mentioned

Corn v. City of Lauderdale Lakes

771 F.Supp. 1557 (S.D. Fla. 1991), aff'd in part, rev'd in part and remanded, 997 F.2d 1369 (11th Cir. 1993), after remand, 95 F.3d 1066 (11th Cir. 1996)

District court initially found takings claim unripe; circuit court then reversed. District court then found a violation of substantive due process and never decided the merits of the takings claim; circuit court then reversed, finding no violation of substantive due process and remanded for further proceedings. Parties then focus on merits of takings claim. In 1996, circuit court ultimately decided on the merits that no taking occurred.

As of 1993, "the parties [had] been litigating over 8.5 acres for sixteen years." Three more years of litigation to address merits of takings claim.

Reahard v. Lee County

968 F.2d 1131 (11th Cir. 1992)

Owner sued county in state court alleging that county's designation of his property in land use plan as resource protection area was a taking under state and federal constitutions. County removed case to federal district court, which found that adoption of land use plan did constitute taking. Circuit court held that district court misapplied legal standard for partial takings and failed to make adequate factual findings that taking had occurred, and thus remanded for further proceedings.

Eight years elapse from county's action to zone plaintiff's land as non-developable open space, to court's decision.

McDougal v. County of Imperial

942 F.2d 668 (9th Cir. 1991)

District court abstained its jurisdiction and found inverse condemnation claim unripe. Circuit court addressed merits of inverse condemnation claim without discussing ripeness issue. Remanded for further proceedings for district court to determine on the merits whether a taking occurred.

Plaintiffs "have been embroiled in litigation with the County for most of the last twenty years."

Midnight Sessions, Ltd. . City of Philadelphia

945 F.2d 667 (3rd Cir. 1991)

No discussion of ripeness issues. Case does not involve typical development scenario, but denial of license to operate an adult dance hall.

Three years elapse form application for dance hall license, to court's decision.

Diaz v. City of Riverside

895 F.2d 1416 (9th Cir. 1990)

Property owners sued because ordinance significantly reduced density of property resulting in denial of economically viable use of their property.

Thirteen years elapse from plaintiff's initial submission of request for map amendment, to court's decision.

Del Monte Dunes at Monterey, Ltd. v. City of Monterey

920 F.2d 1496 (9th Cir. 1990), after remand, 95 F.3d 1422 (9th Cir., 1996), cert. granted, 118 S.Ct. 1359 (1998)

Developer submitted four plans over three years. Each successive submission designed to meet density restrictions recommended by planning board. Last plan developed with planning board staff assistance, but board and county nonetheless rejected plan. Ultimately, city refused to allow any development and jury awarded compensation for a taking. Approximately 17 years elapse between developer's initial submission, to ultimate review by U.S. Supreme Court.

Total of 17 years of negotation and litigation: Nine years elapse from submission of first plan to court's decision that claim was ripe, without ever reaching the merits. Eight more years of litigation on the merits elapse until U.S. Supreme Court argument.

Hodge Capital Co. v. City of Sausalito

908 F.2d 976 (9th Cir. 1990)

Owner applied for conditional use permit to construct office building, but city planning commission denied proposal. The owner appealed to the city council with a revised plan. The city council vote was a tie, which had the effect of affirming the planning commission's denial. The owner petitioned the state court on the interpretation of the effect of the city council's tie vote, and also filed an action in the U.D. district court for a taking, which granted summary judgment to the city. Circuit court affirmed, simply assuming that a ripe claim existed.

Eight years elapse from application for permit, to court's decision.

No. 02-_____

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve the conflict between its decisions in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997)? The former *requires* landowners seeking compensation for regulatory taking of property to sue in the state courts and *prohibits* them from suing in U.S. District Court. However, the latter simultaneously *grants* municipal defendants in such cases the *absolute right to remove* them to U.S. District Courts — even though (a) removal is authorized by 28 U.S.C. § 1441(a) only if the plaintiff could have filed suit in federal court in the first instance which, under *Williamson County*, landowners may not; and even though (b) the combination of *Williamson County* and *City of Chicago* gives municipal defendants a veto power over the plaintiff's 7th Amendment right to a jury trial under *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

   The Court of Appeals agreed with Petitioner that this situation represents an "anomalous . . . gap in Supreme Court jurisprudence," but declined to address it, explicitly concluding that how to resolve the conflict "is for the Supreme Court to say, not us."

2. When a city openly defies this Court's holding in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by (1) imposing onerous conditions on a land use approval that are grossly disproportional to the burdens the proposed project will create, and (2) flatly refusing its duty to show any proportionality, has the landowner stated a claim on which relief can be granted by a U.S. District Court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Franklin P. Kottschade respectfully prays that a Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision was filed on February 13, 2003, and is reported as *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003). (App., p. 1.) A timely Petition for Rehearing and Rehearing En Banc was denied in an unreported order filed March 21, 2003. (App., p. 8.) The District Court's opinion (App., p. 9) is unreported.

JURISDICTION

This case was filed because the City of Rochester defied this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There, this Court held that a municipality could constitutionally condition the issuance of a land development permit only if its conditions were roughly proportional to burdens the proposed development would place on the community, and if the municipality satisfied demonstrating that proportionality. Here, Rochester not only imposed conditions that were grossly disproportionate, and repeatedly refused Mr. Kottschade's requests to explore how the conditions related to his development.

Mr. Kottschade sued in U.S. District Court for these 5th Amendment violations. That court dismissed, believing *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) required Mr. Kottschade to sue in state court first. Mr. Kottschade relied on *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). There, this Court held that a city sued in state court had the

right to remove the case to federal court under 28 U.S.C. § 1441(a) because the plaintiff could have filed suit in federal court in the first instance. Mr. Kottschade therefore urged that *City of Chicago* modified *Williamson County*, for if a defendant can remove, then *perforce* the plaintiff must be able to file in federal court initially.

The District Court concluded that, *City of Chicago* notwithstanding, *Williamson County* controlled and dismissed the case. (App., p. 16-.) The 8th Circuit affirmed. Although it agreed with Mr. Kottschade that the situation was "anomalous" (App., p. 5), the Court refused to address the anomaly, concluding that how to resolve it "is for the Supreme Court to say, not us" (App., p. 5).

This Court's jurisdiction is under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1441(a):

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

STATEMENT OF THE CASE

Frank Kottschade, a long-time resident of, and developer in, the City of Rochester, Minnesota, sued under 42 U.S.C. § 1983 charging a regulatory taking of his property.

Mr. Kottschade sought to develop a townhouse project on a 16.4-acre parcel of land he acquired in 1992. After years of attempting to satisfy various city concerns (through four different development proposals), the city purported to grant a permit in June, 2000. However, it attached conditions to the permit that reduced the number of homes from 104 to 26, and added nearly $70,000 in development costs *to each unit* — in a market where such homes sell for $125,000. Economically, it was an impossibility. Constitutionally, it was a taking.

Knowing that this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) allowed conditions only if they bore a rough proportionality to the burdens the proposed development would place on the community (and knowing that these conditions bore no relationship to his project whatever), Mr. Kottschade asked the city to explain the nexus and its proportionality. Even though *Dolan* placed the burden on the city to provide such an explanation, the city flatly refused. Twice. In writing.

Mr. Kottschade then filed this suit. The District Court dismissed (App., p. 17) and the 8th Circuit Court of

Appeals, albeit with some expressly voiced discomfort (App., p. 5), affirmed (App. p. 7). Thus, this Petition.

REASONS FOR GRANTING THE WRIT

I. THE CONUNDRUM TO BE RESOLVED

A. Do State Or Federal Courts Have Initial (Or Sole) Jurisdiction Over Regulatory Taking Claims Under The 5th Amendment? And Who Decides?

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), this Court held that a municipal defendant in a state court action challenging the validity of land use regulations (under both state and federal law)[1] may remove that case to federal court. The rationale was that the plaintiff could have filed suit in federal court in the first instance (as the suit raised federal questions) and therefore 28 U.S.C. § 1441(a) granted the defendant the reciprocal right to remove the case. (522 U.S. at 164.) However, in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that such plaintiffs may *not* file such actions in federal court, but must first repair to the state courts and seek compensation there, before their claims can be deemed ripe for federal court litigation. (473 U.S. at 200.)

In fairness to this Court, it appears that the briefs in *City of Chicago* did not call *Williamson County* to the

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[1] The plaintiff in *City of Chicago* raised federal due process, equal protection and taking claims, as the trial court noted (1997 WL 171350) and this Court confirmed (522 U.S. at 160). It is the allegations in the complaint that determine federal jurisdiction. (E.g., *Bell v. Hood*, 327 U.S. 678, 681 [1946].)

Court's attention. The adversary system failed to disclose the doctrinal cliff toward which the Court was being urged. That is likely why neither the majority nor the dissent in *City of Chicago* mentions *Williamson County*. As a consequence, the constitutional law of regulatory takings now contains two contradictory jurisdictional holdings.

B. Confusion And Unfairness Of "Catch-22" Proportions Abound In The Wake Of Two Conflicting Decisions From This Court.

The interaction between these two holdings has given rise to a true "Catch-22" conundrum. No matter which court property owners choose to file suit, their municipal adversaries can muster decisional law saying that they should be in the other court system.

Under *Williamson County*, landowners are said to be barred from federal court while *simultaneously* — under *City of Chicago* — defendants *in the same cases* can force them into federal court on the bizarre theory that the plaintiffs could have sued there in the first place, although — under *Williamson County* — they could not. Adding insult to injury, some federal courts have dismissed such removed cases on the stunning ground that the plaintiffs (who were brought to federal court involuntarily by the defendants) should have pursued their action in state court.[2]

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[2] E.g., *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003); *Reahard v. Lee County*, 30 F.3d 1412, 1414, 1418 (11th Cir. 1994) (after two federal trials and two appeals). See *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001) (landowner sued in state court, municipality removed to federal court, district court abstained and remanded state claims to state court; when property owner returned to district court to litigate federal claims, district court

The upshot is that either *City of Chicago* modified *Williamson County* or the Court has inadvertently created not only an insoluble anomaly in the law, but also a class of American litigants who are *de facto* pariahs — second class citizens whose sole access to federal court rests on the whim of the defendant, and who are at times subjected to a judicial "ping-pong game" whereby they file suit in state court, only to have it removed to federal court, which then remands it back to state court. (E.g., *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 [D. Kans. 1999]; *Vigilante v. Village of Wilmette*, 88 F. Supp. 2d 888 [N.D. Ill. 2000].)

Mr. Kottschade submits that this Court could not have intended to bring about such a grotesque procedural regime, and urges that the prevailing "ripeness mess"[3] cries out for a second look by this Court to reconcile *Williamson County* with *City of Chicago*, and inform aggrieved property owners whether they can *ever* have their federal constitutional cases heard on the merits in federal court.

C. The Unfairness And Confusion Created By This Jurisdictional Conflict Are Widely Recognized.

Courts and commentators expressed confusion and unhappiness with the jurisdictional problems created when *Williamson County* held that property owners could try their regulatory taking cases in federal court, but only after first "ripening" them in state court. (See *post*, pp. 22-24.)

City of Chicago exacerbated the situation. Lawyers

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dismissed the case under the *Rooker-Feldman* doctrine).

[3] See John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse,* 31 Urb. Law. 195, 196, fn. 5 (1999).

from the ABA's State and Local Government Law Section, representing diverse clients, concluded after a weekend retreat devoted to this and related issues that either both parties or neither ought to have access to the federal courts:

> "The second and third recommendations deal with the apparent anomaly in effect, though probably not in intent, when *Williamson* is juxtaposed against *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). Under *City of Chicago*, governmental defendants can, and frequently do, remove takings claims initiated in state court to federal court under the federal removal statute. At the same time, under *Williamson*, plaintiffs who bring those very same claims in federal court are told they must litigate in state court. As a result, the defendants in takings claims have a choice of forum — state or federal — while takings plaintiffs under *Williamson* are apparently required to go only to state court." (*Report of Retreat on Takings Jurisprudence*, in *Taking Sides on Takings Issues* 568, 574 [ABA 2002; Thomas E. Roberts, ed.].)

The ABA retreat thereby ended by asking for judicial help in resolving the dissonance between *Williamson* and *City of Chicago*. Mr. Kottschade asks this Court to take this opportunity to correct the anomalous state of regulatory takings jurisdictional jurisprudence.

II. THERE IS DIRECT CONFLICT BETWEEN TWO DECISIONS OF THIS COURT: *WILLIAMSON COUNTY* PRECLUDES PROPERTY OWNERS FROM SUING IN FEDERAL COURT FOR 5TH AMENDMENT REDRESS, WHILE *CITY OF CHICAGO* WELCOMES MUNICIPAL DEFENDANTS TO REMOVE THE SAME CASES TO FEDERAL COURT. THEY CANNOT OPERATE HARMONIOUSLY.

Simply put, *Williamson County* and *City of Chicago* are — as applied below — in direct conflict. *City of Chicago* is based on the even-handed rule of 28 U.S.C. § 1441(a), i.e., if the plaintiff could have filed suit in federal court but chose the state venue instead, then the defendant has the absolute right to remove the case to federal court. Thus, if *City of Chicago* is to be viewed as rational, Mr. Kottschade should have been permitted to file suit directly in federal court. The courts below, however, refused to apply *City of Chicago* because, in their view, until this Court itself reconciles it with *Williamson County*, then *Williamson County* mandates dismissal regardless of what *City of Chicago* may have said later. Under the lower courts' reading of this Court's decisions, only one of the parties to litigation like this has free access to federal court, while the other has none. [4] As summarized in a leading treatise:

> "While not put so starkly, the message for property owners seems to be: 'You can't be heard in federal court, but your opponents can.' " (Steven J. Eagle, *Regulatory Takings* 1091 [2d ed. 2001].)

That cannot be the law.

28 U.S.C. § 1441(a) restricts removal to:

> ". . . any civil action brought in a State court *of which the district courts of the United States have original*

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[4] That the *City of Chicago* complaint also contained due process and equal protection claims is of no moment. As Professor Kovacs has explained, the same Williamson County ripeness rule has been applied to those claims. (Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q. 1, 19 [1999] [collecting exemplars of each].)

jurisdiction." (Emphasis added.)

Thus, unless the International College of Surgeons *could* have brought its regulatory taking case in U.S. District Court initially, based on that court's original jurisdiction, the City of Chicago *could not* have been permitted to remove the case to federal court. But had the International College of Surgeons filed initially in federal court, it would have received the same response as Mr. Kottschade: case dismissed. That has been the consistent lower court treatment since *Williamson County*. (See Delaney & Desiderio, *supra*, 31 Urb. Law. at 206-231 [collecting and analyzing in tabular form all federal land use cases decided between 1990 and 1998].)

In ruling that removal was proper, this Court concluded simply that, "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (*City of Chicago*, 522 U.S. at 528-529.) The Court was well aware of the momentous nature of its decision. Any doubt was dispelled by Justice Ginsburg's dissent, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsburg, J., dissenting.)

Here, the Courts below concluded that, until this Court expressly says otherwise, they would have to apply *Williamson County* and dismiss this case because it had not gone through state court on the way to federal court. (App., pp. 5, 16.) As the Court of Appeals put it, the result of this "perceived gap in Supreme Court jurisprudence" is "anomalous" (App., p. 5), but whether *City of Chicago*

authorizes any relief from this anomaly "is for the Supreme Court to say, not us" (App., p. 5).

It cannot be the rule that property owning plaintiffs are barred from federal court while municipal defendants in the same cases have a free pass into federal court whenever they like. The issue goes to jurisdiction. Property owners are said to be unable to file in federal court because the federal courts lack jurisdiction. (E.g., *Reahard*, 30 F.3d at 1415.) But jurisdiction cannot magically appear out of thin air merely because some municipal defendant wants it. Jurisdiction exists, or it does not. Yet *City of Chicago* and *Williamson County* now simultaneously answer the same jurisdictional question "yes" and "no." The decisions below make plain that lower courts will not address this "mess" without guidance. Clarification by this Court is necessary.

III. EVEN BEFORE THIS COURT ISSUED ITS SECOND — CONFLICTING — OPINION, LOWER COURTS HAD MADE A HASH OF A RULE THIS COURT DESIGNED AS "*NOT YET RIPE* FOR FEDERAL COURT," TURNING IT INTO A RULE OF "*NOT EVER* IN FEDERAL COURT."

A. The Premise Of *Williamson County* Was That Property Owners Would Be Able To Obtain A Federal Court Ruling On The Merits Of Their Regulatory Taking Claims After They First "Ripened" Their Cases In State Court.

Even commentators opposed to landowners concede (as they must) that the plain language of *Williamson County* contains a clear promise of federal court access:

> "Reliance [by the Court] on the ripeness rationale, unfortunately, suggests to property owners that their

complaints will be ripe and heard in the federal courts after their state suits are over." (Thomas Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 480 [1992].)

Williamson County made clear that this Court was (a) deciding whether a claim was YET ripe for litigation in federal court and (b) that there were things which FIRST had to be done in state court AFTER WHICH the federal constitutional claims WOULD BE RIPE for federal court.

The Court's analytical discussion begins by saying that ". . . respondent's claim is *premature*." (473 U.S. at 185; emphasis added.)[5] Prematurity necessarily means that something is yet to be done to make the matter mature, or jurisprudentially "ripe." *Williamson County* then says that, because of the lack of both a final administrative decision (not in issue here[6]) and the absence of an attempt to seek

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[5] The Court did *not* say there was no valid claim. Nor could it. Federal courts at that time had dealt with such claims — as they routinely deal with other Bill of Rights claims — for years. See, e.g., *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 99th Cir. 1983); *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982); *Fountain v. Metro Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); *Hernandez v. Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

[6] Here, the city granted Mr. Kottschade a permit, albeit subject to financially ruinous conditions, and refused any variances. Thus, in *Williamson County's* words, we know precisely "how [he] will be allowed to develop [his] property." (473 U.S. at 190.) As the court below pointed out, Mr. Kottschade — in contrast to *Williamson County* — had exhausted his administrative remedies (App., p. 5) and thus had obtained a

compensation in state court, ". . . respondent's claim is *not ripe*." (473 U.S. at 186; emphasis added.) Absence of ripeness necessarily means that the matter can be ripened.

Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court. The Court's language demonstrates that the Court plainly was *delaying* a property owner's entry into the federal courthouse, not barring it. That concept of a dilatory plea is crucial in analyzing the development of the law since then.

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so." (473 U.S. at 194; emphasis added.)
>
> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." (473 U.S. at 195; emphasis added.)
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is *premature*." (473 U.S. at 197; emphasis added.)

The opinion ends as it began, with this conclusion:

> "In sum, respondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." (473 U.S. at 200; emphasis added.)

Thus, *Williamson County* is founded on the twin concepts of "not yet" and "not until." But lower courts have lost track of that. Instead, property owners who satisfy

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final determination of what the city would approve.

Williamson County find, when attempting to file their now-ripened federal suits, that the door is barred by *res judicata* and collateral estoppel. (See *post*, pp. 16-17.)[7] Thus, the upshot is that this Court's endorsement of property owners' right to litigate in federal court after ripening their suits in state court has been overruled by lower courts. Instead, takings plaintiffs have been banished to state courts.

If that had been this Court's intent, *Williamson County* could have said so. Directly. Its holding could have been simple and straightforward: "All takings litigation must be brought in state courts; federal courts have no jurisdiction to entertain it, even though it involves the application of the federal Constitution." Period. Plainly, neither the Congress that enacted 42 U.S.C. § 1983 nor the Court that wrote *Williamson County* had that in mind. Quite the contrary. All commentators agree that the Court's words plainly tell property owners that the way to litigate their 5th Amendment cases in federal court is to "ripen" them by litigating first in state court.[8]

Williamson County's evident establishment of a system by which property owners could eventually litigate

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[7] As the 8th Circuit put it below, Mr. Kottschade was "justly" concerned about this likelihood. (App., p. 6; 319 F.3d at 1041.)

[8] E.g., Steven J. Eagle, *Regulatory Takings* 1063 (2d ed. 2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation,* 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language . . . suggests that the state law suit is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap,* 32 Urb. Law. 239 (2000) ("language . . . suggested that, eventually, a litigant's taking claim would be heard in federal court"); *Id.* at 249 ("language of Williamson suggests that a federal claim will survive after disposition in the state court").

federal issues in federal court was in keeping with a long line of decisions holding that those who plead federal claims and seek the aid of federal courts have a right to a federal determination. (E.g., *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 [1909]; *Bell v. Hood*, 327 U.S. 678, 681 [1946]; *England v. Louisiana State Bd. Of Medical Examiners*, 375 U.S. 411, 415 [1964].) As this Court put it, there are "fundamental objections" to compelling a plaintiff who has legitimately invoked federal jurisdiction "without his consent and with no fault of his own, to accept instead a state court's determination of those claims." (*England*, 375 U.S. at 415.) It is no different here.

B. Lower Courts Have Misused *Williamson County* As A Device To Prevent Property Owners —Alone Among Citizens — From Litigating *Federal* Constitutional Issues In *Federal* Court.

"We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ." (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].

Notwithstanding this Court's clear language, property owners have been *de facto* singled out for virtual exclusion from the federal court system for redress of their 5th Amendment grievances against local government agencies. As things stand now American land owners like Mr. Kottschade — unlike any other citizens — may *never* obtain federal adjudication of their federal rights.

1. Property owners are the only victims of Bill of Rights violations who are barred from seeking redress in federal court.

That property owners have been singled out is clear. (See, e.g., Eagle, *supra* at 1068-1070; Timothy J. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 2 [1992]; Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683, 685 [1999].) As one commentator concluded, "[t]he state compensation portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law." (Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 [1995].)

Paradoxically, federal court protection is routinely provided in *some* land use cases — but only those involving aspects of the Bill of Rights *other than* the Fifth Amendment. Federal court First Amendment cases abound, for example, in which the validity of local land use ordinances regulating, or zoning for, sexually explicit work has been challenged.[9] There is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and land use ordinances as do other land use cases. First Amendment cases dealing with the land use aspects of establishment of religion are also litigated in federal courts in the first instance[10]

Moreover, at the behest of aggrieved citizens, federal courts have involved themselves in the local

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[9] E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

[10] E.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994).

intricacies of city budget policy,[11] county law enforcement policy,[12] municipal policy governing the use of force during arrests,[13] county road acquisition policy,[14] municipal employment policy,[15] city medical care policy,[16] school district sexual abuse policy,[17] police department sexual harassment policy,[18] and even the question whether "extortion of outsiders, businessmen, or developers" was town policy.[19] As this Court once noted, federal courts routinely review issues involving exercise of a state's sovereign prerogative, including the power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue bonds without a referendum, and a host of others. (*County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-192 [1959] [collecting cases] [retaining federal court jurisdiction over a state eminent domain case].)

The cited cases deal with parallel features of the Bill of Rights, routinely protected in federal court through 42

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[11] *Berkley v. Common Council*, 63 F.3d 295 (4th Cir. 1995) (*en banc*).

[12] *Turner v. Upton County*, 915 F.2d 133 (5th Cir. 1990).

[13] *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), *cert. denied* 117 S.Ct. 1086 (1997).

[14] *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988).

[15] *Richardson v. Leeds Police Dept.*, 71 F.3d 801 (11th Cir. 1995).

[16] *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991).

[17] *Gonzalez v. Ysleta Indep. School Dist.*, 996 F.2d 745 (5th Cir. 1993).

[18] *Gares v. Willingboro Township.*, 90 F.3d 720 (3d Cir. 1996).

[19] *Roma Constr. Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996).

U.S.C. § 1983 — even against unconstitutional land use regulations. All sorts of local governmental issues are litigated in federal courts every day. And they involve all aspects of the Bill of Rights — except the 5th Amendment's Just Compensation Clause.

2. Doctrines of claim and issue preclusion have been misemployed by lower courts to undercut *Williamson County*'s "ripening" process.

The mechanism for keeping property owners out of federal court has been the combination of *Williamson County*'s requirement of state court litigation with *res judicata*, and collateral estoppel. The law is used as a diabolical trap. Once a property owner sues in state court, any attempt to follow *Williamson County*'s directive to *then* litigate the "ripened" 5th Amendment case in federal court is met by one or more of the preclusion doctrines and the case is summarily dismissed.

Federal cases dismissing property owners' "ripened" efforts at federal court litigation abound. (E.g., *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998]; *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-729 [3d Cir. 1989]; *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 [9th Cir. 1993]; *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 [10th Cir. 1998]; *Rainey Brothers Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1002 (W.D. Tenn. 1997], *aff'd* 178 F.3d 1295 [6th Cir. 1999][table][unpublished Sixth Circuit opinion at 1999 U.S. App. LEXIS 6396].)

Thus, according to these cases, "the very act of 'ripening' a case also ends it." (Robert H. Freilich, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 [1999].) In Prof.

Roberts' colorful words:

> "Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten." (Thomas E. Roberts, *supra*, 11 J. Land Use & Envtl. L. at 72.)

As seems evident from the language of *Williamson County* and its underlying theory of "ripening" matters for federal court litigation, this Court intended no such thing. Rather, it granted property owners an opportunity to litigate their 5th Amendment cases in federal court. It is therefore apparent that the lower courts are undermining this Court's intent.[20] Plainly, the preclusion doctrines being used to bar federal court litigation were known to this Court when it decided *Williamson County*. Just as plainly, *Williamson County* established a system that permitted dual court litigation: first in state court, to exhaust the state compensation remedy and thereby "ripen" the case, followed by an action in federal court, to litigate the merits of the underlying 5th Amendment claims. If the lower courts are correct, then the *Williamson County* "ripening" procedure was stillborn, and this Court wasted its time in formulating it. As the 10th Circuit put it, "It is difficult to reconcile the ripeness requirements of *Williamson* with the laws of res judicata and collateral estoppel." (*Wilkinson*, 146 F.3d at 1325, fn. 4.) It is time for this Court to review the way in which its *Williamson County* decision has been

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[20] This Court made it crystal clear in *England*, 375 U.S. at 416-417 that limiting a litigant to certiorari review from a State supreme court was not an acceptable substitute for full federal court litigation. (Compare App., p. 7, where the court below disagreed.) Besides, state courts often dispose of these cases on the basis of state law, so that seeking certiorari may not even be possible.

treated by the lower courts. Either the requirement of state court litigation should be eliminated, or it should have no preclusive impact on subsequent federal court litigation.

C. With Respect, There Is A Flaw At The Core Of *Williamson County* That Explains The Lower Court Confusion: Its Assumption That A 5th Amendment Taking Without Just Compensation Is Not Complete Until A State Court Certifies That The Local Agency Really Won't Pay.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights to be incorporated into the 14th Amendment's Due Process Clause)[21] prohibits government from taking private property for public use unless it pays just compensation. Logically, a violation of that provision occurs as soon as government actions take private property and the municipality refuses to pay. There is nothing in either logic or the 5th Amendment to require that refusal to be certified by a state court before it is complete.

Therein lies *Williamson County*'s flaw. The opinion quite properly begins its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blends or blurs the distinction between acts of the agency that has actually committed the taking and the State that may or may not have provided a litigational process for seeking compensation. (473 U.S. at 195-196.)

But the *State* is not involved in 42 U.S.C. § 1983

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[21] *Chicago B.&Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

cases like this one. States and their officials cannot be sued under section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 123 S.Ct. 1972 [2003]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue is whether the local entity — like the City of Rochester at bench — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of both state and federal court litigation. Thus, the aggrieved property owners' adversaries ask: how can the plaintiff get a "second bite of the apple" by simply re-filing for the same relief on the same facts in the other court system?

The answer lies in the fact that, under *Williamson County*, the aggrieved property owners have no choice whatever — they *must* sue first in state court, even though they desire only one "bite" — and they want that one in the federal courts, the historical guardians of the federal Constitution — the same as other plaintiffs complaining of federal law violations.

The crux of the problem is *blurring the State legal system with the local agency defendant* and disregarding the plain words of the Constitution. Nothing in the 5th Amendment requires that. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court*."

The issue is not whether a state has countenanced the constitutional violation; the suit is not against the state. Rather, the issue is whether the particular defendant has committed it. 42 U.S.C. § 1983 forbids any person acting under color of state law from violating rights secured by federal law. When a city council — like Rochester's — prohibits viable economic use of property without any

pretext of compensation, it has violated Section 1983. The presence or absence of a state remedy has no bearing on whether the malefactor has done the deed.

Nor are other constitutional rights treated that way.[22] Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law. The constitutional provision is the same 14th Amendment stricture: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape*, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [section 1983 suits are enforceable in federal court "*in the first instance*"] [emphasis added]; cf. *Screws v. United States*, 325 U.S. 91, 108 [1945].)

If, as *Williamson County* said, the federal violation

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[22] *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. That is all Mr. Kottschade and others want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

is not ripe until a *state court* verifies that state law provides no remedy, then all Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Eagle, *supra* at 1070.)[23]

There is no need to sue in state court merely to confirm the non-payment. The non-payment is obvious; it is the reason for the suit. This can be seen in any regulatory taking case. In *City of Monterey*, 526 U.S. 687, for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That process did not end for another 13 years. At no time — even after a compensatory judgment had been entered after trial — did the city offer to pay anything. Suit was not necessary to determine the lack of compensation.

Nor is a state court suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. Here, for example, Mr. Kottschade directly told the city that its actions had taken his property and

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[23] See also Peter A. Buchsbaum, *Should Land Use Be Different: Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in *Taking Sides on Takings Issues: Public and Private Perspectives*, (A.B.A. 2002, Thomas E. Roberts ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

demanded that the city begin proceedings to condemn the land and compensate him. The city denied it. Must he now impose on the time of a state court seeking to have it say the obvious? To what end?

There is no need to require the victim to approach a third party (the state courts) in order to establish that she has a federal claim at all. That is a job for the federal courts. Worse, deferring to state courts is tantamount to granting state courts a veto over citizens' access to federal court, making them *de facto* federal court gatekeepers. On the contrary, this Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

D. Commentators Have Vied With Each Other Devising Ways To Disparage The Quagmire The Lower Courts Have Created In Their Applications Of *Williamson County*.

Even before *City of Chicago*, lower court applications of *Williamson County* were described by courts and commentators as "odd,"[24] "unpleasant,"[25] "unfortunate,"[26] "ironic,"[27] "unclear and inexact,"[28]

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[24] *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1307, fn. 8 (11th Cir. 1992).

[25] Roberts, *supra*, 24 Urb. Law. at 480.

[26] *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1306, fn. 5 (11th Cir. 1992); Jan Laitos, *Law of Property Rights Protection* § 10.05[A][5], p. 10-25 (Aspen Publishers 1999).

"surprising,"[29] "worse than mere chaos,"[30] "dramatic,"[31] "misleading,"[32] an "anomaly,"[33] "paradoxical,"[34] "most confusing,"[35] a "source of intense confusion,"[36] "inherently nonsensical,"[37] "shocking,"[38] "absurd,"[39] "self-stultifying,"[40] "revolutionary,"[41] "nonsense,"[42] "draconian,"[43] "riddled with obfuscation and inconsistency,"[44] and thereby creating "a procedural

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27 Kathryn E. Kovacs, *supra,* 26 Ecology L.Q. at 20.

28 Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue* 67 (Island Press 1999).

29 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 67.

30 Freilich, *supra*, 31 Urb. Law. at 387.

31 Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997).

32 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71.

33 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 479; Roberts, *supra*, 11 J. Land Use & Envtl. L. at 68.

34 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71; Stein, *supra*, 48 Vand. L. Rev. at 93.

35 Laitos, *supra*, p. 10-20.

36 Freilich, *supra*, 31 Urb. Law. at 387.

37 Freilich, *supra*, 31 Urb. Law. at 387.

38 Overstreet, *supra*, 20 Zoning & Plan. L. Rep. at 27.

39 Overstreet, *supra*, 20 Zoning & Plan. L. Rep. at 27.

40 Freilich, *supra*, 31 Urb. Law. at 387.

41 *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995); see Kovacs, *supra,* 26 Ecology L.Q. at 20.

42 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 480.

43 *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995); see Kovacs, *supra*, 26 Ecology L.Q. at 20.

44 Testimony of Prof. Daniel R. Mandelker before the House

morass,"[45] "conflict of decision,"[46] a "result [that] makes no sense,"[47] "doctrinal confusion,"[48] a "mess,"[49] a "trap,"[50] a "quagmire,"[51] a "Kafkaesque maze,"[52] and "a fraud or hoax on landowners."[53]

It is worth noting that many of these commentators are avowedly government-oriented in their views, yet they agree with landowners' criticisms and they clearly are troubled by the chaotic and unjust nature of the rule in question.

Enough time has passed and enough experience has been had in lower courts for this Court to examine the operation of the *Williamson County* rule and re-evaluate its conclusion that *de facto* denies land owners any opportunity

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Judiciary Committee, reproduced at 31 Urb. Law. 234, 236 (1999).

[45] Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 482.

[46] Freilich, *supra*, 31 Urb. Law. at 388; Meacham, *supra*, 32 Urban Lawyer at 240 ("The circuits have been divided on whether there is a way to avoid the Williamson trap, and the Supreme Court has sent conflicting messages.")

[47] Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 478.

[48] Freilich, *supra*, 31 Urb. Law. at 388.

[49] Delaney & Desiderio, *supra*, 31 Urb. Law. 195.

[50] David A. Dana & Thomas W. Merrill, *Property Takings* 264 (2002); Freilich, Wyker & Harris, *supra*, 31 Urb. Law. at 716; Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, *Federal Land Use Law* § 4A.02[6] at p. 4A-21 (Clark, Boardman, Callaghan 1998); Meacham, *supra*, 32 Urb. Law. 239; Meltz,. Merriam, & Frank, *supra* at 67.

[51] Kassouni, *supra*, 29 Cal. West. L. Rev. at 44.

[52] Kassouni, *supra*, 29 Cal. West. L. Rev. at 51.

[53] Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71.

whatever to try their *federal* constitutional claims in *federal* courts. As Professor Mandelker put it:

> "In my opinion, federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." (Mandelker, *supra*, 31 Urb. Law. at 236.)

Only this Court can end that distortion and bring some rationality to the jurisdictional aspects of regulatory takings law.

IV. AS A DIRECT RESULT OF LOWER COURT MISUSE OF *WILLIAMSON COUNTY*, AND NOW THEIR DISREGARD OF *CITY OF CHICAGO*, PROPERTY OWNERS IN 5TH AMENDMENT TAKING CASES HAVE NOT ONLY BEEN DENIED ACCESS TO FEDERAL COURTS TO PURSUE FEDERAL REMEDIES UNDER 42 U.S.C. § 1983, BUT ALSO DENIED THE 7TH AMENDMENT RIGHT TO A JURY GUARANTEED BY THIS COURT'S *CITY OF MONTEREY* DECISION.

Lower court actions barring property owners from federal court (except, when defendants invoke *City of Chicago* and remove state court litigation) have serious consequences: they deny aggrieved parties the ability to invoke civil rights jurisdiction under 42 U.S.C. § 1983 to have federal courts guard against local government incursions into constitutionally protected realms, and they deny property owners the 7th Amendment right to a jury trial that is provided in federal court, but generally denied in state courts in land use cases, in deciding governmental liability under section 1983. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 719 [1999].)

A. The *Williamson County* Rule, As Applied By The Lower Courts, Denies Property Owners The Protection Intended By 42 U.S.C. § 1983.

A Section 1983 case is a "species of tort liability,"[54] a statutorily created "constitutional tort"[55] that sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely *federal* remedy"[56] with "broad and sweeping protection"[57] "to secure private rights against government encroachment"[58] "read against the background of tort liability that makes a man responsible for the natural consequences of his actions"[59] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[60] While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader" than tort law,[61] and must be broadly and liberally

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[54] *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

[55] *Jefferson v. City of Tarrant*, 522 U.S. 75, 78-79 (1997); *Monell v. Department of Social Servs*, 436 U.S. 658, 691 (1978).

[56] *Mitchum v. Foster*, 407 U.S. 225, 239 (1972); emphasis added.

[57] *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) [quoting with approval].

[58] *Inyo County v. Paiute-Shoshone Indians*, 123 S.Ct. 1887, 1894 (2003).

[59] *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part, to expand government liability, in *Monell*, 436 U.S. 658.

[60] *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

[61] *Kalina v. Fletcher*, 522 U.S. 118, 124-125 (1997).

construed to achieve its goals.[62] Its "goals" are straightforward: **"to provide compensatory relief to those deprived of their *federal* rights by state actors"**[63] **by "interpos[ing] the *federal courts* between the States and the people, as guardians of *the people's federal rights*."**[64] To effectuate those goals, Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals *immediate access to the federal courts* . . . ."[65]

But in cases like the one at bench, property owners find this Court's holdings obverted. Instead of interposing the federal courts as the citizen's protector against local government, the system interposes state law as a barrier between the citizen and the federal courts.

Contrary to this Court's section 1983 holdings, property owners — and they alone — find the doors of the United States courts not merely hard to open, but barred. (See Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 477; Brian Blaesser, *Closing The Federal Courthouse Door On Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Property L.J. 73 [1988].)

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[62] *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

[63] *Felder v. Casey*, 487 U.S. 131, 141 (1988); emphasis added.

[64] *Mitchum*, 407 U.S. at 243; emphasis added.

[65] *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982); emphasis added.

B. The Lower Courts' Application Of *Williamson County* Denies Property Owners Their 7th Amendment Right To A Jury Trial Under *City Of Monterey*.

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) made another major post-*Williamson County* change in regulatory taking law.

In *City of Monterey*, this Court held as a matter of first impression that plaintiffs in section 1983 litigation — specifically, property owners like the ones involved there and here — have a 7th Amendment right to a jury trial on the issue of liability. That, as this Court recognized in *City of Monterey*, 526 U.S. at 719, is in stark contrast to the practice in state courts generally, which don't submit regulatory taking liability issues to juries.[66] But the trial court in *City of Monterey* did, and this Court affirmed.

Others have recognized the potentially significant change this means for regulatory taking litigation. (E.g., Meacham, *supra*, 32 Urb. Law. at 240, 242-243.)

By denying Mr. Kottschade federal court access, the courts below denied his 7th Amendment right to obtain a jury determination of the city's liability. This Court could not have considered that issue when it decided *Williamson County* 17 years earlier. It merits consideration now.

CONCLUSION

American property owners have become the proverbial pea in a jurisdictional shell game. Unlike all other victims of federal constitutional violations, their

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[66] For a recent example of such refusal, see *Cumberland Farms v. Town of Groton*, 808 A.2d 1107 (Conn. 2002).

attempts to seek justice in federal court are rebuffed. They are told to sue in state court. When they do so, their adversaries can unilaterally remove the cases to federal court. Once removed, the plaintiffs find their removed cases dismissed (on motion of the removing defendants!) and told to litigate in state court — where they are filed in the first place. With the utmost respect, that isn't law; it is a parody of law usually found only in the legal humor sections of libraries. (See, e.g., Arthur Train, *Mr. Tutt Plays It Both Ways*, in *Mr. Tutt's Case Book* 413 [Charles Scribner's Sons 1948].) In the process, lower federal courts have abandoned their traditional roles as guardians of the constitutional rights of American citizens, leaving them to wander through a procedural maze that has no federal exit.

Petitioner prays that certiorari be granted so that this "anomalous . . . gap in Supreme Court jurisprudence," as the court below gently called it, can be rectified.

Respectfully submitted,

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Mr. CHABOT. Thank you, Mr. Kottschade.

And, Mr. Siegel, you are recognized for 5 minutes.

TESTIMONY OF DANIEL SIEGEL, SUPERVISING DEPUTY ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, STATE OF CALIFORNIA

Mr. SIEGEL. Chairman Chabot, Ranking Member Nadler, Members of the Subcommittee, on behalf California Attorney General Bill Lockyer, thank you for this opportunity to testify.

Forty attorneys general, Republicans as well as Democrats, oppose the predecessors to this bill. I would like to review why there has been such strong bipartisan opposition to these measures.

First, they run counter to basic concepts of federalism. Most significantly, this bill would reduce the role of State courts in local land use disputes. State courts, however, are the best forum for resolving local disputes.

As the Supreme Court explained just last year in its *San Remo* decision, "State courts undoubtedly have more experience than Federal courts do in resolving the complex factual, technical and legal questions related to zoning and land use regulations."

Similarly, the newest Supreme Court member, Justice Alito, cautioned in an opinion he authored shortly before joining the Supreme Court that the Federal judiciary should reject procedural rules—reject procedural rules—under which it could be, "cast in the role of a zoning board of appeals."

This bill, however, would do just that: It would move local land use disputes out of the State courts and into the Federal courts, making them zoning board of appeals.

Second, this bill facilitates the intimidation of local governments, instead of locally based collaborative—the use of a locally based collaborative process. A key supporter made this clear.

In 2000, promoting a prior effort to alter these *Williamson County* requirements, the chief lobbyist for the National Association of Home Builders, Jerry Howard, declared that, "This bill will be a hammer to the head of these State and local bureaucracies."

He is right, especially when you consider whose head this hammer will be to. This will mainly be to the head of the approximately—excuse me, there are approximately 36,000 cities and towns throughout the nation. Ninety percent of them have populations of under 10,000.

These small towns and cities, with their limited financial resources, will be highly intimidated by the threat of a Federal lawsuit. They will also be intimidated by the bill's finality provisions, which facilitate the filing of premature lawsuits, if local governments try to work out reasonable compromises to often difficult land use issues. That is not good policy.

Finally, this bill runs counter to separation of powers principles. The separation of powers defect is particularly stark in the section V of—section V of the bill, which is called a clarification. It is a new provision that was not in prior bills.

It seeks to change—this bill seeks to change, for example, the test used by the courts in reviewing substantive due process challenges involving property rights disputes.

As Justice Alito explained in an appellate decision he wrote shortly before joining the Supreme Court, "These land use disputes are judged under a 'shocks the conscience' standard, not an arbitrary and capricious standard." That was expressed holding.

This bill, however, seeks to change the standard to an arbitrary and capricious standard that is not permitted under separation of powers principles. In *City of Boerne v. Flores,* the Supreme Court expressly held that Congress cannot dictate the standard that courts already use in reviewing constitutional challenges; that is the rule of the judiciary. A similar separation of powers problem permeates the rest of this bill.

Is the current land use system—land use system perfect? No, of course not. With the tens of thousands of decisions being made each year, there are sure to be abuses. Most are corrected by the State court; moreover, State and local governments are continuously seeking to improve the system.

This bill, however, is not the solution. It would federalize local land use issues. It facilitates the use of intimidation rather than a thoughtful, deliberative process. And it runs counter to separation of powers principles.

On behalf of the California attorney general, I therefore respectfully urge that you reject this bill.

Thank you.

[The prepared statement of Mr. Siegel follows:]

PREPARED STATEMENT OF DANIEL L. SIEGEL

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June 6, 2006

STATEMENT OF DANIEL L. SIEGEL, CALIFORNIA SUPERVISING DEPUTY ATTORNEY GENERAL, IN OPPOSITION TO H.R. 4772

I appreciate this opportunity to testify on behalf of California Attorney General Bill Lockyer to explain why the Attorney General strongly opposes H.R. 4772, the Private Property Rights Implementation Act of 2005. The bill seeks to increase the role of the federal government in matters of traditional state and local concern. For that reason, forty Republican and Democratic State Attorneys General, including former California Attorney General Dan Lungren, strongly opposed H.R. 1534, the initial predecessor to H.R. 4772, and a like number of State Attorneys General from both parties strongly opposed the next version of that measure -- H.R. 2372. (See attached letters in opposition to those bills.)

H.R. 4772 not only incorporates the procedural changes of its predecessor bills that have garnered wide-spread opposition. It also contains new provisions that seek to "clarify" (change) judicial interpretations of the constitution. Those provisions, however, are inconsistent with basic separation of powers requirements, and therefore present an additional reason for rejecting this bill.

The following discussion specifically considers (1) why, as a matter of policy, H.R. 4772 represents an unnecessary federal intrusion into matters of state and local concern; (2) why the measure is unnecessarily divisive – supporters going so far as to characterize it as a "hammer to the head" of state and local governments; (3) why, if enacted, H.R. 4772's ripeness provisions would fail to accomplish its objectives; (4) why the provisions in this bill that did not appear in prior versions – measures that are characterized as the "clarification" of constitutional law -- are contrary to separation of powers principles; and (5) why any improvements to the local regulatory process must be developed at the state and local level.

I. H.R. 4772 IS AN UNNECESSARY FEDERAL INTRUSION INTO STATE AND LOCAL ADMINISTRATION OF LAND USE AND REAL PROPERTY LAWS

H.R. 4772 represents a significant federal intrusion into state and local administration of real property and land use laws, which are areas that have always been recognized as matters of intrinsic state and local concern. See, e.g., *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 565 n.17

(1994). Although cast as legislation that eases procedural hurdles in federal court, H.R. 4772 will have a powerful impact on land use planning by local governments and will "federalize" many disputes that are now being worked out at the state or local level. The reasons why should be readily understood.

H.R. 4772 facilitates and encourages the filing of lawsuits in federal court. It does this in two primary ways. First, the bill provides that a taking claim brought under the Federal Civil Rights Act, 42 U.S.C. § 1983, shall be ripe for adjudication upon a final decision rendered by any person acting under color of state law that causes actual and concrete injury. The bill then goes on to define a "final decision," essentially providing that a final decision has been reached if the applicant has made one meaningful application and has applied for one appeal or waiver, unless (1) an appeal or waiver is unavailable, (2) the governmental agency cannot provide the relief requested, or (3) reapplication would be futile. Second, H.R. 4772 provides that persons may bring taking claims under section 1983 without first having sought compensation in state court. H.R. 4772 thus seeks to lessen or remove the barriers to federal court taking claims found in cases such as *Williamson County Regional Planning Com.* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985).

The existing procedural requirements tend to insure that disputes involving state and local planning issues will be decided below the federal level. That is good policy. As the Supreme Court recently reiterated: "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel v. City and County of San Francisco*, 162 L.Ed. 2d 315, 339 (2005). The "strong policy considerations [that] favor local resolution of land-use disputes" (*Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1291 (3d Cir. 1993)), however, would be undermined by eliminating the requirements set forth in cases such as *Williamson County*. Prior to joining the Supreme Court, Justice Alito therefore explained that the federal judiciary should avoid procedural rules under which it could be "cast in the role of a zoning board of appeals." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (2003) (internal citation and quotation marks omitted).

H.R. 4772, however, would cause more taking claims to be filed in general and would encourage them to be filed in federal court. The broadening of the final decision requirement would mean that more lawsuits may be filed because developers would no longer need to explore project alternatives in the manner required under existing law. The elimination of the requirement that a landowner first seek compensation in state court would mean that taking claims can be filed directly in federal courts. And because H.R. 4772's "final decision" test would only apply in federal court, developers would have a much greater incentive to file in federal courts. Thus, it is no exaggeration to say that H.R. 4772 will increase taking litigation and "federalize" local land use disputes.

II. H.R. 4772 PROMOTES AN ADVERSARIAL RELATIONSHIP BETWEEN GOVERNMENT AND DEVELOPERS

The fact that H.R. 4772's provisions will promote a hostile, rather than a thoughtful and balanced process, was actually presented as a reason for adopting, rather than rejecting, a predecessor to

H.R. 4772. In 2000, the chief lobbyist for the National Association of Home Builders, Jerry Howard, declared that **"[t]his bill will be a hammer to the head of these [state and local] bureaucracies."** See the National Journal's Congress Daily AM (March 14, 2000).

This threat is very real. Most local governments are small and have limited resources. As the Mayor of Ames, Iowa explained, on Behalf of the National League of Cities in opposing a predecessor to H.R. 4772, there are almost 36,000 cities and towns in the United States. (See attached testimony of Larry Curtis, dated October 7, 1997.) Of those, 97 percent have populations of under 25,000. Indeed, over half have populations smaller that 1000. If H.R. 4772 is enacted, these small cities and towns will be faced continually with a serious dilemma: they will be induced to approve potentially harmful development that they might otherwise have conditioned or denied, or they will be required to undertake the expense of substantial federal litigation. The costs of defending these lawsuits, in turn, will indirectly affect the amount of resources that local governments can devote to planning in the future.

We do not believe that a hammer to the head approach is appropriate. It ignores the reality that local planners each day are asked to interpret complex zoning and land use plans and comply with state environmental disclosure laws, and then apply these laws and policies to sophisticated development schemes with a broad range of physical and social impacts. Local governments, in making their ultimate use determinations, must balance the command of the law and the wishes of the developer with the concerns of other public and private interests who may be affected by the project. Development projects often must undergo multiple levels of administrative review, which allows a project to receive the full attention it deserves by specialized decision makers, as well as afford developers an administrative recourse when they are displeased with the outcome.

It is inevitable that disagreements over policy and the interpretation of the law will occur during this process, and that those disagreements will add to the time and expense associated with it. While individual planners justifiably may be criticized in individual cases, the dissatisfaction of many developers about cost and delay may result from a general skepticism about the value of modern land use and environmental regulation, as well as a reluctance to accept that there is a reciprocity of benefits to be gained from the regulatory process. These larger concerns about the wisdom and administration of local land use laws and policies must, of course, be directed to state and local governments. Political and philosophical disputes about local land use matters are not a federal concern, and it is inappropriate for the federal government to intervene by facilitating federal lawsuits that will alter the balance in the local regulatory process.

III. H.R. 4772 WOULD NOT CORRECT THE RIPENESS PROBLEMS THAT IT PURPORTS TO SOLVE

H.R. 4772's attempted modification of the finality requirement and its elimination of the compensation requirement would likely be ineffective. Moreover, H.R. 4772 would create even more uncertainty in the law and frustration for those who support its enactment.

Existing Ripeness Doctrine. The Supreme Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer and Frates* v.*County of Yolo*, 477 U.S. 340, 351 (1986). There are two components of the ripeness doctrine. A landowner

alleging a taking in federal court must show that (1) the government entity has issued a final and authoritative decision with regard to the application of its regulations to the proposed use of the landowner's property, and (2) the landowner has requested compensation through state procedures. *Williamson County,* 473 U.S. at 194; see *MacDonald, Sommer and Frates,* 477 U.S. at 348. In order to establish that the agency has made its "final decision" for the purposes of the ripeness doctrine, the applicant must allege an initial rejection of a development proposal *and* that there has been a definitive action by the agency indicating with some specificity what level of development will be permitted on the property. *MacDonald, Sommer and Frates,* 477 U.S. at 351. More recently, the Supreme Court explained that "a takings claim is likely to have ripened" where it either "becomes clear that [an] agency lacks the discretion to permit any development, or **the permissible uses of the property are known to a reasonable degree of certainty.**" *Pallazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001), emphasis added.

The Modification of the Finality Requirement Would Be Ineffective. Dissatisfied with these existing rules, the advocates of H.R. 4772 seek to obtain certainty through a mechanical test for determining when a taking claim is ripe. Presumably, a federal court would be required to decide a taking case on the merits if the landowner could demonstrate compliance with the test, regardless of how far along the administrative process had actually progressed.

Proponents of H.R. 4772 seriously underestimate the force of the ripeness doctrine. They perceive the doctrine as a procedural obstacle created by the courts to avoid deciding taking claims. By reducing the federal courts' discretion to determine finality, the argument goes, access to the federal courts will improve and many more taking claims will be decided. This view of finality misperceives the critical role that the ripeness doctrine plays in the adjudication of taking claims.

Finality in the context of a taking claim has two different but overlapping dimensions. First, it serves to define when a taking claim is ripe for adjudication. Second -- and this is the aspect overlooked by H.R. 4772's adherents -- it helps define whether a taking has in fact occurred. That is, there can be no injury and therefore, no taking, unless the government has taken final action. Furthermore, without a truly final decision, a court is simply not in a position to evaluate the nature of governmental action said to effect a taking.

This second dimension of finality is evident in the cases. Consider how the Supreme Court described the need for finality in *Williamson County*:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause . . . . [The factors specified in the *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978)] *cannot be evaluated* 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. *Williamson County*, 473 U.S. at p. 191 (emphasis added). Later, the Court said:
>
> It is sufficient for our purposes to note that whether the "property" taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, *it is impossible to determine* the extent or the loss or interference until the

> Commission has decided whether it will grant a variance from the application of the regulations. *Williamson County*, 473 U.S. at 192 (emphasis added).

The Court made a similar observation in *MacDonald* when, in rejecting a taking claim as unripe, it stated:

> It follows from the nature of a regulatory taking claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. *A court cannot determine* whether a regulation has gone "too far" unless it knows how far the regulation goes. . . . *No answer is possible* until a court knows what use, if any may be made of the affected property. *MacDonald, Sommer and Frates,* 477 U.S. at 348, 350 (emphasis added).

The final decision requirement therefore is essential to determining whether a taking has occurred and whether there has been injury in fact. This has important implications for H.R. 4772 and explains why H.R. 4772's imposition of arbitrary standards for determining ripeness is unlikely to effect any significant change.

How might a federal court analyze such a taking claim under H.R. 4772's finality standards? There are two likely possibilities. First, a court may find that H.R. 4772 impermissibly dictates the manner in which the court must decide cases. See *Clark* v. *Valeo,* 559 F.2d 642, 650-651 n.11, aff'd, 431 U.S. 950 (1977) ("To the extent this language may be read as suggesting a view that Congress may 'command' the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed 'for its own governance in the cases confessedly within its jurisdiction' . . . we respectfully disagree," citing *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (Brandeis, J., concurring)). Given that the Supreme Court has said that "it is impossible" and that it "cannot determine" whether a taking has occurred unless there has been a truly final decision that informs the court as to how far the regulation goes, it is questionable whether a court may be compelled to reach a decision on the merits by legislation that arbitrarily determines what constitutes a final decision. If "no answer is possible," then no answer is possible, regardless of legislative insistence that the courts look for one. Moreover, a court in these circumstances might question whether H.R. 4772 impermissibly intruded on the judiciary's paramount authority to interpret the Constitution, at least to the extent that H.R. 4772 purports to redefine the manner in which a court must decide the merits of a constitutional taking claim.

Second, a court might construe H.R. 4772 narrowly and assume that there was no intent to dictate how the courts should analyze a taking claim. For the reasons already discussed, however, the court still would have to analyze whether an agency had rendered a truly final decision to determine the impact of government's regulations and whether a taking has occurred. In essence, if government's action was not truly final, the court would likely address the action the same way it analyses a facial claim. Facial challenges assert that a regulation will constitute a taking no matter how it is applied; its "mere enactment" constitutes a taking. See *Suitum v Tahoe Reg'l Planning Agency* (1997) 520 U.S. 725, 736 (1997). No final decision is required before bringing these claims because, as the Ninth Circuit explains, facial challenges "by definition, derive from the ordinance's enactment, not any implementing action on the part of governmental authorities." *Ventura Mobilehome Communities Owners Ass'n v City of San Buenaventura,* 371 F3d 1046,

1052 (9th Cir 2004). Proving a facial claim, however, is almost impossible, due to the uncertainty as how the governmental body will actually act. The Court therefore refers to this type of challenge as an "uphill battle." See *Tahoe-Sierra Preservation Council v Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002). A litigant attempting to establish a taking where the governmental entity's action is not truly final would be confronted with an equally daunting challenge.

The Elimination of the Compensation Requirement Would Be Ineffective. H.R. 4772 also attempts to modify existing standards by eliminating the second prong of *Williamson County* which requires that taking claimants demonstrate that they have unsuccessfully attempted to obtain compensation using state procedures. The constitutional issues raise by the elimination of this requirement was the subject of much discussion with regard to H.R. 1534. As critics have pointed out, eliminating the procedural hurdle does not solve the problem because the compensation requirement is an element of a cause of action for an uncompensated taking. The Court stated in *Williamson County*:

> If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation . . . . [B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a section 1983 action. *Williamson County*, 473 U.S. at 195, 195 n. 13.

The Supreme Court has frequently reaffirmed *Williamson County* on this point. See *Suitum* v. *Tahoe Regional Planning Agency,* 520 U.S. 725, 733-734 (1997); *Presault* v. *ICC,* (1990) 494 U.S. 1, 11 (1990); *MacDonald, Sommer and Frates,* 477 U.S. at 350. In *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), the Court again emphasized the constitutional underpinning of the requirement. The Court first noted that the case was filed before California courts recognized a remedy for temporary takings. *Id.* at 710. The Court then explained, however, that "had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone." *Ibid.*

H.R. 4772 Would Create More Uncertainty in the Law. In addition to the potential constitutional deficiencies just discussed, the language of H.R. 4772 contains a number of interpretive problems that will lead to even further uncertainty. As one example, the measure requires that applicants obtain a "definitive" decision, in addition to following other specified administrative steps for obtaining a final decision. "Definitive," however, is not defined. In *Williamson County*, the Court used the term "definitive" interchangeably with "final." *Williamson County*, 473 U.S. at 191, 192. Thus, the reference to a "definitive" decision in the bill could be read as importing the very judicial finality standards that the measure tries to avoid in going on to specify specific administrative steps that need to be taken. This may not be the drafters' intent, but it leaves uncertain exactly what "definitive" means.

As another example, the bill excuses the need to seek a waiver or appeal if it "cannot provide the relief requested." This phrase might be read to excuse a waiver if the developer asserts the need

for monetary relief (because agencies ordinarily have no power to grant relief), or if the developer seeks some other extreme relief outside the scope of what the agency is authorized to provide. Similar concerns have been raised about the use of the word "infringed" in comments concerning H.R.4772's predecessor bill – a use that continues with H.R. 4772.

In summary, H.R. 4772 would not cure any of the perceived problems with the regulatory system or the access of landowners to the federal courts. Instead, it would create more uncertainty and more unproductive, protracted and expensive litigation.

IV. THIS BILL ADDS "CLARIFICATION" PROVISIONS THAT DID NOT APPEAR IN PRIOR BILLS AND THAT ARE NOT PERMITTED UNDER SEPARATION OF POWERS PRINCIPLES

Finally, unlike its predecessor bills, H.R. 4772 contains a section that purports to be a "clarification" of various requirements for establishing constitutional violations. (Section five of the bill.) For example, the bill seeks to modify the existing "parcel as a whole" rule under which the courts analyze the owner's entire property interests, rather than the particular portion of the property that is regulated, to determine whether the impact of the regulation on a parcel is "so onerous" as to amount to a taking. See *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 331 (2002) ("in regulatory takings cases we must focus on 'the parcel as a whole' [internal citation omitted]"); *Lingle v. Chevron U.S.A., Inc.*, 161 L.Ed.2d 876, 887 (2005) (restriction must be "so onerous" as to be the functional equivalent of a direct appropriation of the property). The U.S. Court of Federal Claims, which sees a large number disputes in which the definition of the "parcel" is important, explains that the relevant parcel is determined by reviewing various factors concerning individual lots, such as:

> the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the [regulated] lands enhance the value of remaining lands.

Cane Tennessee, Inc. v U.S., 60 Fed. Cl. 694, 700 (2004), citing *Ciampitti v U.S.,* 22 Cl. Ct. 310, 318 (1991). In some cases, that analysis leads courts to conclude that a number of lots in a subdivision should be considered as a whole. See, for example, *District Intown Props. Ltd. v. District of Columbia,* 198 F.3d 874, 880 (D.C. Cir. 1999), where the Court expressly approved of the lower court's determination that "nine lots should be treated as one parcel for the purpose of the court's takings analysis."

H.R. 4772, however, seeks to change the law. It states that each "lot" in a subdivision is the only relevant parcel for takings purposes if the lot is treated as an "individual property unit" under state law.

Similarly, the bill allegedly clarifies the test that courts are to apply when they review substantive due process challenges concerning property rights disputes. Section five of the bill states that the challenged action "shall be judged as to whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As Supreme Court Justice Alito emphasized while he

was a Court of Appeals justice, however, that is not the constitutional test. Rather, the test is whether the challenged action "shocks the conscience." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (2003). Under that standard, it is "insufficient" to allege that local government "arbitrarily applied" a land use restriction. *Ibid.*

These Congressional interpretations of constitutional requirements are contrary to basic separation of powers notions. As the Supreme Court explains, under the "vital principles necessary to maintain separation of powers and the federal balance," the courts, not Congress, have the authority to interpret the constitution. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). In that case, the Court rejected Congress' attempt to change the test for determining whether a government regulation violated the First Amendment's protection of the free exercise of religion. In the same manner, H.R. 4772 impermissibly attempts to change tests for determining whether a government regulation violates the takings or substantive due process protections of the Constitution.

V. ANY CHANGE TO THE REGULATORY PROCESS OF LOCAL GOVERNMENTS SHOULD OCCUR AT THE STATE AND LOCAL LEVEL

Given the complexity of modern life, it is inevitable that there will be "horror stories" of individual experience with the courts or the regulators. These stories are unfortunate but understandable. Sophisticated land use and environmental regulation is necessary to insure the orderly use of land and resources and to minimize human impact on a fragile environment. Moreover, the overburdened judicial process is lengthy, especially where it becomes necessary to employ appellate review. And, because human beings of varying degrees of competence and diligence administer these systems, the results sometimes will be uneven.

When compared to the many thousands of land use decisions made every year by the nation's 35,000 cities and towns, however, and the typical length of time that the judicial process requires, the stories of extreme delay are isolated. There is no evidence that the land use system does not work reasonably well or that it has failed to improve the quality of life. Nevertheless, government needs to remain aware that its actions affect the lives of real people and to minimize, where reasonably possible, the time and inconvenience of going through the process. But there is no justification for a federal response to remedy these relatively few cases, especially where H.R. 4772 is unlikely to work as intended and where federal interference would alter the land use process by upsetting the existing balance between government and the regulated community.

If changes need to be made, they should be made at the state and local level. In California, many changes to expedite the process have already been made. The Permit Streamlining Act, Cal. Gov. Code §§ 65920 et seq., requires that agencies decide the completeness of applications and approve or disapprove projects within specified time limits, or else risk that the application will be deemed approved by operation of law. The California Coastal Act requires that hearings be conducted within 49 days of the filing of an application, Cal. Pub. Resources Code § 30621, and, to keep the process moving, provides that any legal challenges be brought within 60 days after the Coastal Commission's decision, *id.*, § 30601. The Coastal Act also forbids the taking of

property, *id.*, § 30010, and gives the Commission the flexibility to prevent a taking in situations where strict application of its substantive policies might have resulted in the denial of all economically viable use.

Much has been done and still can be done to streamline the process. The impetus for change, however, must be directed at the state and local level. H.R. 4772 only tinkers at the margins of the perceived problems. This federal intrusion into local land use administration is unjustified and diverts attention from the areas where this much time and energy would be better spent.

CONCLUSION

H.R. 4772 offends principles of federalism because it injects the federal courts into resolving local land use disputes, matters of traditional state and local concern that typically are resolved in state courts. H.R. 4772 also upsets the balance between local governments and landowners by facilitating lawsuits and the threats of lawsuits by disappointed developers. It will change the dynamics of the land use process by encouraging both developers and government to act with litigation in mind, rather than promoting conciliation and compromise in the regulatory process. The need for this divisive federal incursion into local affairs is unproven. Moreover, the "procedural" problems that H.R. 4772 purports to correct, and its "clarification" of takings law are linked to the very core of the taking doctrine, a constitutional matter within the province of the courts. This legislation would create even more uncertainty than is believed to exist in the present system.

For these reasons, the California Attorney General strongly opposes H.R. 4772. Thank you for the consideration of our views.

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
BILL LOCKYER
ATTORNEY GENERAL

The Honorable Henry Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

RE: H.R. 2372, the Private Property Rights Implementation Act of 1999

Dear Chairman Hyde:

On behalf of the undersigned State Attorneys General, I am writing to express our strong opposition to H.R. 2372. This bill is substantially the same as H.R. 1534, which many State Attorneys General opposed in their letter to you of September 24, 1977.

Like its predecessor, H.R. 2372 represents an unwarranted federal intrusion into state land use regulation. It permits landowners to sue local governments for regulatory takings before the regulatory process is complete and before they have had a sufficient opportunity to render a final decision on a proposed project. H.R. 2372 also allows landowners to sue local governments directly in federal courts, without first complying with state procedures for obtaining just compensation. Because H.R. 2372 accomplishes its objectives by modifying the Supreme Court's interpretation of a constitutional doctrine, there are serious questions about whether the bill is a permissible exercise of Congressional authority.

The primary purpose of H.R. 2372 is to alter the requirements developed by the federal courts to determine whether a taking claim is ripe for adjudication. Under existing taking doctrine, a landowner in federal court must show that (1) the government agency has issued a final and authoritative decision regarding the application of its regulations to the proposed use of the landowner's property and (2) the landowner has requested and been denied compensation

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through the procedures provided by the State. *Williamson County Regional Planning Com. v. Hamilton Bank*, 473 U.S. 172, 194 (1985); see *MacDonald, Sommer and Frates* v. *County of Yolo*, 477 U.S. 340, 348 (1986). H.R. 2372 seeks to modify the ripeness doctrine in two significant ways.

First, H.R. 2372 defines "final decision" in a manner that relaxes the judicially-imposed requirements for demonstrating that a landowner has obtained an agency's final and authoritative decision on the use of the landowner's property. H.R. 2372's broad definition of "final decision" is unwise. Agencies often are forced to deny projects that are harmful to the public, even though they might have approved a more thoughtful proposal. Noting that "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews," the Supreme Court has held that refinement of a project and additional applications are often necessary to determine an agency's definitive position. *MacDonald, Sommer and Frates, supra*, 477 U.S. at 351, 353 fn.9. By arbitrarily limiting the number of applications that a landowner must make to demonstrate a ripe taking claim, H.R. 2372 forces local government to defend itself from taking claims on an incomplete record and before the regulatory process is truly over.

Second, H.R. 2372 proposes to eliminate the second prong of *Williamson County* by declaring that "a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State . . . ." By providing landowners the opportunity to bypass state courts, H.R. 2372 invites forum shopping and may have the unintended effect of inducing local governments into approving potentially harmful development out of fear of protracted federal litigation. This extraordinary federal intervention into the States' administration of their real property and land use laws is all the more puzzling because there is no evidence that state courts have been unwilling or unable to protect private landowners with meritorious claims.

Policy considerations aside, this effort to eliminate the second prong of *Williamson County* may be unconstitutional. Because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until a landowner has unsuccessfully attempted to obtain compensation through the procedures provided by the State. *Williamson County*, 473 U.S. at 195. It is doubtful whether Congress may modify substantive aspects of the taking doctrine without encroaching upon the judiciary's responsibility to interpret the Constitution.

In summary, H.R. 2372 interferes with the relationship between local and federal governments, creates a substantial new workload for overburdened federal judges and elevates the rights of landowners above other civil rights claimants. It is not surprising that last year's version (H.R. 1534) of this bill was opposed by virtually every major membership organization representing state and local government and state and local courts, as well as numerous environmental, planning, religious, labor and historic preservation organizations. We share the

The Honorable Henry Hyde

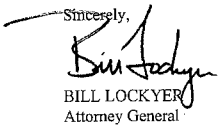
Page 3

view expressed by the National Governors' Association, the National League of Cities and the U.S. Conference of Mayors in their letter to you of October 21, 1997 in opposition to H.R. 1534:

> "[T]he Founding Fathers never intended the federal courts as the first resort in resolving community disputes among private property owners. Rather, these problems should be settled as close to the affected community as possible. By removing local disputes from the state and local to the federal level, H.R. 1534 violates this principle and undermines basic concepts of federalism."

We request that the Committee not approve H.R. 2732.

Sincerely,



BILL LOCKYER
Attorney General

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We respectfully request that the Committee not approve H.R. 2732.

Sincerely,

Bill Pryor
Attorney General of Alabama

Bruce M. Bothello
Attorney General of Alaska

Janet Napolitano
Attorney General of Arizona

Bill Lockyer
Attorney General of California

cc: Congressman Canady, Chair of the Subcommittee on the Constitution
Ranking Minority Member Watt, Subcommittee on the Constitution
Members of the House Judiciary Committee

Ken Salazar
Attorney General of Colorado

Richard Blumenthal
Attorney General of Connecticut

M. Jane Brady
Attorney General of Delaware

Robert A. Butterworth
Attorney General of Florida

Thurbert E. Baker
Attorney General of Georgia

Earl Anzai
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Mike Hatch
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Mike Moore
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Jeremiah W. Nixon
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Joseph P. Mazurek
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Darrell V. McGraw Jr.
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James E. Doyle
Attorney General of Wisconsin

Gay Woodhouse
Attorney General of Wyoming

STATE ATTORNEYS GENERAL

A Communication From the Chief Legal Officers
Of the Following States

September 24, 1997

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Hyde:

We, the Attorneys General of Alabama, Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Texas, Vermont, Virgin Islands, Washington, Wisconsin, and Wyoming, are writing to express our strong opposition to H.R. 1534. Entitled an act "to simplify and expedite access to the Federal courts for injured parties...," H.R. 1534 invades the province of state and local governments and directs federal judges to intrude into matters pending before state and local officials and courts. Not only does the bill catapult many state land use decisions into federal court but it also authorizes defendants in any type of state or local case, civil or criminal, to seek the intervention of a federal judge.

We are also concerned that H.R. 992, "the Tucker Act Shuffle Relief Act," also pending in this committee, may be construed to subject state defendants to unconstitutional exercises of judicial power by judges not appointed under Article III of the Constitution.

H.R. 1534

Section two of H.R. 1534 literally compels federal judges to intrude into state and local matters. It does so in three very damaging ways. First, it prohibits federal judges from abstaining from hearing issues which are pending in important state adjudicative proceedings. Second, it restricts federal judges from certifying state law questions to state courts. Third, it orders federal judges to hear "takings" claims before state or local land use proceedings are completed and in disregard of state procedures to pay just compensation.

Abolishing "Younger" Abstention

Section two [by adding new 28 U.S.C. § 1343(c)] would effectively abolish "Younger abstention" in any case brought alleging a deprivation of federal constitutional rights. The section would amend 28 U.S.C. § 1343 by prohibiting a federal court from abstaining in an action where no violation of state law is alleged. Younger v.

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Harris, 401 U.S. 37 (1971), held that federal courts must almost always dismiss civil rights suits challenging on-going state criminal prosecutions. The Younger doctrine also prevents federal courts from intervening in pending state civil or administrative adjudicatory proceedings which implicate important state interests and which provide full and fair opportunity to resolve the federal constitutional claim. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986). This doctrine has been applied to protect the jurisdiction of state agencies and courts to hear and decide criminal cases, prison discipline, attorney or doctor disciplinary matters, and drivers license revocation, for example.

Abstention assures that important State proceedings will not be disrupted. State administrative processes are designed to accommodate the many interests involved in diverse areas of state regulation. (For example, a medical doctor charged with incompetence cannot now jump into federal court to avoid peer review by other doctors in a licensing case. Often, an incompetent doctor might prefer to take a chance with a "battle of the experts" in federal court on an allegation of denial of equal protection, for example.) Abstention not only preserves important State interests in its own decision-making processes but also assures that federal judges not reach constitutional issues unnecessarily. Abstention protects state and federal courts from conflicts and wastes of resources. If a lawyer can craft an abstention-proof petition by simply omitting state law claims, many cases will be tried in state and federal proceedings simultaneously, thus giving defendants in state criminal or disciplinary proceedings two opportunities to derail a state prosecution. State and local prosecutors would be forced to expend resources in simultaneously prosecuting and defending lawsuits where the state proceeding could effectively resolve all federal and state claims.[1]

Restricting the Certification of State Law Questions

Section two would order federal courts not to certify questions of State law to State courts unless the State law question will significantly affect the merits of the Federal claim and the question is "so unclear and obviously susceptible to a limiting construction as to render premature a decision on the merits of the constitutional or legal issue in the case." It is unclear whether this section is intended to abolish "Pullman abstention" in such cases in favor of a national process for certification of state law questions. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), held that federal courts should abstain where a case raised unclear questions of state law and a state court decision on those questions might eliminate the need to resolve the federal constitutional question. So, for example, it might be appropriate for a federal court to abstain from hearing a challenge to a state statute regulating sexually explicit materials where a state court adjudication could provide a limiting construction of state

[1] Federal suits challenging a prosecution can be very disruptive to an overworked prosecutor's office even though the claims are baseless. For example, in a case from Black Hawk County, Iowa, on the eve of trial of weapons offenses and terrorism charges, the defendants filed an action under 28 U.S.C. § 1983 alleging violations of the Second Amendment and requesting a temporary restraining order. The Federal court abstained. Under this bill, the prosecutor would be forced to brief the merits of a motion to dismiss or resistance to the temporary restraining order while trying the state law action.

law and where simultaneous federal and state proceedings might result in two different interpretations of a state statute. See, e.g., Almodovar v. Reiner, 832 F.2d 1138, 1140 (9th Cir. 1987). Certification of state law questions to the State's highest court is also helpful but certification is not a substitute for Pullman abstention in cases where there are issues of fact because the state appellate court cannot conduct an evidentiary hearing.

About two-thirds of the states have adopted statutes providing for certification of state law questions. The reason is obvious: state courts are the ultimate arbiters of state law. Federal district courts should not make educated guesses at the meaning of state law when a mechanism exists to assure that a definitive state law interpretation can be had.

Federalization of Land Use Disputes

Section two, new 28 U.S.C. § 1343(e), would require federal courts to hear "takings" cases prematurely and in lieu of state court compensation processes. This will involve federal courts in local land use disputes, defeat local procedures designed to balance interests of neighboring land owners, and force local zoning procedures to conform to a federal procedural mandate.

This subsection states that a claim for "the deprivation of a property right or privilege secured by the Constitution" is ripe for federal court action if a definitive decision regarding the extent of permissible uses on the property is made by "any person" acting under color of state law and if the party has applied for one appeal or waiver. Further, persons are not required to exhaust state judicial remedies before suing in federal court (overruling Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).

Property law is traditionally a matter of intense State and local concern. In most states, land use is primarily a local function. Local zoning and land use ordinances typically provide for an initial staff decision on a building or use permit but with built-in appeal and variance procedures to assure consideration of competing interests, to mitigate undue hardship, and to provide official accountability and consistency by having boards of adjustment or city councils render the final decision. Further, state laws recognize that the Constitution prohibits takings without just compensation. The states all have administrative and judicial processes designed to prevent takings without just compensation. These procedures typically provide for judicial review to prevent a "taking" under the ostensible exercise of the police power and second, provide inverse condemnation actions to assure that just compensation is paid if the governing body refuses to rescind the "taking."

Sovereign Immunity

The invasion of State sovereignty in favor of federal courts would be accompanied by a high cost to State and municipal treasuries. The bill encourages developers and others to drop out of processes designed to work out disputes and to instead sue for damages and attorneys fees in federal court.

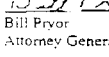
We question whether federal courts could constitutionally hear the suits against State officials (to be paid from State treasuries) permitted by the proposed amendment of 28 U.S.C. § 1343(e) under H.R. 1534. Because the Fifth and Fourteenth Amendment prohibit only those takings made without payment of just compensation, a statute that authorizes damages remedies before the State has determined whether to "take" the property or the amount of compensation is not merely a procedural statute. Congress lacks the authority to interfere so directly in the operation of State and local governments and to authorize suits against the States in federal court beyond its power to enforce the Fourteenth Amendment. See Printz v. United States, 521 U.S. __, 138 L.Ed.2d 914, 117 S.Ct. __ (1997) (Congress has the power to regulate individuals, not States); City of Boerne v. Flores, 521 U.S. __, 138 L.Ed.2d 624, 117 S.Ct. __ (1997) (Congress lacks the power to substantively re-define constitutional limitations on the States); Seminole Tribe v. Florida, 517 U.S. __, 134 L.Ed.2d 252, S.Ct. 1114 (1996) (Congress lacks power to abrogate State's Eleventh Amendment immunity under the Commerce or Indian Commerce Clauses or to expand federal jurisdiction beyond that provided in Article III).

H.R. 992

We are concerned that H.R. 992, expanding the jurisdiction of the Court of Federal Claims to invalidate federal agency action, will subject State and local governmental officials to the jurisdiction of this legislative court. While on its face, H.R. 992 extends to an "agency action" adversely affecting private property interests and the term "agency action" is defined to encompass only actions of the United States, we are concerned that inclusion of a definition for the term "state agency action" may be construed as suggesting the availability of Tucker Act relief against States or their officials. If these "State agency actions" are subject to relief in the Court of Federal Claims, then we are very concerned about the wisdom and constitutionality of a non-Article III court invalidating state agency action or awarding damages against States and local government. State officials are also frequently parties to challenges to federal agency action (which is often a means of challenging state projects, such as roads, receiving federal funds). We are concerned that property owners can elect a distant forum to litigate issues of State and local concern and avoid not only the applicable state court but also the applicable federal district and appellate courts. Others affected by regulation of public concern do not have this option but would be subjected to suit in an alien forum.

For all of these reasons, we request that the Committee not approve H.R. 1534 and H.R. 992.

Very truly yours,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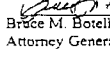
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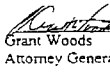
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cc: Honorable John Conyers, Jr.
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Testimony of Larry Curtis
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Ames, Iowa

on Behalf of
National League Of Cities
The United States Conference of Mayors

before the

Senate Judiciary Committee
Property Rights
S. 1204

October 7, 1997

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Recycled Paper

My name is Larry Curtis, and I am the mayor of Ames, Iowa. I am testifying today on behalf of the citizens of Ames, Iowa, as well as the National League of Cities and the U.S. Conference of Mayors. The National League of Cities, which I am representing this morning, is composed of elected Republican, Democratic and Independent leaders of cities of all sizes. It is the largest and oldest organization representing the nation's cities and towns. I am here today to express strong opposition to S. 1204.

We have grave concerns about this bill. We strongly oppose it. We believe it would mark an extraordinary intrusion into one of the most historic and traditional rights and responsibilities of cities in this country, that it would impose a significant new unfunded federal mandates - especially on smaller cities, and that it would sharply interfere with the ability of American citizens in every community to exercise their traditional authority to determine the future of their and our communities.

At the very least, Mr. Chairman, we are concerned about the rush to judgment without a full foundation of hearings, much less a careful analysis of what the impact on citizens, taxpayers, and our communities would be. That this bill proposes an approach that is so contrary to the spirit of devolution and so opposite to the commitments to halt federal intrusion into local affairs and new federal burdens on local taxpayers is especially troubling.

We believe that activities such as franchising, zoning, issuing permits and licenses, all municipal code development and enforcement are fundamental responsibilities of cities and towns to ensure public health and safety and to protect the environment. Our national municipal policy opposes any preemption. It states that when a clear and compelling need arises, Congress must explicitly express its intent to preempt, and Congress must accompany any such preemption with a timely intergovernmental impact analysis, including costs.

We oppose federal regulations, statutes, or amendments which place restrictions on state and local government actions regulating private property or requiring additional compensation beyond the Fifth Amendment of the U.S. Constitution.

There has been no mandates or impact study done for this Congress. There has been no effort to sit down with us and demonstrate there is a compelling need for the United States Congress to interfere with one of the most traditional roles and responsibilities of communities in this country since its founding.

The intent seems to be to upset the traditional American methods we have relied upon in cities and towns to address land use and zoning issues, such as where to locate a filling station, an industrial facility, a movie theater or store engaged in adult entertainment. In my city, we have nearly a dozen boards and commissions composed of citizens to make decisions on planning and zoning, historic preservation, housing, parks and recreation, and zoning appeals. It is difficult to imagine issues more important to the citizens in my city than those which directly affect their assessed property values and quality of life. As

such, we find it especially difficult to understand why and how the federal courts should suddenly be held over the heads of these citizen boards and commissions and, ultimately, all local taxpayers.

Perhaps the most serious aspect of this proposed legislation is what it will cost. The bill is an invitation to sue local governments - early and often. This will impose a significant burden on smaller cities and towns, those with the least in-house legal resources. It will subject those citizens and those communities to significant financial pressures. It will substitute outside legal threats and the federal judiciary in place of the traditional local, citizens' land use agencies that have historically decided issues of land use and zoning. There is simply no record of a compelling need to act in such a hasty fashion to rewrite our American federal system and subject our smallest communities to federal intrusion.

Under current law, federal law requires developers and other property owners to make every effort to resolve land use disputes with local officials before going to federal court. This respect for our local processes helps ensure that citizens in our city make the land use decisions, not federal judges. It helps ensure there is a sufficiently developed factual record before a federal court ever becomes involved. In most instances, of course, federal courts properly abstain from deciding novel or complex issues of state law so state tribunals can decide those issues.

This bill would turn this traditional, common sense federal approach on its head. It would be a boondoggle for plaintiffs' attorneys and produce litigation in federal courts before a final decision, which might come out in the litigant's favor, was even reached by a city. The bill would turn over to the federal courts an unprecedented role in interpreting state laws and local ordinances.

Let me provide a perspective from my own community:

Ames, in the northeastern quarter of the State of Iowa, has a population of 47,000. We are a diverse community -- a service center for a robust agricultural community, the seat of the State's largest university, and home to a small but thriving manufacturing and service economy. Ames also is a beautiful community and we endeavored to protect the character of the community through a variety of zoning and subdivision regulations, historic district designations, and other measures. While I have the privilege of working with a very dedicated and skilled professional staff, many of the most important decisions in our community are made by local business leaders, professionals of one sort or another, as well as ordinary citizens who serve as volunteers on city boards and committees. These boards and committees include, for example, the Building Code Board of Appeals, the Board of Electrical Examiners and Appeals, the Historic Preservation Commission, the Housing Board of Appeals, the Planning and Zoning Commission, and the Zoning Board of Adjustment.

Ames is in many ways typical of smaller cities and towns across America in which government is a community effort involving citizens from all walks of life. All told,

there are some 35,935 thousand cities and towns in the United States. While some cities have comparatively large budgets and staff, most communities have small populations, few professional staff, and small budgets. 97 percent of the cities and towns in America have populations of less than 25,000; 91 percent have populations of less than 10,000; and 52 percent have populations of less than 1,000. Virtually without exception, cities and towns with populations under 10,000 persons have no full-time professional legal staff. As a result, these smaller communities must retain outside legal counsel each time a suit is filed against them. In short, lawsuits filed against smaller towns and cities can impose an enormous financial burden on the citizens and taxpayers of these communities.

Let me cite one example to illustrate the potential magnitude of the problem. Several years ago, the nation's fourth largest pork producer started operating a 50,000-head hog farm in rural Lincoln Township in Putnam County, Missouri. Township officials, who represent a community of only a few hundred residents, objected that the operation violated the local zoning ordinance. The company countered with a lawsuit complaining that the town's attempt to enforce its zoning represented a taking, and sought damages of $8,000,000. It is obvious that small communities are in a weak position to defend against this type of lawsuit, and the mere cost of defending against such a suit could be ruinous to taxpayers.

S. 1204 would have a number of unfair, negative consequences for cities and towns across America. The bill would result in the filing of more lawsuits against cities and towns, allow litigation to be commenced earlier, prolong the cost and duration and litigation, and ultimately increase the risk that local communities would be required to agree to expensive settlements. In addition, the bill would greatly encourage the filing of land use litigation in federal court rather than state court. In many cases, having to defend litigation in federal court will be more costly than litigating the same claim in state court. While a handful of lengthy, procedurally tangled cases have been cited as evidence of the need for this bill, in my experience the local land use regulatory process in most instances works fairly and efficiently for all concerned. In my view, there is no need for this type of drastic legislative action, much less an enactment of this type at the Federal level.

I would like to outline what I see as the four basic problems with this bill:

First, this bill would violate the bipartisan commitment made by Congress to end unfunded mandates on local governments. This proposal would impose large new costs on local communities, in particular in the form of higher legal fees. I respectfully ask whether Congress also intends to ensure that attorneys from the Department of Justice would be assigned to defend local communities against the additional lawsuits that would be generated by this legislation. Alternatively, would Congress be willing to guarantee federal funding to pay increased litigation costs. To be blunt, if Congress thinks it is fair and appropriate to subject local governments to increased litigation costs -- a premise I obviously dispute -- then Congress should at least be willing to defray the costs to local governments resulting from this new federal policy.

At the very minimum, I would respectfully suggest that the Committee hold several hearings at different locations around the country to gather information about the local fiscal impact of this legislation. As a matter of simple fairness, the Committee should hear from cities and towns across America, most particularly the smallest towns most likely to be most dramatically affected by this bill, before moving forward.

Second, this bill would interfere with the ability of locally elected officials to protect public health and safety, the environment, and property values in their communities. By granting developers a number of significant new procedural advantages in land use litigation, the bill would provide developers and other claimants greater leverage to challenge local land use planning and zoning regulations. In simple terms, the bill represents a congressional license for legal extortion of local governments.

Third, the bill is inconsistent with Congress' renewed commitment to the preservation of Federalism. There is perhaps no other governmental function performed by cities and towns which is so clearly understood to be a local responsibility than local planning and zoning. In accordance with this traditional view, the overwhelming majority of land use litigation takes place in the state courts. At the same time, the U.S. Supreme Court and other federal courts, in Williamson County and other decisions, has developed a body of precedent which respects the traditional responsibility of local government over local land use issues. This bill, on the other hand, would encourage the filing of legal challenges to local land use regulations in federal court. In fact, because the bill would provide significant procedural advantages in federal court as compared to state court, the bill would likely result in the transfer of the overwhelming majority of land use cases from state to federal court. The result would be far greater federal court involvement in traditionally local activities. Furthermore, the bill would undermine the development of a consistent body of precedent developed in the state courts interpreting and enforcing the land use laws of the particular state.

In many areas -- from welfare reform to administration of the EPA wetlands program -- the federal government has been moving in the direction of restoring the rights and responsibilities of states and local government. In many other arenas, Congress has taken to heart the view that the states are truly the laboratories of democracy. This bill, however, goes in completely the opposite direction. This represents national use legislation -- national land use legislation with a particular slant, but national land use legislation all the same.

Finally, by encouraging the premature filing of lawsuits, the bill would interfere with efforts of local governments across the country to work with developers to address their proposals in the context of the overall objectives of the community. Under current law, developers are not permitted to proceed to court immediately after an initial development proposal, but must work with the local community to determine what can actually be permitted consistent with the community's development and conservation objectives. This requirement of existing law fosters locally based, collaborative process which is in the best interests of cities and towns as well as most developers. The bill would tend to

short circuit this process and result in premature, adversarial litigation.

In closing, I want to emphasize that the City of Ames, along with the National League of Cities, values and supports private property rights. Also, the League recognizes that, across the thousands of local government jurisdictions in this country, local governments sometimes make mistakes in addressing difficult and complex land use issues. The solution to these isolated problems is not a one-size fits all mandate handed down by Congress. In our view, the courts have, over time, developed a reasonably balanced approach -- from both a substantive and a procedural standpoint -- in handling taking property claims. We urge Members of Congress to leave to the Courts the responsibility of devising the evolving solutions to these admittedly complex issues.

Thank you for the opportunity to testify. I would be pleased to respond to any questions that you or other members of the Committee may have.

Mr. CHABOT. Thank you, Mr. Siegel.

And our final witness here this afternoon will be Professor Eagle.

Professor Eagle, you are recognized for 5 minutes.

TESTIMONY OF STEVEN EAGLE, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. EAGLE. Thank you, Mr. Chairman, Representative Nadler, and distinguished Members of the Subcommittee.

My name is Steven Eagle. I am a professor of law at George Mason University, in Arlington, Virginia. I testify today in my individual capacity as a teacher of property, land use, and constitutional law. I write extensively on property issues.

My prepared statement, Mr. Chairman, is somewhat technical. In my oral statement, however, I wish to stress principles more than technicalities. It is not my general inclination to suggest that more laws be passed, and that goes especially for Federal laws. I want America to be a nation under the rule of law and not a nation under the rule of laws in the plural.

My own approach is one of subsidiarity, that decisions be made at the lowest appropriate level. I neither oppose local government nor want to deprive local officials of their legitimate powers.

To the extent that completing the third edition of a 1,200-page treatise on regulatory takings makes me a student of the subject, Mr. Chairman, I would be the first to concede that the line separating private property rights and legitimate Government regulations is not always easy to draw.

But at the same time, Mr. Chairman, we have to struggle with real issues. We ought not to create artificial ones for ourselves and for the public.

Mr. Kottschade is a home builder. In a real sense, he represents the young families and others who are depending on him for places to live. The rest of us on this panel are employed in interpreting words.

It is tempting to use language and to invent and defend unnecessary procedural requirements with the result of discouraging those with whom we disagree from seeking justice. We inveterate federalism in the United States, but federalism is inherently messy.

No one knows what kind of politics, or religion, or personal characteristics might be acceptable to the people of a given community like its local officials. However, our Federal Constitution provides certain rights to individuals, and those rights sometimes work against the grain of what local officials want. This is the heart of our Bill of Rights.

In *Dolan v. City of Tigard,* the Supreme Court declared, "We see no reason why the takings clause of the fifth amendment, as much a part of the Bill of Rights as the first amendment or the fourth amendment, should be relegated to the status of a poor relation."

The fact that State courts might be more aware of local preferences doesn't prevent plaintiffs from bringing other kinds of claims involving the Bill of Rights to Federal courts, and that should be the case here, as well.

Likewise, in a bond covenant case, *United States Trust Company of New York v. New Jersey,* the Supreme Court warned us that more judicial oversight is required when the State's self-interest is

at stake. In the regulation of real property, the financial interests of municipalities might well depend on keeping out uses that result in the expenditure of tax revenues, such as the creation of residences that will house school pupils.

I support H.R. 4772, Mr. Chairman, because I think it will remove artificial impediments to individual property owners, vindicating their rights not to have their property taken without just compensation.

My friend, Daniel Siegel, is concerned that H.R. 4772 would provide a hostile process involving land owners and local government, as opposed to a thoughtful and balanced process he thinks exists now.

I would suggest, with respect, that salaried planning staffs and city attorneys are better able to use delay to advantage than home builders and land owners, who must pay property taxes, mortgage interests, and their own litigation fees.

Under the final decision prong of *Williamson County*, localities have yet an additional incentive to avoid giving permanent applicants a straightforward response. If they are going to have to wait for a truly final decision, as Mr. Siegel indicates, they have a long time to wait.

The *Williamson County* State compensation prong is one that many courts have mentioned. Yet, in the case of *Lingle v. Chevron,* we saw that a phrase, long repeated by the Supreme Court, when first subject to re-analysis fell by the wayside.

Likewise, Mr. Chairman, I think that, in this case, we will find that, when the Supreme Court finally does get down to examining *Williamson County*, it will decide that the State compensation prong is not necessary as a constitutional standard and makes little sense as a prudential standard.

I hope, Mr. Chairman, that the Subcommittee understands that, if it and the Congress express the intent of having the process one where it is easier for individuals to vindicate their rights, that the Supreme Court probably will accept many of those provisions. And if it does not, Mr. Chairman, that is something that will have to be dealt with in the normal course of legislation and judicial adjudication.

But most of the issues we are talking about are not written in stone, and for the Supreme Court to have the benefit of a clear expression of congressional intent and a congressional statute would be very salutary.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Eagle follows:]

PREPARED STATEMENT OF STEVEN J. EAGLE

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UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION

—

LEGISLATIVE HEARING ON H.R. 4772,
THE "PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 2005."

JUNE 8, 2006

—

TESTIMONY OF STEVEN J. EAGLE
PROFESSOR OF LAW
GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. Chairman, Representative Nadler, and distinguished members of the Subcommittee:

My name is Steven J. Eagle. I am a professor of law at George Mason University, in Arlington, Virginia. I testify today in my individual capacity as a teacher of property, land use, and constitutional law. The principal focus of my scholarly research is the interface of private property rights and government regulatory powers. I am the author of a treatise on property rights, *Regulatory Takings* (3d ed., 2005), and write extensively on takings issues. I also lecture at programs for lawyers and judges, and serve as chair of the Land Use and Environment Group of the American Bar Association's Section of Real Property, Probate and Trust Law. I thank the Subcommittee for inviting me to appear today.

H.R. 4772 (the Act) Would Remove Unjustified Barriers to Federal Court Adjudication of Property Owners' Claims Brought Under the Constitution's Bill of Rights.

Mr. Chairman, I testify in support of H.R. 4772 because I believe that the "Private Property Rights Implementation Act of 2005," as its name implies, would clarify existing law and would resolve anomalies that often make it difficult or impossible for landowners to vindicate their constitutional rights in federal court.

These anomalies result largely from the expansion and interaction of judicial doctrines that initially were developed to provide sensible case management in federal courts. As such, these doctrines are prudential, not constitutional, in nature. It is therefore within the purview of the Congress to modify them in order to facilitate substantial justice for property owners.

The most pivotal of these doctrines is the two-prong "ripeness" requirement that is applicable only to regulatory takings cases and that was enunciated by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). As I will elaborate, *Williamson County* requires that before a landowner may bring a regulatory takings claim in federal court, he or she must obtain a final decision as to what land uses government would permit ("final decision" prong) and must seek and be denied compensation ("state compensation" prong). Despite their apparently sensible requirements, both prongs have been interpreted is such extravagant fashion as to make federal judicial review of regulatory takings claims against localities almost impossible.

The Private Property Rights Implementation Act's Specific Goals.

The principal goals of the Act are:

- To ensure that property owners can obtain review by United States district courts of their regulatory takings claims that are brought against local government entities and are based solely on the Constitution and laws of the United States.

- To ensure that property owners can perfect their takings claims against both federal and state entities for review in federal court by following reasonable and well-defined steps.
- To ensure that the outcomes of lawsuits involving the regulatory taking of private property rights are not determined by arbitrary distinctions involving whether property rights are taken by the terms of local ordinances or indirectly by officials apply those ordinances; or whether the property rights exacted by government officials as a condition for approval of real estate development are classified as real property interests, personal property interests, or money.

In implementing these goals, the Act adheres to the admonishment by the Supreme Court in *Dolan v. City of Tigard*: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." 512 U.S. 374, 392 (1994).

Section 2 of the Act Would Ensure Property Owners Recourse to Federal Court When Their Takings Claims Are Based Solely On Federal Law and the United States Constitution.

Section 2 of the Act provides that U.S. district courts shall not refrain from deciding cases involving private property rights in land where the claims relate solely to federal law and where the no state court proceedings are pending relating to the same operative facts.

At first impression, it hardly would seem necessary that federal courts be charged with the responsibility of not abstaining or otherwise failing to exercise jurisdiction in cases involving the deprivation of rights where the plaintiffs do not invoke state law, but rely on federal law and the U.S. Constitution only. However, judicial interpretations of the "state compensation" prong of *Williamson County*, when combined with judicial interpretations of the full faith and credit statute, 28 U.S.C. § 1738, mean the state court review deemed necessary to "ripen" a takings claim for federal judicial review also precludes federal courts from reviewing the takings issues on which the claims are based.

"Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten." Thomas E. Roberts, "Ripeness and Forum Selection in Fifth Amendment Takings Litigation," 11 *J. Land Use & Envtl. L.* 37, 72 (1995).

Last year, in *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 125 S.Ct. 2491 (2005), the Supreme Court refused to read into the full faith and credit statute an exception that would avoid this perverse result. Section 2 of the Act provides the necessary corrective.

Background—The "State Compensation" Prong of *Williamson County*.

In *Williamson County*, the Supreme Court held that it could not determine whether the denial of a development permit constituted a taking. The respondent was deemed not to have obtained a "final decision" regarding permissible land uses. (This first prong of *Williamson County* is discussed later.) Furthermore, the second prong of the Court's two-part test was not satisfied because "respondent did not seek compensation through the procedures the State has provided for doing so." 473 U.S. at 194. For these two reasons, the Supreme Court ordered the claim to be dismissed as unripe. *Id.* at 185.

The following year, the Court noted, in *MacDonald, Sommer & Frates v. Yolo County*, that "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." 477 U.S. 340, 350 (1986).

Taken at face value, the latter statement suggests that the second prong of *Williamson County* simply requires that an owner asserting that a government action constitutes a taking must make a formal demand upon the responsible agency for compensation and that the demand must be rejected before the owner has a constitutional takings claim. However, *Williamson County* requires that the landowner follow state procedures to obtain compensation, and every state provides recourse to the full panoply of judicial review—up through the State's highest court.

The conceptual basis for the "state compensation" prong of *Williamson County* was articulated as follows: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* "[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Id.* at 195, n.13 (emphasis in original).

The Court also drew an analogy to suits brought against the United States. It stated that "we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195 (citation omitted).

Yet neither of these bases for requiring landowners to run the gauntlet of state litigation in order to ripen a federal claim is sound.

It is true that the federal government and the States and their subdivisions may take private property for public use, subject to the condition that they pay just compensation. But there is nothing unique in this arrangement. The U.S. Constitution similarly conditions many other governmental powers. The Supreme Court holds that government may deprive individuals of the right to free speech, conditioned on an adequate showing of fighting words, slander, refusal to follow reasonable time, place, and manner restrictions, etc. Likewise, the Fourth Amendment permits government to search and seize the persons,

papers, and effects of individuals, but that, too, is conditioned on reasonableness and, under some circumstances, the issuance of a search warrant. As a leading scholar and litigator in the field of eminent domain, Professor Gideon Kanner, has written:

> [T]here is nothing in the Constitution that forbids the government from depriving its citizens of life, liberty, or property either. The Constitution only requires that such deprivations not occur without due process of law, just as takings may not occur without just compensation.
>
> Thus, if we were to take the *Williamson County* reasoning as reflecting reasoned constitutional doctrine, we would have to conclude that plaintiffs claiming any deprivation of constitutionally protected rights without due process of law—the life's blood of 42 U.S.C. § 1983 litigation—should not be able to sue in federal courts either, without a preliminary detour through the state courts.

Gideon Kanner, "Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?", 30 *Urb. Law.* 307, 328 (1998).

It is no more logical to force a landowner who has been subjected to a taking to litigate the issue of just compensation in state court than it is to force someone denied a parade permit to litigate in state court the issue of whether the time, place, and manner restrictions cited as justifications were reasonable.

Adding to these anomalies, the Supreme Court held, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), that a municipal defendant may remove a regulatory takings case to federal court without regard to *Williamson County* ripeness requirements. Relying on this, the plaintiff in *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003)., argued that the landowner should be able to remove to federal court as well.

The plaintiff argued, citing 28 U.S.C. § 1441(a), that only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." Therefore, if the defendant could remove the regulatory takings case to federal court without the establishment of ripeness, the plaintiff should be able to file the case without establishing ripeness. The Eighth Circuit rejected the argument, suggesting that, while *Williamson County* has been substantially eroded, any determination that it had been overruled in *City of Chicago* should be left to the Supreme Court:

> [A]s the District Court noted, *City of Chicago*'s holding addresses only the question of federal-question jurisdiction over a ripe takings claim. It does not explicitly answer the question of what is necessary to render a takings claim ripe. The Supreme Court has not explicitly overruled or modified the ripeness requirements laid out in *Williamson* in the context of takings cases. The requirement that all state remedies be exhausted, and the barri-

> ers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous. Nonetheless *Williamson* controls the instant case. . . . Whether something similar should occur here is for the Supreme Court to say, not us.

319 F.3d at 1040-41. The Supreme Court declined the invitation. 540 U.S. 825 (2003).

Also, the Supreme Court's analogy to the review of claims against the United States under the Tucker Act is misleading in two respects. First, prior to 1855 private claims were barred by sovereign immunity, with the only recourse being private bills introduced in Congress. The Court of Claims, established in that year, originally had the authority only to recommend the disposition of claims to Congress. Only in 1863 was the court given the power to adjudicate claims. The Tucker Act of 1887 reenacted and revised the existing statutes and gave the court the authority to hear claims against the United States based on the Constitution. See Richard H. Seamon, "Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance, 43 *Vill. L. Rev.* 155, 175-77 (1998). To this day Congress may refer bills to the court, most recently styled the U.S. Court of Federal Claims, for its recommendations. See 28 U.S.C. § 1492. Thus, the functions of the tribunal have changed over time and it has not functioned exclusively in an independent judicial capacity.

More important, the Court of Federal Claims is an instrumentality of the United States, and, with respect to federal takings, functionally serves as the designee that decides, on behalf of the government actor, whether the actor's conduct should result in the payment of just compensation or not. The local government equivalent would be an office in the city law department or a city court given the power to make or deny awards. In the case of an alleged municipal taking, the State is a third party. While they adjudicate takings cases, state courts do so on behalf of the State and not as agents of the locality.

The Supreme Court has held, in *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), that local government entities are amenable to suit under the Civil Rights Act, 42 U.S.C. § 1983. This statute imposes liability on those who deprive individuals of "rights, privileges, or immunities secured by the Constitution and laws."

Background—The Full Faith and Credit Statute and *San Remo Hotel.*

Since the U.S. Constitution is the supreme law of the land, state courts must apply it and litigants suing in state court are presumed to submit for adjudication their federal constitutional claims as well as their state claims. However, in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Supreme Court held that plaintiffs could submit their state claims to state court and explicitly reserve their federal claims for subsequent proceedings in federal court.

If an issue is decided by a state court, the losing party generally is precluded from relitigating that issue in federal court. The federal full faith and credit statute, 28 U.S.C.

§ 1738, provides that judicial proceedings in one State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ."

In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 125 S.Ct. 2491 (2005), an affordable housing ordinance prohibited the petitioners from converting their 62-unit hotel in the Fisherman's Wharf neighborhood from residential to tourist use, unless they provided replacement residential units or paid a $567,000 "in lieu" fee. The petitioners litigated their takings claims based on California law in the California courts, and asserted that they would reserve their federal takings claims for adjudication in federal court, if necessary. The California Supreme Court found against the landowners, but noted that they had reserved their federal causes of action.

In the federal litigation, however, the U.S. Court of Appeals for the Ninth Circuit subsequently held that issue preclusion applied. *San Remo*, 364 F.3d 1088 (9th Cir. 2004). Claim preclusion did not apply, with the result that the plaintiffs had a right to go to federal court, but could assert no issues of substance when they got there.

On the other hand, the U.S. Court of Appeals for the Second Circuit reached a very different conclusion in *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2nd Cir. 2003). It declared:

> It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.*, those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court.

342 F.3d at 130. The Supreme Court granted certiorari in *San Remo* to resolve the conflict between the two cases.

The U.S. Supreme Court found that the state supreme court in *San Remo* did not confine its analysis to California jurisprudence, but considered federal takings jurisprudence as well.

Justice Stevens stated the question before the Court as "whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation." 125 S.Ct. at 2501.

Furthermore, Stevens reasoned that *England*, the case supporting the right of litigants to reserve their federal claims while litigating others in state court, applies only when the

antecedent state issue "was *distinct* from the reserved federal issue." *Id.* at 2502 (emphasis in original). He concluded:

> Although petitioners were certainly entitled to reserve some of their federal claims . . . *England* does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. Federal courts, moreover, are not free to disregard 28 U.S.C. § 1738 [the full faith and credit statute] simply to guarantee that all takings plaintiffs can have their day in federal court.

Id. at 2501-02.

Background—The Use of Abstention Doctrines to Avoid Federal Adjudication of Fifth Amendment Rights.

As a matter of judicial policy, the federal courts have developed a number of doctrines under which they would abstain from ruling on disputes otherwise properly before them.

Under "*Pullman* abstention," federal courts would avoid premature rulings on unsettled questions of state law, and instead retain jurisdiction while those issues are decided by state courts. *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). Given the wide range of fact patterns and very broad discretion typically accorded local land use regulators, it has proved easy for a federal court to abstain on ruling on landowners' Fifth Amendment takings claims on the grounds that the treatment of those claims in state court would be uncertain. See *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985).

Under "*Burford* abstention," federal courts should avoid construing "complex" state regulatory programs. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). For instance, where a State had established an "elaborate review system for dealing with the geological complexities" of oil and gas fields, federal court interpretations might "have had an impermissibly disruptive effect on state policy for the management of those fields." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 815 (1976). In some cases, however, courts have seized upon *Burford* abstention to avoid ruling on routine matters of subdivision controls. See *Pomponio v. Fauquier County Board of Supervisors*, 21 F.3d 1319 (4th Cir. 1994).

Under "*Younger* abstention," federal courts should not become involved when a dispute is the subject of pending state litigation. *Younger v. Harris*, 401 U.S. 37, 54 (1971). In *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), the U.S. district court found "one of the rare cases in which possible 'bad faith, harassment, or some extraordinary circumstance' makes abstention inappropriate.'" *Id.* at 1172. The U.S. Court of Appeals for the Eighth Circuit reversed, holding that the trial court should have exercised *Younger* abstention, despite the fact that condemnation proceedings were not commenced

in state court until almost two weeks after federal injunctive relief was sought. 357 F.3d 768 (8th Cir. 2004).

Act Section 2 Implements Protection for Fifth Amendment Property Rights in the Situations Described Above.

Section 2 of the Private Property Rights Implementation Act would protect private property rights in the situations I have just described.

The proposed addition by Section 2 of a Subsection (d) to 28 U.S.C. § 1343 would require the U.S. district courts to exercise jurisdiction over landowners' claims that they have been deprived of their property rights, without the need to pursue state judicial remedies. This would abrogate the prudential second prong of *Williamson County*.

In an opinion concurring in the judgment in *San Remo* in which Justices O'Connor, Kennedy, and Thomas joined, Chief Justice Rehnquist agreed that the present full faith and credit statute requires the preclusion of issues in federal court that had been decided in the process of "ripening" the case in state court. He went on to declare:

> It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in *Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement. . . . More recently, we have referred to it as merely a prudential requirement. *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 733-734 (1997). It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim. Cf. *Patsy v. Board of Regents of Fla.,* 457 U.S. 496, 516 (1982) (holding that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies.

125 S.Ct. at 2508 (Rehnquist, C.J., concurring in judgment).

In practice, the state litigation requirement has proved extremely onerous, and only plaintiffs who have been prepared to devote a decade of time and hundreds of thousands of dollars in attorney fees and other expenses could expect to obtain a chance to litigate in federal court. *See generally*, John J. Delaney & Duane J. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse," 31 *Urb. Law*. 195 (1999).

The answer to what sometimes is termed the "two bites at the apple" problem is clear—the plaintiff should have one bite, but the right to decide whether it is taken in state or federal court. The Act would accomplish this by permitting the landowner to sue for the relief provided under Section 1983 without having to go to state court first.

Likewise, Section 2 of the Act would limit overly-broad abstention in property rights cases by federal district courts. In adding Subsection (c) to 28 U.S.C. § 1343, it mandates that district courts "shall" exercise jurisdiction when there is no invocation of state law and no parallel proceeding actually pending in State court. In adding Subsection (e), it would impose strict limitations on the certification of unsettled questions of state law to the highest appellate court of the State in question.

Section 2 of the Act Would Reduce Undue Burdens on Property Owners Resulting from Uncertainty About the Definitiveness of Refusals to Rule Affirmatively on Development Applications.

In *Williamson County*, the plaintiff filed suit in federal court immediately after the planning commission denied its application for permission to expand a subdivision. The plaintiff did not pursue alternative forms of relief, such requesting a variance, appealing to the County Council, requesting that the county's general plan be amended, or suing in inverse condemnation in state court. 473 U.S. at 196-97. The Supreme Court ruled that it could not determine whether there had been a taking, because there had been no "final decision" by the planning commission. Under the "final decision" prong of *Williamson County*, an as-applied takings claim "is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to *the property* at issue." *Id.* at 186 (emphasis added).

Permit delays are very expensive for developers, since mortgage interest, taxes, and many other expenses continue unabated. On the other hand, government planners remain steadily employed. Without a "final decision," landowners have no recourse to federal court under *Williamson County*. For these reasons, delay increases the chances that the landowner will surrender many development rights or agree to large exactions in order to gain some sort of development approval. For this reason, localities faced with development applications have every incentive to say "try again" instead of "no." In some cases, developers comply with government requests that they rework a given application time after time, only to have new demands imposed after previous demands are satisfied. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

A second reason why the "final decision" prong has proved unsatisfactory is that, under general principals of American land use law, regulators are not obligated to issue determinations of permissible uses. Rather, they do, or do not, issue development permits based on the specifics contained in landowners' development applications. In addition, the discipline of land use planning does not lend itself to such determinations, since land use proposals incorporate hundreds of variables with respect to the potential uses of a parcel, the size, shape, and density of structures, landscaping, traffic flow, and other aspects of modern development. Thus, planners simply cannot determine, on a single scale, "how much" development is permissible. "The planner's job is to draw an abstract plan and then determine whether a specific proposal meets all the requirements." Michael M. Berger, "The 'Ripeness' Mess in the Federal Courts, C872 *ALI-ABA* 41 (1993).

For all of these reasons, the apparently simple "final decision" prong of *Williamson County* has embroiled landowners in litigation over the nuances of the plethora of "sub-prongs" that have embellished the basic requirement. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986) (holding submitted plan must not be "exceedingly grandiose"); *Gil v. Inland Wetlands and Watercourses Agency*, 593 A.2d 1368, 1374-75 (Conn. 1991) (holding multiple applications expected and four insufficient here); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990) (holding number dependent upon nature of project and challenge); *Landmark Land Co. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) (requiring one application plus some effort to pursue compromise with city).

Section 2 of the Act would assist by defining a "final decision" as involving one meaningful application, together with one request for a waiver and one administrative appeal, if these are available and the request would not be futile.

Sections 3 and 4 of the Act Would Impose Similar "Final Decision" Rules Respecting Federal Actions.

Section 3 of the Act would amend the "Little Tucker Act," 28 U.S.C. § 1364, which gives district courts concurrent jurisdiction with the U.S. Court of Federal Claims for civil actions against the United States, not exceeding $10,000 in amount. The amendment would add a new Subsection (h), defining "final decision" in the same manner as Section 2.

Likewise, Section 4 would amend the Tucker Act, 28 U.S.C. § 1491(a), by adding a new Paragraph (3), defining "final decision" in the same manner.

Section 5 of the Act Clarifies the Intent of Congress that Extraneous Interpretations Unduly Burdening Private Property Rights be Discarded.

Section 5 of the Private Property Rights Implementation Act of 2005 clarifies that it is the intent of Congress that, insofar as they are not mandated by the Constitution, a number of arbitrary or extraneous interpretations of takings law that derogate from private property rights not be imposed.

Exactions of Property for Development Approval Must be Based on "Rough Proportionality" and an "Individualized Determination" of Need.

Under the doctrine of "unconstitutional conditions," government may not condition receipt of a benefit, or upon grant or deny any individual a privilege, subject to conditions that improperly "coerce," "pressure," or "induce" the waiver of that individual's constitutional rights. "[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the bene-

fit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Just as the Court held that a college teacher did not have to choose between renewal of his contract or freedom of speech in *Perry*, it held in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that the requirement that a landowner dedicate property in exchange for a building permit would constitute an unconstitutional condition where there was no "essential nexus" between "the condition substituted for the prohibition [and] the end advanced as the justification for the prohibition. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (citation omitted).

While in *Nollan* there was no nexus between the Commission's power to ensure the view of the ocean from the public highway and its insistence that the landowner surrender an easement along the beach behind his house, the situation was different in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Dolans applied for permission to expand their plumbing supply store and to pave the adjoining parking lot. These changes would have some connection with the City's traffic congestion and storm water problems. The issue, then, was the extent of the nexus required in order to justify the City's demands that easements be granted along a creek behind the store for flood control and in front of the store for a bicycle path.

The Supreme Court held that there must be "rough proportionality" between the required dedications and the impacts of the proposed development, and that this proportionality be calculated not by using citywide ratios, but rather through an "individualized determination." *Id.* at 391.

The Act Would Apply "Rough Proportionality" and "Individualized Determination" to Legislative as Well as Administrative Decisions.

Dolan noted that the Court had granted local land use regulations considerable latitude in the past, but that those regulations "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." 512 U.S. at 385. However, the Court has never explicated the distinction between "legislative" and "adjudicative" determinations. Some states have taken the position that all zoning ordinances, whether they are comprehensive or relate only to one parcel, should be treated as "legislative." See, e.g., *Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980). Others have deemed small-scale rezoning essentially an administrative, or quasi-judicial function. See, e.g., *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993).

The problem is encapsulated in *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995). There, the City passed an ordinance, intended to beautify the

downtown area for upcoming Olympic games, by requiring downtown parking lot owners to devote considerable space and expense to landscaping. The Court denied certiorari, over the strong dissent of Justices Thomas and O'Connor:

> It is hardly surprising that some courts have applied *Dolan*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18 (Thomas, J., dissenting from denial of cert.).

Section 5 of the Act would clarify the intent of Congress by amending the Civil Rights Act, 42 U.S.C. § 1983, to state that takings liability would apply to an unconstitutional condition or exaction, "whether legislative or adjudicatory in nature."

Section 5 of the Act also would clarify the intent of Congress by amending the Civil Rights Act, 42 U.S.C. § 1983, to state that takings liability for exactions would apply to the requirement of payment of a monetary fee, in addition to the requirement of a dedication of real property.

In *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), a case remanded by the U.S. Supreme Court in light of *Dolan*, the Supreme Court of California held that a monetary exaction "in lieu" of the provision of art in private buildings had to meet the same standards of "rough proportionality" and an "individualized determination" as would a dedication of real property. On the other hand, the New York Court of Appeals has held that "rough proportionality" is not applicable to perpetual, but non-possessory, conservation easements. *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004). The U.S. Supreme Court has suggested, but not definitively ruled, that *Nollan* and *Dolan* are limited to exactions of real property. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005).

Clarification that Every Subdivided Lot is a Separate Parcel for Takings Purposes.

Section 5 of the Act would clarify the intent of Congress by amending the Civil Rights Act, 42 U.S.C. § 1983, to state that whether the restrictions placed upon a platted and approved building lot in a subdivision are so severe as to constitute a regulatory taking shall be determined with respect to that lot.

This might appear self-evident, but it is very easy for property owners to become ensnared in the "parcel as a whole" doctrine enunciated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). There, the Court wrote that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather . . . on . . . the nature and extent of the interference with rights in the parcel as a whole . . . ." *Id.* at 130-31.

While "parcel as a whole" might be sensible in theory, in practice it has proved an exceedingly difficult concept to adjudicate fairly. Contiguous lands slowly might be acquired over time, and parts of a large tract might have been sold off long before the contemplated use or regulatory imposition at issue. Also, a myriad of problems exist involving the coordination of non-contiguous parcels, and regarding parcels belonging to entities the beneficial ownership of which is overlapping but not co-extensive. A given case might involve a mixture of several of these types of issues. For these reasons, there has been considerable litigation involving what sometimes is referred to as the "relevant parcel" problem. See, e.g., *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). For analysis, see Dwight H. Merriam, "Rules for the Relevant Parcel," 25 *U. Haw. L. Rev.* 353 (2003).

Section 5 does not relate to parts of larger tracts that are self-selected by landowners. Rather, it clarifies that "relevant parcel" complexities, expense, and delay should not frustrate the efforts of property owners to obtain constitutional protection for their interests in subdivision lots that are taxed, or otherwise treated and recognized as independent units of property by government itself.

Clarification that a Deprivation of Due Process of Law Means Arbitrary or Capricious Conduct or an Abuse of Discretion.

The Civil Rights Act, 42 U.S.C. § 1983, provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment may impose liability for undue interference with the use of land not merely because it deprives the land of all value, but also because the regulation itself is arbitrary, capricious, or unreasonable. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained." *PruneYard Shopping*

Center v. Robins, 447 U.S. 74, 84-85 (1980). For a good explication of the various meanings of substantive due process, see *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992).

Last year, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the Supreme Court made clear that landowners may challenge government deprivations of property rights under the Due Process Clause, independent of any rights they might have under the Takings Clause. *Id.* at 543. *Lingle* thus corrects the impression of some lower federal courts that they had to apply all of the panoply of regulatory takings doctrine, including *Williamson County* ripeness, to due process claims involving real property. An example is *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), where the Ninth Circuit drew an analogy to the Supreme Court's holding in a criminal case, *Graham v. Connor*, 490 U.S. 386 (1989), that the validity of a search and seizure should be determined with reference to the Fourth Amendment rather than to generalized principles of due process.

In the same manner as the Ninth Circuit in *Armendariz* gravitated towards a criminal case to define the procedural standards for judging landowners' due process claims, several Circuit Courts of Appeals have utilized a Supreme Court opinion involving a high-speed police chase to articulate the standard for what constitutes a deprivation of due process. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court considered whether the high-speed chase manifested indifference the human life. It declared that the "Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Id.* at 847 (citation omitted). *Lewis* noted that the Court had articulated the "shocks the conscience" test in *Rochin v. California*, 342 U.S. 165 (1952) where the forced pumping of a suspect's stomach violated the "decencies of civilized conduct." 523 U.S. at 846.

The "shocks the conscience" test has been applied regarding landowners' claims of property deprivation in cases such as *Lindquist v. Buckingham Township*, 68 Fed. Appx. 288, 2003 WL 21356409 (3d Cir. May 26, 2003) (not published in F.3d), and *Creative Environments, Inc. v. Estabrook*, 680 F.2d 882, 883 (1st Cir. 1982). Similarly, the District of Columbia Circuit recently adopted an "egregious government misconduct" requirement. *George Washington University v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003).

Whatever the merits of a "shocks the conscience" test under the exigencies of police work, where fleeing suspects or dissipating evidence requires instant decisions, deprivations of landowners' property does not result from the reflexive conduct of police officers under great stress. Rather, such deprivations result from the methodical actions of government officials who have every opportunity to consult their superiors, experts, and legal counsel before acting.

Section 5 of the Act would clarify the intent of Congress by amending the Civil Rights Act, 42 U.S.C. § 1983, to state that the standard for review of a alleged deprivation of substantive due process is whether the government conduct "is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

I believe, Mr. Chairman, that the changes embodied in the Private Property rights Implementation Act of 2005 are welcome and important. They would assist substantially in protecting private property rights in the United States without unduly restricting the exercise of their proper police power functions by the federal government, the States, or local governments.

Mr. CHABOT. Thank you, Professor Eagle.

Members of the Committee will now have 5 minutes each to ask questions. And the Chair will recognize himself for 5 minutes for that person—that purpose.

And, Mr. Trauth, I will begin with you.

Can you describe what it takes under current law for a citizen to get into Federal court with a Federal free speech or religious discrimination claim and contrast that to what it takes for someone to get into court with a Federal property rights claim?

Mr. TRAUTH. Yes. Mr. Chairman, today, for a free speech or religious discrimination claim, a person under the U.S. Constitution has direct Federal access to Federal courts. Under a taking claim, property rights claim, you have no access under the case law of *San Reno* in 2005.

Mr. CHABOT. We are talking about Federal rights under both issues, in essence, both?

Mr. TRAUTH. What is that?

Mr. CHABOT. I say that we are talking about a right that one would think one would have under the Constitution in both instances?

Mr. TRAUTH. Yes, right. I mean, to be denied access to Federal court on a constitutional claim is ridiculous. When, you know, this is as sacrosanct as any other Federal right under the Constitution—even more so. I mean, our country was founded on private property rights.

And, you know, not to be able to address that in Federal court, I think, is absurd.

Mr. CHABOT. Thank you.

Mr. Kottschade, I will go with you next, if I can. What has happened to your land since the Supreme Court denied your cert petition?

Mr. KOTTSCHADE. Mr. Chairman, in March of 2003, the State of Minnesota Department of Transportation commenced condemnation proceedings against it. Now, this is very significant, and I just heard the testimony that the State and local governments are working to improve the system. I am not sure I can afford that.

The reason I say that tongue-in-cheek is real simple: The city of Rochester attached conditions onto my property which devalued it. Now, the State of Minnesota has come in and is clipping the coupons. They have offered me, at this point, 10 cents on a dollar.

When I challenged them on that, "Why are they doing that?" They said, "Well, you can't get the permits anyway."

So there is a collaboration between local and State government, as was testified. I am not sure that, as a citizen of this community, of this nation, that I can afford that.

Mr. CHABOT. Thank you.

Let's see, Mr. Siegel, if I could go to you next. In one case in Minnesota, a property owner filed his Federal takings lawsuit in State court first, as he was required to do so by the Supreme Court's *Williamson County* case. Then the city removed the case to Federal court, as they are allowed to do under the Supreme Court's *College of Surgeons* case.

Then, the Federal court dismissed the property owner's case because the property owner hadn't litigated his case in State court

first, even though that is exactly what the property owner was doing when the city removed the case to Federal court.

Can you give me any example from any other area of law that results in such a hopelessly unfair Catch-22 for the average citizen?

Mr. SIEGEL. Well, I have not read that case, the Minnesota case. But I what I believe happened, from my—reading the testimony of my co-witness here—is that, under the removal statutes, any party to a State action who believes that an action should have been filed in Federal court can remove the case into Federal court, which is like filing a complaint, a new lawsuit in Federal court.

The court then looks at that new lawsuit and says, "Should this really be here in Federal court or not?" And it sounds like, in that case, in should never have been in the Federal court in the first place, so that Federal court put the court—the case back where it belonged, in State court, because there never had been an exhaustion of State court requirements, which is required under *Williamson County*.

So it is just the way that the removal statutes work. And, you know, the Committee may want to look at the removal statutes, but that is how they operate.

Mr. CHABOT. Mr. Kottschade?

Mr. KOTTSCHADE. Mr. Chairman, for the record, the Federal—or the State moved to take that into Federal court under the *College of Surgeons v. Chicago* case, where the State can take court cases into Federal court, but I as a property owner am denied that right. And I guess the question is: Why isn't a level playing field, that if the city can petition a takings case into Federal court, why can't I, as an individual, go to State—or go into Federal court?

Mr. CHABOT. In the little time that I have left, if I can go to you, Professor Eagle. Practically speaking, under current rules, can the average person expect to be able to litigate their Federal property rights claims up to and through the Federal court system today? And what financial and time barriers await such people who try to do so?

Mr. EAGLE. No, Mr. Chairman, they cannot. If they file an as applied case, that is, that the regulation is unconstitutional, given their specific situation, it can take them up to a decade and several hundred thousand dollars of expenses to ripen their case for Federal court.

And then, of course, under *San Remo,* they will be precluded from having the substance heard anyway. So that is absolutely a dead end.

On the other hand, Mr. Chairman, there could be a facial challenge, saying that the regulation, under all circumstances, never conceivable can be constitutional, but, of course, that is impossible to win, so they lose right off. Either way, they have no chance.

Mr. CHABOT. Thank you. My time has expired.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you.

Mr. Siegel, the bill makes certain changes to the ripeness doctrine. To what extent do you think that these changes to ripeness and other standards in section V, of the takings standard in section

V, present constitutional issues we have to deal with, not just statutory issues?

Mr. SIEGEL. They very definitely present constitutional issues. And it is most stark in section V.

For example, I gave one example concerning changing the standard of review and substantive due process cases, where in essence what this bill does is it directs the judiciary to change the law, change the judiciary's interpretation of the Constitution.

Another example is in the so-called partial as a whole provision. That is in subsection two of section V. And what this bill does is it says that if a property owner owns, say, 100 lots, and if one of those lots cannot be developed because it has a wetland, but the other 99 can, the court is directed to only look at that single lot that cannot be developed.

That is not current law. As explained in *District Intown* and many other cases, the courts look at what is—whether or not a property holding is a unified holding or not, and that is the test that is used.

This directs the courts to change their interpretation of the Constitution, and that is, on the separation of powers principles, there is—Congress does not have that authority.

Mr. NADLER. Do you think this provision will be ineffective as passed?

Mr. SIEGEL. Well, it will not only be ineffective, but it will—rather than helping developers, to the extent that developers rely on these provisions it is going to delay rather than speed up their lawsuits, because there is going to be litigation over this bill and whether or not it is valid.

So there is going to be more confusion and more delay, rather than what its supporters are hoping for, which is to try to speed things up.

Mr. NADLER. Okay, one more question, Mr. Siegel, before I go onto others. We have considered several bills over the years that are similar to this one. How is this one different? I am sure you are familiar with the other takings bills we have considered in the last few years.

And should Members who voted for the other bills have any concerns that this contradicts those?

Mr. SIEGEL. They should be very concerned about section V. Section V never appeared in any of the prior bills. It is described as a "clarification" of constitutional law, but what it is doing is attempting to make constitutional law, and that has never been done before in any of the prior bills.

Mr. NADLER. Thank you.

Mr. Kottschade, are there jurisdictions where a developer would fare better in State court than in Federal court? Would this legislation give the developer the choice of forum?

Mr. KOTTSCHADE. Congressman, that is a great question. The short answer is: I do not want to go to court, period. I want to be able to develop. I want to be able to pull projects together. I—but——

Mr. NADLER. Yes, but this—excuse me, but this bill—if you don't want to go to court, this bill doesn't affect it.

The question is, if this—if you have to go to court, you feel you have to go to court, does this bill give you a choice of forums?

Mr. KOTTSCHADE. What, Congressman, this bill would give me a right to go to court, Federal court, as I testified earlier. I don't believe today, based upon a decision in Minnesota, that I have—can go to State court, because, if I do, I am going to get bounced into Federal court and I am going to get bounced out.

So I think, after the—after the *Koscielski v. Minneapolis,* this is very important that we have this.

Mr. NADLER. May I ask Professor Eagle the same question?

Mr. SIEGEL. If I could——

Mr. NADLER. Mr. Siegel, go ahead? Whoever is most eager to answer.

Mr. SIEGEL. We could change our names.

Mr. NADLER. Whoever is the most eager to answer. [Laughter.]

Mr. SIEGEL. Well, I would like to just quickly answer, which is that the removal statutes involve a very quick process. So if there is a concern, I think, if one has a good case, they should bring it in State court.

I am surprised. My understanding is that Mr. Kottschade never brought his case, even after the—being thrown out of Federal court, never brought his case in State court, which is surprising, because that is——

Mr. NADLER. Why should he bring it into State court, as opposed to Federal court, if he can do it in either?

Mr. SIEGEL. Well, he can bring his case to State court. What he is saying is that he would be removed to Federal court under a removal—he—under a removal statute, which is——

Mr. NADLER. Yes, but are there cases where you would be advantaged in bringing it in Federal court, as opposed to State court, and vice versa?

Mr. SIEGEL. I don't think so.

Mr. NADLER. Okay.

Professor Eagle?

Mr. EAGLE. If I may answer that, Mr. Chairman, if you look at *City of Chicago v. International College of Surgeons* itself, I think it is no accident that the International College of Surgeons wanted this matter heard in State court. The Illinois courts have a tradition of taking property rights more seriously than the courts of some other States.

But there is nothing incongruous about this, Mr. Nadler, because when a plaintiff chooses to bring an action, the plaintiff almost always has the right to pick the cause of action and to bring that case in the applicable court. So this is the same treatment that the International College of Surgeons wanted that any other plaintiff would get.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Professor Eagle, I would like to ask you first, you know, some of the critics of the legislation, H.R. 4772, have somehow said that this would federalize local disputes. But isn't it true that Federal

constitutional property rights and the procedural rules that ultimately govern them is truly a Federal issue?

Mr. EAGLE. Well, as I said earlier, Mr. Franks, I think that the Bill of Rights of the Constitution does understand that individuals have certain rights.

One of those rights is the right not to be deprived of property without just compensation, and this should be treated in the same fashion as other rights within the Bill of Rights. And, thus, I think it certainly is amenable to hearing in Federal court.

Mr. FRANKS. Thank you.

Well, Mr. Chairman, I might then just take, based on that, take a moment to respond to something that was said earlier, that somehow a day had changed a great deal of this Committee's focus.

The central premise of the United States Constitution and its declaration is that governments are instituted among men to protect their basic, God-given rights. And among those are life, liberty and property, in the Constitution and in life, liberty and the pursuit of happiness in the declaration.

And it occurs to me that the right of property, as outlined in the Constitution, is a very basic, foundational, constitutional right.

And far from moving from our concept of yesterday, when we in this Committee, in the full Committee, we were doing what we could to tell courts that they had failed in protecting the rights of freedom, freedom of religion, in telling people that they could not say the words "under God" in the Pledge of Allegiance, we were, at that time, trying to protect a basic constitutional right: life, liberty and property being the first three of those.

And here again today, the reason that we are putting this in the courts, wanting to put this into the Federal courts, is simply because people like Mr. Kottschade and others are unable to get a clear hearing on the Federal issue of property rights.

And far from holding the courts to be the—the Supreme Court from being the ultimate arbiter, if, indeed, the Supreme Court is the ultimate arbiter of all of those issues and the Constitution is not, then I ask myself: Why are we here? Why don't we just close the doors, and go home, and let the courts do it all, if they are the ultimate arbiter?

The truth is, as Members of Congress, we are given a great charge to protect those basic, federal, Constitution rights; among those are life, liberty and property.

And I think that is what we are trying to do here, Mr. Chairman. Thank you.

Mr. CHABOT. Thank you very much. Does the gentleman yield back?

Mr. FRANKS. I yield back.

Mr. CHABOT. Okay. The gentleman's time is expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I think the last comment from the gentleman from Arizona shows how complicated some of these things are, but it can be boiled down to the idea that, if we agree with what the courts are going to do, we want them to hear the case as quickly

as possible. If we don't think we are going to agree with what the courts are going to do, we don't want them to hear it at all.

So, Mr. Siegel, there is a concept of exhausting administrative remedies. At some point, you want the case to remain through the normal steps of administrative procedure, that is the little zoning board, the city council, and wherever else you have to agree to it. When is it appropriate for the case to be ripe for a Federal review of a Federal constitutional right?

Mr. SIEGEL. Well, the courts have explained, most recently in the *Pallazzolo* decision, that, when the permissible uses of property are known to a reasonable degree of certainty, then the case is ripe.

The courts want to know what uses of property are permitted, so it can decide whether or not there has been such an economic impact on the property, that is, as the court recently explained, so onerous as to amount to a direct appropriation.

But to make that determination, is this imposition so onerous you have to know what local government is doing? And there needs to be a reasonable degree of certainty, according to the courts.

Mr. SCOTT. Well, the way it is working now in practice is you never get there.

Mr. SIEGEL. Oh, certainly cases get there all the time. I mean—and people complain sometimes about the California—California courts——

Mr. SCOTT. No, because, if you stuck—you never get to a Federal court review—let me back up. You think there ought to be somewhere in the process a Federal review of a Federal constitutional right?

Mr. SIEGEL. Oh, I am sorry, no, I misspoke if I implied that. The court has been clear, going back to *Allen v. McCurry,* a case decided, I believe, in 1981, that there is no right to have a 1983 action heard in Federal court.

If there is a meaningful opportunity to be heard in a State court and one has been given that opportunity, that can bar, through collateral estoppel, the right to a Federal hearing and access to a Federal court.

That was not a property rights case. It was not a—it was a search and seizure case. In *San Remo,* the court explained that the same principle applies in that search and seizure case to a property rights case, so there is not an absolute right to go to Federal court.

Mr. SCOTT. So, in those cases, there would never be a Federal—following that line of thinking, there can in some cases be no Federal review of a Federal constitutional right?

Mr. SIEGEL. There can't—there would be Federal review, but not by a Federal district court or court of appeal. There could be Federal review by the United States Supreme Court, because the—once a State court has reached its decision, if it involves the interpretation of Federal law or Federal Constitution, there is the right to petition for certiorari to the United States Supreme Court.

And, in fact, many of the takings case that, you know, takings litigants at least know about are just such cases. The first *English* case, the *Nolan* case, the *Pallazzolo* case are all cases that came out of the State court systems. Property owners said, "Wait a second; we disagree with the way the State courts are interpreting the Constitution."

The United States Supreme Court stepped in to decide whether or not the State courts were interpreting the Constitution properly or not.

Mr. SCOTT. And if the State is hanging things up so that it takes, as has been pointed out, an average of over 9 years to get there, does that seem like a reasonable length of time to get—finally get a Federal review of a Federal right?

Mr. SIEGEL. Nine years, I think, is a long time for any case to proceed. That is a reality, in some situations, in some courts, not just in takings law, but in any law.

There has been no comparison that I have seen of how long it takes for a takings case, which—a ripe takings case to go from being filed to being to an ultimate decision versus other cases. I don't think there is any difference between how any—you know, in terms of the length of time it takes for any case to be litigated.

As you say, in my State——

Mr. SCOTT. Let me—I don't mean to cut you off, but my time is just about up, and I wanted to ask another question on section V in the bill, which kind of redefines deals with takings, what is the present law? And how does that section change present law?

Mr. SIEGEL. Present law is that as—one of the takings provisions under this bill says that, in analyzing a parcel in a subdivision, say, with a hundred different lots, you, under this bill, only look at the particular lot that is being regulated, while current law says that you look at the parcel as a whole.

Mr. SCOTT. You mean——

Mr. SIEGEL. You look at if all the lots are part of the same development, they were purchased at the same time, they were part of the same scheme, then the courts have been treating those in cases such as *Tab Lakes* and *District*—I am sorry, I am forgetting the name of the case now—as a single unit, rather than this discrete little unit.

Mr. SCOTT. Is that the only change by section V?

Mr. SIEGEL. No, no. There is an attempt to change the *Nolan/Dolan* standards, to extend what is—as Professor Eagle pointed out—at least strongly, implicitly current law, that those cases, for example, do not apply to fee impositions. And this bill attempts to apply them to fee impositions.

It also attempts to change the rule articulated in *Dolan* that legislative decisions are given deference, and this bill attempts to take away that deference. So those are two changes of existing constitutional law, as interpreted by the United States Supreme Court.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Well, Professor Eagle, with respect to the deference—if I understood Mr. Siegel's last comment—what we really do in section V is to clarify the standard. The Supreme Court has never used "shock the conscience" as a test in a property takings case; it is usually police work.

What we go back to is an arbitrary and capricious standard, is that right?

Mr. EAGLE. Yes, sir. And if I may, let me just make a much more general comment about this notion that this bill would go against existing law.

There was a very insightful colloquy in the oral argument in *San Remo*—which I had the privilege of attending—where the attorney for the city said that the court had never considered the interaction of issues of preclusion and the *Williamson County* doctrine.

And Justice O'Connor said, "Well, it is clear we didn't, so now we are faced with the consequences of that. And it looks to me like the lower courts have run pretty far with *Williamson County*."

And that is exactly what has happened. There are decisions in some of the lower courts that reached the results that Mr. Siegel has indicated, but the Supreme Court's view of these has not yet been definitively determined. And I certainly don't think, apart from what the Chair has, in my view correctly, pointed out to be this Committee's independent duty and Mr. Franks has pointed out to be this Committee's independent duty to look at the Constitution.

The fact of the matter is that the Supreme Court itself has not really definitely ruled in the Constitution on these issues. And even in the *International College of Surgeons* case, the *Chicago* case, we are talking about how that interacts with the decision of the court in *Williamson County*.

And the point is: The court didn't consider it; the court didn't even mention *Williamson County*.

Mr. FEENEY. We address a lot of unaddressed issues, at least from the Supreme Court. I actually have a parochial interest here, and I want to make sure that my understanding is correct.

In Florida, for—we have different guaranteed constitutional rights if property is taken by the State or a subdivision thereof, a country or a city, for example, attorney's fees on top of fair market value. There is actually—you know, by and large, property owners would rather be condemned by the State than by the feds, for that reason.

My question is, supposing a property owner condemned by a State or a subdivision thereof opted—wanted to opt for a Federal court under this law, once it was passed in Florida, the Federal court, as I understand it, would be applying State law in the remedy stage, including attorney's fees. Does everybody agree with that?

Mr. EAGLE. Well, I think the question would be what body of law—what right that the plaintiff is seeking to have vindicated in court.

Mr. FEENEY. Well, assuming that—okay, I have put the bunny in the hat, as my professors used to say. Assuming that the property owner can establish a regulatory takings under the fifth amendment in a Federal court by a State subdivision, would the property owner then be eligible for attorney's fees?

Mr. Siegel, do you have an opinion on that?

Mr. SIEGEL. I do not believe, if it was based upon Federal law, unless——

Mr. FEENEY. Supposing the statute—supposing the State statute of Florida said that, if a State subdivision takes your property, you

are entitled to attorney's fees? In that case, at the remedy stage, wouldn't they get—avail themselves as the property owner of——

Mr. SIEGEL. In State court, they would. What I am struggling with and I have don't have the answer to is, if the Federal court—if the property owner seeks to have a State compensation claim also brought into Federal court and have the Federal court decide that, and if the Federal court decides to accept that claim under pendant jurisdiction——

Mr. FEENEY. Well——

Mr. SIEGEL [continuing]. Then it might——

Mr. FEENEY [continuing]. I would like to put that question in writing. Basically, the question is, supposing there is a regulatory taking, a rezoning issue, for example, by a State subdivision, but I, as a property owner, I decide to go to Federal court.

And so I will put that in writing. Maybe we can all do collectively some research about how this would impact the rights of Florida property owners, which is preeminent in my mind on occasion.

Mr. Siegel, I was interested in the question about a property owner—whether 9 or 10 years is a reasonable length of time to wait for all—to all your State remedies and processes to expire before you eventually get to a Federal court on an important Federal principle.

And aside from the fairness of that, how about the mere fact that, you know, if I acquire property when I am 50 and have a life expectancy of 70, the 10 years that I am tied up—I can't use my property while I am having courts decide what my rights are—hasn't half the value to me effectively been taken, merely because the Government has an endless amount of resources? They are taxing me to pay to promote their position, and I have to pay out of my pocket during that 10-year period.

Do you have sort of a moral problem with the fact that there is an imbalance between the resources, typically, between a private property owner and the Government?

Mr. SIEGEL. Well, let me answer the delay question from the point of view of my State. Delay in having justice issued is a problem in property rights cases and in any other kind of case. It is a very serious problem.

In California, we therefore have the Trial Court Delay Reduction Act, which forces trial courts to move cases along. We also have—quickly, and it has that time limit in which cases need to be brought to trial.

We also have strict limits on the amount of time an appellate court can take to issue a decision and the California Supreme Court. So that delay is a problem for property owner and for any other litigant, and it is something that has been addressed in our State and should be addressed.

It should be—what we are saying, though, is the whole system of reviewing these property rights disputes should not be federalized. It should be addressed in the Florida courts, and in the California courts, and in any other State courts. And the States have been and should continue to work on making their systems fair and efficient.

And, yes, it is a very serious problem to have a 9-year delay for a litigant.

Mr. CHABOT. The gentleman's time has expired.

Mr. FEENEY. Could I ask unanimous consent just to follow up on that point?

Mr. CHABOT. Yes. I think Mr. Kottschade would like to answer the question, as well.

Mr. FEENEY. Well, wonderful. And if—but with the—with the patience of my colleagues, on that point, Mr. Siegel, you said it is a very serious problem.

If States aren't as efficient in California at resolving issues, do you think that the mere length of time that it takes to go through the State process and resolve all of your—expedite or go through all of your procedural rights, before you ever get to Federal court, you think, in and of itself—and I would like to hear Professor Eagle's and perhaps Mr. Trauth's opinion on—could that be a fifth amendment problem?

Mr. SIEGEL. Well, these aren't just——

Mr. FEENEY. If a State is not as efficient as California and if it is taking 10 or 15 years before I could actually figure out what I can do with Black Acre, in and of itself, is the length of time a fifth—does that implicate the fifth amendment, potentially?

Mr. SIEGEL. Let me just make one point before answering that, which is that, when one goes to State court, they are not just going to State court to bring procedural, technical challenges. They are going to State court to bring their claim for just compensation, because the takings clause prohibits the taking of property without just compensation.

And what is being litigated is not some technicality. It is as I am as—am I entitled to just compensation? And the Florida court or the California court is saying either, "Yes, your property was taken; you were denied compensation; you have the right to money," or the court will say, "No, this was not a taking; you are not entitled to just compensation."

Mr. CHABOT. The gentleman's time has once again expired, but the other witnesses were asked to respond.

And, Mr. Kottschade, if you would like to—Professor Eagle, did you want to respond to anything on that?

And Mr. Trauth?

Okay, and then Mr. Kottschade? I don't care which order you go.

Mr. KOTTSCHADE. Congressman, I really appreciate your question, in terms of 9 years, 10 years, but I want you to remember that I am 14 years into this. And, by the way, another couple of years and this is going to be old enough to vote; that is how long it has been going on.

And I don't—I honestly don't know when the end is near. And that frightens me, because, you know, when I started this project, purchased this land, I was 50—I was 50 years old. Tomorrow, I will become 65.

Does this mean—and my wife keeps asking me when, when, when? And, you know, I can't honestly answer here. Will this be another 10 or 15 years? There has got to be an end to it, and so your question is a great question. Thank you for asking it.

Mr. TRAUTH. Yes, Congressman Feeney. I think the problem is an equal protection problem, to a certain extent, because, why

should one constitutional right be treated differently than another constitutional right?

And, in the one, like a first amendment issue or a religious freedom issue, you are entitled to go directly to Federal court, but here, where you have go a property right, you know, which a fairly substantial right under the U.S. Constitution 5th and 14th amendment, you can't go to Federal court.

And the reason that I want to be able to have the option to go to Federal court with a property owner is that Federal courts are usually more efficient in handling these cases than our State courts. I mean, I have seen it over, and over, and over again in State courts, where you get lost in the black hole, literally, and you never get out.

And that is what happened with Mr. Kottschade.

The other issue deals with costs. It is not going to cost the Government—governmental entities any more. Most of them actually have insurance. So the property owner is fighting the governmental entity who is insured with their own fund; so, the balance is clearly unequal. And, therefore, access to Federal court is a must.

And, again, I get back to the fact that this is not a developer issue. It is not a home builder issue. It is a personal property rights issue.

Mr. CHABOT. And Professor Eagle, this will be our last response.

Mr. EAGLE. Yes. I think, Mr. Feeney, that the answer to the question is that the delay is not the delay in a given court proceeding, as much as the fact that the needless complexities and technicalities we have causes remands, re-hearings by appellate courts, other remands.

And you also have the fact that administrative agencies take a long time to process situations and also may gratuitously and wrongfully bring actions, such as has happened in California, where an agency tries to assume jurisdiction when it doesn't have the basis to do so.

That could be litigated for 2 or 3 years until it finally gets back to the agency it is supposed to be—that is supposed to have jurisdiction over the matter. And this is simply attributed to a normal administrative delay.

Mr. CHABOT. Thank you. The gentleman's time has expired.

Mr. Nadler is recognized to make a point?

Mr. NADLER. Thank you. I just wanted to be observed, and then I am going to make a unanimous consent request.

As we have discussed these issues, we are all conscience of the fact of how we lucky we are that we never have similar delays in the Federal courts.

Mr. Chairman, I ask unanimous consent to place the following letters in opposition, one from the United States Conference of Mayors, one from the National League of Cities, and one from former Mayor Giuliani of New York City in opposition to this legislation into the record.

Mr. CHABOT. Without objection, so ordered.

Mr. NADLER. Thank you. And I also ask unanimous consent that all Members have 5 legislative days to revise and extend their remarks and to include additional materials in the record.

Mr. CHABOT. Without objection, so also ordered.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. CHABOT. Okay. The gentleman's time has expired.

I want to thank the panel very much for their testimony this afternoon. It was really excellent. And I think you gave us an opportunity to consider this from many different angles.

And the Committee will further consider this in the near future and, in that consideration, your contribution will be a big part of that. So thank you for doing that.

If there is no further business to come before the Committee, we are adjourned. Thank you.

[Whereupon, at 3:15 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

RESPONSE TO POST-HEARING QUESTIONS FROM JOSEPH L. TRAUTH, JR., PARTNER, KEATING, MUETHING & KLEKAMP, PLL

KMK | Keating Muething & Klekamp PLL
ATTORNEYS AT LAW

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June 27, 2006

Mr. Paul Taylor
Subcommittee on the Constitution
H2-362 Ford House Office Building
Washington, DC 20515

Dear Mr. Taylor:

Pursuant to Chairman Chabot's letter to me dated June 19, 2006, I have enclosed my written responses to the questions posed therein supplementing my testimony on the "Private Property Rights Implementation Act of 2005." Should you have any questions or require any further documentation, please do not hesitate to contact me.

Respectfully submitted,

Joseph L. Trauth, Jr.

JLT:gs

1668816.1

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QUESTION: If the Private Property Rights Implementation Act of 2005 is signed into law, will it create any new causes of action?

ANSWER: No.

QUESTION: Under the Act, if an individual brings a federal Fifth Amendment takings claim in Federal court, a claim in which the operative facts concern the uses of real property, and this claim is based on a regulatory taking through State agency action, would the remedy of attorneys' fees be available for a successful plaintiff?

ANSWER: Yes, the remedy of attorneys' fees would be available for a successful plaintiff just as they available in State court.

QUESTION: Would expert fees (for assessment, surveying, etc.) be available in the same situation?

ANSWER: I do not believe that expert fees for assessment, surveying, etc., would be available in the same situation unless statutorily provided for under State law.

1668811.1

Response to Post-Hearing Questions from Franklin Kottschade, President, North American Realty

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July 6, 2006

The Honorable Steve Chabot
Chairman
Subcommittee on the Constitution
House Judiciary Committee
129 Cannon House Office Building
Washington, DC 20515

Dear Chairman Chabot:

On behalf of the 225,000 members of the National Association of Home Builders (NAHB), I am writing to respond to the two additional questions that were submitted for written response following the June 8, 2006, hearing on the *Private Property Rights Implementation Act* (H.R. 4772).

1. If the Private Property Rights Implementation Act of 2005 is signed into law, will it create any new causes of action?

No, the Private Property Rights Implementation Act would not create a new cause of action. H.R. 4772 would simply amend 28 U.S.C. § 1343, which provides that parties protecting their constitutional rights can have access to the federal courts when they file suit under 42 U.S.C. § 1983. Section 1983 itself, while not a source of substantive rights (see *Albright v. Oliver,* 510 U.S. 266 (1994); *Baker v. McCollan,* 443 U.S. 137 (1979)), creates a private right of action and provides a possible monetary remedy whenever anyone, acting under color of state law, deprives a person of federal rights, privileges, or immunities. Congress intended Section 1983 to provide "immediate access to the federal courts" and "throw open the doors of the United States courts" for individuals deprived of their constitutional rights. *Patsy v. Fl. Bd. of Regents,* 457 U.S. 496, 504 (1982). The federal judiciary's role under Section 1983 is to oversee and correct actions taken by municipalities "under color of state law." The "central purpose" of Section 1983 "is to provide compensatory relief to those deprived of their federal rights by state actors," *Felder v. Casey,* 487 U.S. 131, 141 (1988), by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights."

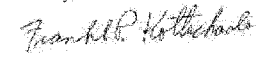
H.R. 4772 would do nothing to alter or expand on the types of claims or causes of action that may be brought under Section 1983. It would simply clarify that individuals deprived of property rights can bring their Section 1983 claims in federal court.

2. Under the Act, if an individual brings a federal Fifth Amendment takings claim in federal court, a claim in which the operative facts concern the uses of real property, and this claim is based on a regulatory taking through state agency action, would the remedy of attorneys' fees be available for a successful plaintiff? Would expert fees (for assessment, surveying, etc.) be available in the same situation?

Yes, attorneys' fees would be available to a prevailing takings plaintiff who files suit under Section 1983. Under current law, 42 USC § 1988(b) allows the court to award to the prevailing party "a reasonable attorney's fee as part of the costs" in Section 1983 actions. There is no independent claim for relief under § 1988; an award of attorneys' fees under it is ancillary to a judgment in a § 1983 action. *N.C. Dep't of Transp. v. Crest Street Comty. Council,* 479 U.S. 27 (1986). Moreover, a prevailing plaintiff eligible to recoup attorneys' fees is one who has succeeded in any significant claim affording at least some of the relief sought. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782 (1989). "[A]ccordingly, a prevailing plaintiff 'should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." *Hensley v. Eckerhart,* 461 424, 429 (1983) (citations omitted). It is not a "special circumstance" that the defendant has a good faith belief that its actions were legal, *Jones v. Wilkinson,* 800 F.2d 989 (10th Cir. 1986), *aff'd mem.,* 480 U.S. 926 (1986), or that the defendant was complying with an official order in good faith. *Walker v. City of Mesquite,* 313 F.3d 246 (5th Cir. 2002). Therefore, the remedy of attorneys' fees would be available for a prevailing takings plaintiff bringing a claim under Section 1983.

However, reimbursement of costs, which would include expert fees, are treated differently. Under 42 USC § 1988(c), expert fees may only be awarded in Section 1981 (equal rights under the laws) or 1981(a) (intentional discrimination in employment) cases. As a result, a successful takings plaintiff with a Section 1983 claim may not receive reimbursement for expert fees under current law.

Sincerely,



Franklin P. Kottschade
President, North American Realty

RESPONSE TO POST-HEARING QUESTIONS FROM DANIEL L. SIEGEL, SUPERVISING DEPUTY ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, STATE OF CALIFORNIA

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June 23, 2006

The Honorable Chairman Steve Chabot
Attn.: Paul Taylor
Subcommittee on the Constitution
Committee on the Judiciary
H2-362 Ford House Office Building
Washington, D.C. 20515

RE: H.R. 4772

Dear Chairman Chabot:

Thank you again for the opportunity to present testimony, on behalf of California Attorney General Bill Lockyer, concerning H.R. 4772. The following are the supplemental written questions that you asked me to respond to, followed by my responses.

1) If the Private Property Rights Implementation Act of 2005 is signed into law, will it create any new causes of action?

Response: Arguably yes. The bill seeks to alter current judicial interpretations of the Constitution. Those alterations, if successful, might give rise to new causes of actions. For example, under the Supreme Court's "parcel as a whole" rule, a restriction on a portion of a 100 lot subdivision that has been treated by the owner as a single unit might give rise to a single takings cause of action. Under the bill, however, if the restriction affected more than one lot, there might be a separate cause of action for each affected lot. Given the separation of powers limitations articulated in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), however, it is questionable whether the alterations are constitutional.

2) Under the Act, if an individual brings a federal Fifth Amendment takings claim in Federal court, a claim in which the operative facts concern the uses of real property, and this claim is based on a regulatory taking through State agency action, would the remedy of attorneys' fees be available for a successful plaintiff? Would expert fees (for assessment, surveying, etc.) be available in the same situation?

Response: Under the Act, the claim would be based upon 42 U.S.C. section 1983. That section, however, does not permit federal court actions seeking just compensation from the States

or their agencies. See *Will v. Michigan* (1989) 491 U.S. 58, 71. In addition, federal court lawsuits seeking just compensation for State agency actions are barred by the Eleventh Amendment. See *DLX, Inc. v. Kentucky*, 381 F.3d 51, 526 (6th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005). It follows that ancillary relief, such as attorneys' and expert fees, would therefore not be available.

Actions against local governments, however, are permitted under section 1983. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978). Moreover, those actions are not barred by the Eleventh Amendment. See *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). Attorneys' fees might therefore be available under 42 U.S.C. section 1988 to the successful plaintiff in a regulatory takings action against a local government, since that section gives district courts the discretion to award attorneys' fees to the prevailing party in an action brought pursuant to 42 U. S. C. section 1983. Expert fees, however, are not available for section 1983 actions. See *Doe v Keala* (2005, D. Haw.) 361 F.Supp.2d 1171, 1190-1191.

Please do not hesitate to let me know if you have any further questions concerning this matter.

Sincerely,

DANIEL L. SIEGEL
Supervising Deputy Attorney General

For BILL LOCKYER
Attorney General

Response to Post-Hearing Questions from Professor Steven J. Eagle, Professor of Law, George Mason University School of Law

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July 10, 2006

The Honorable Steve Chabot, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

I have the honor to respond to the questions addressed to me by members of the Subcommittee that were contained in your letter of June 19, 2006.

The questions, and my responses, are as follows:

1) If the Private Property Rights Implementation Act of 2005 is signed into law, will it create any new causes of action?

As the title of the Private Property Rights Implementation Act of 2005 ("Act") implies, I believe that the Act would implement existing rights rather than creating new ones. The Act would clarify that, with respect to the Fifth Amendment Takings Clause, that claims could be adjudicated in U.S. district courts without having to be "ripened" through litigation for compensation up the chain of State courts. This state litigation requirement arose from the Supreme Court's decision, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that landowners had to avail themselves of procedures provided by t States to obtain compensation for alleged local regulatory takings before they would be heard in federal court. This requirement has proved vastly burdensome to property owners in practice. Furthermore, *Williamson County*'s statement that a claim is "premature" for federal adjudication until it is ripened turns out to be a false promise.

Under the Court's recent holding in *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005), the State court decision that ripens the claim at the same time constitutes collateral estoppel under the federal full faith and credit statute. Thus, while the claim may then be brought in federal court, the substance of the claim is already decided against the landowner. The Court has described the *Williamson* state litigation prong as merely a prudential requirement. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-734 (1997). Furthermore, four justices in *San Remo*, while agreeing with the application of the full faith and credit statute, declared: "It is

not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." 545 U.S. at _____, 125 S.Ct. 2491, 2508 (Rehnquist, C.J., concurring in the judgment).

The Act also would clarify the "final decision" prong of *Williamson County*, by stating a clear rule that would apply in U.S. district courts and the Court of Federal Claims as to what is needed to constitute a final decision. Lower federal courts have expressed this in somewhat disparate formulae, and clarification would further substantive justice.

The Act also adopts the local platting of a subdivision lot as a relevant parcel for purposes of discerning whether a regulation works a partial taking of that lot. This, too, is a clarification of existing law, since the Supreme Court's "parcel as a whole" test, enunciated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), never has been interpreted literally or with any definitive meaning.

Finally, the Act defines the deprivation of substantive due process in terms of conduct that is "arbitrary, capricious, [or] an abuse of discretion." In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Supreme Court adopted a "shocking the conscience" standard in the context of a high-speed police chase in which an innocent motorist was killed. Some lower courts have employed the *Lewis* test for deprivations of property rights, but it is by no means clear that the Supreme Court would regard this as having Constitutional import.

3) Under the Act, if an individual brings a federal Fifth Amendment takings claim in Federal court, a claim in which the operative facts concern the uses of real property, and this claim is based on a regulatory taking through State agency action, would the remedy of attorneys' fees be available for a successful plaintiff? Would expert fees (for assessment, surveying, etc.) be available in the same situation?

Actions brought by landowners in federal court against localities and their officials generally assert that the landowners have been deprived of Constitutional rights under color of state or local law. 42 U.S.C. § 1983. In pertinent part, 42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Courts are split regarding the inclusion of expert fees. Some allow reasonable expenses incurred in preparation for trial. *See, e.g.*, *Henry v. Webermeir*, 738 F.2d 188 (7th Cir. 1984). Other courts have been less generous. *See, e.g.*, *Duckworth v. Whisenant*, 97 F.3d 1193 (11th Cir. 1996) (not allowing expert witness fees, computerized legal research, etc.).

Once again, Chairman Chabot, I appreciate the honor of testifying before the Subcommittee. I am gratified that, as was the case in my past appearances, those on my panel were treated with the utmost courtesy by you, Mr. Nadler, and other members. The questions asked by members displayed both considerable insight into the law and a strong desire to fashion legislation responsive to the needs of our citizens and consistent with our Constitution.

Respectfully yours,

Steven J. Eagle
Professor of Law

LETTER FROM JOSEPH M. STANTON, NATIONAL ASSOCIATION OF HOMEBUILDERS TO THE HONORABLE JIM SENSENBRENNER, DATED MARCH 1, 2006

LEGISLATIVE AND POLITICAL RELATIONS

Joseph M. Stanton
Chief Lobbyist

March 1, 2006

The Honorable Jim Sensenbrenner
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

On behalf of the 225,000 members of the National Association of Home Builders (NAHB), I am writing to express our strong support for the *Private Property Rights Implementation Act of 2006* (H.R. 4772), introduced by Representatives Steve Chabot (R-OH) and Bart Gordon (D-TN). This bill would ensure that property owners can have their day in federal court when their Fifth Amendment rights are violated.

Last year, the House took decisive and swift action in response to the U.S. Supreme Court's decision in *Kelo v. City of New London* (2005), which ruled that government may condemn property—that is, use its power of eminent domain—to take land from one private property owner and give it to another for the purpose of economic development. In an overwhelming and bipartisan vote of 376 to 38, the House chose to defend the rights of property owners and voted to end eminent domain abuse.

Unfortunately, in the property rights arena, misuse of eminent domain powers is not the only abuse of our Fifth Amendment protections—a far more pervasive and subtle abuse can occur where government regulates property *as if they condemned it.* It is a more widespread practice for agencies to take the private land they want through excessive regulation, as opposed to the more cumbersome process of initiating formal condemnation proceedings against a property owner. H.R. 4772 will level the playing field in the regulatory takings context. Property owners should get the chance to bring a federal court action, to protect their constitutional rights, when government avoids the use of eminent domain but nonetheless regulates property in a manner that is the practical equivalent to condemnation.

H.R. 4772 allows property owners, who are only raising a federal constitutional claim under the Fifth Amendment, to have a federal court decide the merits of their case. Currently, all other civil rights cases can be brought directly to federal court. NAHB strongly believes that the Fifth Amendment should not be treated differently from the rest of the Bill of Rights. H.R. 4772 does not provide special rights for Fifth Amendment claims—in fact, it merely puts Fifth Amendment takings claims on par with the rest of the Bill of Rights.

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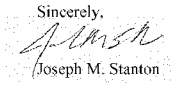
Unfortunately, property owners with a takings claim now face a real Catch-22 situation. The Supreme Court's *Williamson County* (1985) decision has been interpreted to require property owners to file and pursue litigation for just compensation in *state* court before filing suit in *federal* court on a Fifth Amendment taking. While *Williamson County* requires initial state court litigation, the Supreme Court's *San Remo* (2005) decision provides that takings plaintiffs who bring their claims in state court are precluded from later seeking review in federal court. In short, the ironic effect of both *Williamson County* and *San Remo* is: (1) property owners must litigate their constitutional takings case in state court first, but (2) after they litigate in state court, they can never have their case heard in federal court. Property rights claims under the Fifth Amendment, therefore, bear the unfortunate, but unique, distinction of never being heard in federal court, unlike other protections in the Bill of Rights. H.R. 4772 addresses this unfair situation by eliminating the state-litigation requirement for property owners and allows property owners access to federal court, but only where they raise solely federal claims.

In addition, while *Williamson County* and *San Remo* effectively block a property owner from bringing a takings claim to federal court, another Supreme Court case, *College of Surgeons* (1997), allows local government agencies to remove cases to federal court when they are sued in state court by a takings plaintiff. If government agencies have the option of bringing a case in federal court, then a private property owner, alleging a violation of Constitutional rights, should have the same option.

The late Chief Justice Rehnquist, joined by three other concurring Justices, recognized in *San Remo* that there is no sound reason for blocking property owners from federal court because "the affirmative case for the state-litigation requirement has yet to be made." In fact, an adult book store owner who challenges a municipal land-use regulation based on the First Amendment's free speech protection has direct access to federal court, but a property owner challenging the same regulation, but raising a Fifth Amendment takings claim, does not. Congress has passed laws to ensure that citizens whose rights are violated have access to the federal courts, and I commend Representatives Chabot and Gordon for introducing this bill to protect the rights of property owners.

I urge you to support H.R. 4772 and become a cosponsor this important legislation to restore the protections offered to property owners under the Fifth Amendment. Thank you for consideration of our views.

Sincerely,



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LETTER FROM R. BRUCE JOSTEN, EXECUTIVE VICE PRESIDENT, GOVERNMENT AFFAIRS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, TO THE MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES, DATED MARCH 8, 2006

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

March 8, 2006

TO THE MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, strongly urges you to support H.R. 4772, the Private Property Rights Implementation Act of 2006, which will allow property owners access to federal courts when their Fifth Amendment rights are violated.

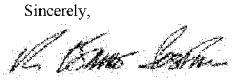
Property owners are increasingly subjected to a proliferation of regulatory "takings" that can severely restrict the use of their property and, consequently, the overall value of the land. These regulatory takings give rise to a federal constitutional claim under the Fifth Amendment. Unfortunately, as the result of two irreconcilable Supreme Court opinions, property owners are currently prevented from seeking redress in federal court for these Fifth Amendment takings claims.

In *Williamson County Planning Commission v. Hamilton Bank* (1985), the U.S. Supreme Court decided that property owners must litigate all Fifth Amendment takings claims in state court before they could file in federal court. In *San Remo Hotel v. City and County of San Francisco, California* (2005), however, the U.S. Supreme Court held that property owners who had adjudicated their Fifth Amendment takings claims in state court were precluded from seeking federal court review. Together, these two cases serve to bar property owners from ever having their constitutional claims heard on the merits in federal court.

H.R. 4772 would correct this profound inequity by allowing property owners access to federal court for Fifth Amendment takings claims. All other civil rights cases can be brought directly into federal court, and the Fifth Amendment should be treated no differently. This bill would merely level the playing field with regard to the rest of the Bill of Rights.

The U.S. Chamber urges you to support and cosponsor this important legislation to restore Fifth Amendment protections to property owners.

Sincerely,



R. Bruce Josten

LETTER FROM BOB STALLMAN, PRESIDENT, AMERICAN FARM BUREAU FEDERATION, TO THE HONORABLE STEVE CHABOT, DATED APRIL 12, 2006

AMERICAN FARM BUREAU FEDERATION®
600 Maryland Avenue S.W. • Suite 800 • Washington, DC • 20024 • (202)406-3600 • fax (202)406-3604 • www.fb.org

April 12, 2006

The Honorable Steve Chabot
U.S. House of Representatives
129 Cannon House Office Building
Washington, DC 20515-3501

Dear Representative Chabot:

The American Farm Bureau Federation is pleased to support H.R. 4772, the Private Property Rights Implementation Act of 2005.

The bill provides much-needed clarification on the jurisdiction of federal courts in cases involving real property. Too often, private landowners have been rebuffed by the federal courts from having their day in court on claims involving private property. Often, federal courts tell landowners that their claims are not ripe for hearing, leaving landowners in regulatory limbo while they pursue permit after permit, or waiver after waiver, in many cases for several years. Or federal courts will tell them that they have to exhaust their state law remedies first, thereby delaying final resolution of their claims for several years. The result is that deserving landowners are denied their day in court, or are forced to wait years to even bring a claim in court.

H.R. 4772 would clarify that cases involving only federal claims should be heard in federal court. It also defines a "final" agency action for purposes of court jurisdiction to mean the rejection of one meaningful permit application and the denial of one waiver and/or one appeal. This eliminates the "regulatory limbo" in which landowners often find themselves.

H.R. 4772 will end years of frustration for landowners and will ensure that they receive their day in court in a reasonable timeframe. We thank you for introducing H.R. 4772, and we look forward to working with you in support of its passage.

Sincerely,

Bob Stallman
President

LETTER FROM DAN DANNER, EXECUTIVE VICE PRESIDENT, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, TO THE HONORABLE STEVE CHABOT, DATED MAY 15, 2006

May 15, 2006

The Honorable Steve Chabot
129 Cannon House Office Building
Washington, D.C. 20515

Dear Representative Chabot:

On behalf of the 600,000 members of the National Federation of Independent Business (NFIB), I want to express strong support for H.R. 4772, the Private Property Rights Implementation Act of 2006. This bill will allow private property owners and small businesses access to federal courts when bringing up a property rights claim that is protected by the Constitution.

H.R. 4772 will help private property owners and small businesses to seek federal court relief for economic damages quicker and with less cost by clearing some of the hurdles that affect property owners' access to justice. H.R. 4772 would affect cases that originate from a dispute over land use regulations.

Eighty-one percent of NFIB members believe that private property rights should be protected. Currently, property owners and small businesses do not have the option of taking a Fifth Amendment claim directly to federal court. Instead, they are faced with exhausting all possible state court remedies, even though all other civil right plaintiffs can take their claims directly to federal court.

H.R. 4772 expedites suits filed in federal court by property owners and small businesses seeking relief from Federal statutory and Constitutional law. The bill defines when a government agency's decision on land use is final, so property owners are not left in "regulatory limbo" while waiting years before courts consider the agency action final.

NFIB strongly supports your efforts to give property owners and small businesses a fair chance at their "day in court," and we thank you for introducing H.R. 4772.

Sincerely,

Dan Danner
Executive Vice President
Federal Public Policy and Political

LETTER FROM TERRY L. ADKINS, CITY ATTORNEY, CITY OF ROCHESTER, MINNESOTA TO THE HONORABLE STEVE CHABOT AND THE HONORABLE JERROLD NADLER, DATED JUNE 9, 2006

ROCHESTER

Minnesota

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City Attorney
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June 9, 2006

Via FedEx Delivery

The Honorable Steve Chabot, Chair
Subcommittee on the Constitution
House Judiciary Committee
129 Cannon House Office Building
Washington, D.C. 20515

The Honorable Jerrold Nadler, Ranking Member
Subcommittee on the Constitution
House Judiciary Committee
2334 Rayburn House Office Building
Washington, D.C. 20151

Dear Subcommittee Chair Chabot and Ranking Member Nadler:

On behalf of the City of Rochester, Minnesota, I wish to provide the Subcommittee with additional information concerning Mr. Frank Kottschade's application for a general development plan and the City's response to that application. I have read the written testimony of Mr. Kottschade and note that on several occasions he has misstated or exaggerated on what actually took place. Because Mr. Kottschade has urged the Subcommittee to change federal law in response to the City's response to one of his development applications, it is critical that the Subcommittee have a correct understanding of what transpired.

Mr. Kottschade submitted an application to the City for approval of his proposed development in the City's southwest quadrant. Mr. Kottschade planned a multi-family development taking access from an increasingly busy intersection located at 40th Street S.W., and U.S. Highway 63. As required by Minnesota law, the City applied its ordinance requirements to this application and analyzed the impact this proposed development would have upon existing and planned public infrastructure, such as road capacity, water and sewer facilities and pedestrian trails. Indeed, the City prepared a 13-page technical report showing in great detail the impact of this development upon the City's current infrastructure.

As a result of this extensive analysis, the City determined that the existing infrastructure was inadequate to handle all of the traffic, storm water, pedestrian travel and park land needs created by this development. But the City wanted to work with the developer to make this development work. That would have required the developer to make additional changes to his proposed development so that there would exist adequate facilities and to ensure the project would be consistent with the welfare of the community. As such, the City did not deny the proposed development. Instead, it approved the development, but with conditions of approval attached. There were nine conditions that related to the needs for additional facilities to handle the demands for public services created by this development.

Mr. Kottschade found objection with all nine conditions. He refused to accept any of them and, instead, sought a variance from all nine conditions. After a lengthy public hearing, the Council adhered to the nine conditions. But, the Council repeated its desire to see this development work and specifically noted areas where options existed for the developer that, if followed, could allow the development to go forward.

Mr. Kottschade's account is colorful, but it is squarely at odds with the historical record, as reflected in numerous public documents. The City of Rochester regularly uses detailed findings-of-fact documents to memorialize its action taken on land use applications. The Kottschade application is no exception. I have enclosed copies of the 13-page technical report that details with great specificity the impact of this proposed development upon the City's current and planned infrastructure (Exhibit #1), the July 5, 2000, approval of the project (Exhibit #2) and the January 3, 2001, decision to maintain the nine conditions of approval (Exhibit #3). From these documents, you will note that:

1. The ordinance requirements that prompted the imposition of conditions upon the City's approval of the project were in place long before Mr. Kottschade ever owned the property in question. He therefore had notice of these requirements when he bought the land at issue.

2. The ordinance requirements address and are intended to further vehicular and pedestrian safety and movement, storm water management, sufficient provision of water and sewer facilities and park land for public recreational activities. In Minnesota, a city's legal authority to condition its approval of new development upon steps needed to protect such public interests is simply beyond question. These requirements reasonably promote public welfare and have never been deemed unreasonable by any court.

3. Efforts to determine which of the nine conditions of approval were most problematic for Mr. Kottschade were unsuccessful. He simply objected to all of them. He never proposed any compromise under which he would comply with some conditions but not others.

4. Members of the Rochester City Council and the City's Planning and Zoning Department repeatedly outlined options available to Mr. Kottschade that would allow him to proceed with his development. There were viable changes he could make to his development design or variances he could seek to various performance standards. And, both council members and planning department staff members offered to meet with Mr. Kottschade to discuss these available options.

5. Mr. Kottschade showed no interest in discussing these options or alternatives with the City. He did not meet with council members or city staff members to find ways to make his development work. Instead, the next step he took was the filing of a lawsuit in federal court against the City.

Finally, there is a clear and unequivocal written record of the City of Rochester public officials' efforts to meet with Mr. Kottschade to find ways to implement his proposed development while satisfying previously established ordinance requirements. On April 24, 2001, Rochester Assistant City Administrator Gary Neumann wrote Mr. Kottschade's attorney to express disappointment upon hearing Mr. Kottschade did not want to meet with City officials about his general development plan. Mr. Neumann stated he had "hoped that such a meeting would lead to the development proceeding in a manner that was acceptable to both Mr. Kottschade and the City." A copy of Mr. Neumann's letter is enclosed (Exhibit #4).

On May 18, 2001, Rochester Mayor Chuck Canfield wrote Mr. Kottschade noting the options and alternatives available to him that would allow his proposed development to proceed. Mayor Canfield noted that "the record indicates that the waiver of performance standards, the use of other townhome styles and the use of an alternative access would allow your planned development to occur." Mayor Canfield concluded his letter by stating, "I am disappointed that you deemed it in your best interests to sue the City rather than work with the City to identify and discuss options available to you in developing your property." A copy of Mayor Canfield's letter is enclosed (Exhibit #5).

I appreciate the opportunity to complete the record as to the City of Rochester's actions in receiving, reviewing and approving Mr. Kottschade's application.

Sincerely,

TERRY L. ADKINS
Rochester City Attorney

Enclosures

Memorandum

To: File

From: Richard W. Freese

Date: June 15, 2000

Re: Technical Report of Impacts of Proposed General Development Plan #151

Intent

It is the intent of this document to address those issues that are relevant to the City's criteria for approval of a general development plan. Specifically, for GDP #151 this document will:

1. Provide a historical summary related to the subject property,
2. Discuss the impacts of the proposed GDP on the planned improvements to 40th Street SW and 11th Avenue SW, and
3. Evaluate the proposed GDP against the City Ordinance criteria for approval of a general development plan, and
4. Identify the amount of right-of-way needed by the City to construct the planned improvements to 40th Street SW, and
5. Determine the amount of right-of-way to be dedicated for the planned improvements to 40th Street SW based on the proportional share of the trips generated by the development proposed by GDP #151, and
6. Summarize findings of this Technical Report.

Background

The following information was gathered from the files of the Rochester Olmsted Planning Department and the Rochester Public Works Department and provide a historical summary related to the subject property.

1. The ROCOG Long Range Transportation Plan has shown the entire segment of 40th Street SW that lies along the frontage of GDP #151 as a collector road since 1977.

EXHIBIT #1

2. In 1994, ROCOG begins the study of transportation improvement options for the Willow Creek area and the land use and development issues impacting the transportation infrastructure of the area.

3. Mr. Kottschade purchases the former Cote property (includes the subject property) in April 1994.

4. Mr. Kottschade files a GDP #95-116 for the subject portion of land on April 14, 1995. At a plan review meeting held on April 26, 1995, Public Works staff advise Mr. Kottschade's planning consultant that 50 feet of right-of-way will be required along 40th Street SW.

5. On May 10, 1995, The City Planning Commission tables GDP #95-116 at the request of Mr. Kottschade. He indicates that he needs to complete a Traffic Impact Report for the property and he requests the GDP be tabled until he can complete the TIR.

6. On August 21, 1995, Charles Reiter, Transportation Planner for the Rochester Olmsted Planning Department, makes a presentation to the Rochester City Council on the preliminary recommendations coming forth from the U.S. 63 South Corridor Study.

7. Mr. Kottschade, in a letter dated 9/12/95 and addressed to Charles Reiter of the Rochester Olmsted Planning Department, formally objects to the proposed Highway 63 Corridor Study for Highway 63 from 40th Street Southwest to 48th Street Southwest. Mr. Kottschade states that "my objection is specifically that the proposed Corridor Study conflicts with the Land Use Plan for the Rochester Urban Service Area as adopted by the City of Rochester". The staff comment to Mr. Kottschade's letter, as provided in the Final Study Report, states that "the upgrading of 40th St. SW is likewise necessary to provide an adequate facility to serve traffic generated from areas along 40th St. SW, and represents a necessary infrastructure element for the orderly and efficient functioning of traffic in this area".

8. The City Council, by Resolution 514A-95 dated October 3, 1995, recommends that the Thoroughfare Plan be amended to incorporate the recommendations of the U.S. 63 South Corridor Study prepared by ROCOG. The Corridor Study recommends the construction of interchanges on TH 63 South at 40th Street and 48th Street South. The Study further recommends that the ROCOG Long Range Plan be amended to designate the portion of 40th Street SW between TH 63 and Enterprise Drive as a Collector Road.

9. Mr. Kottschade files a GDP #98-130 for the subject property on April 8, 1998. Planning staff comment in reviewing the GDP that 50 feet of right-of-way will be needed for 40th Street SW and 11th Avenue SW abutting the property.

10. Mr. Kottschade asked for GDP #98-130 to be tabled by the Planning Commission on April 20, 1998. Mr. Kottschade states that he is willing to waive the 60 day review period and asks that the GDP be tabled indefinitely until he initiates a request to bring it back to the Planning Commission.

11. The City, Olmsted County and MnDOT enter into a cooperative agreement in 1998 for the preparation of a Layout Plan and Environmental Assessment for the TH 63 interchanges at 40th Street and 48th Streets South and adjacent public streets. Mr. Kottschade was asked, and accepted a position on the TH 63 Public Advisory Committee.

12. A Public Information Meeting was held on September 15, 1999 on the TH 63 Layout Plan and Environmental Assessment. The meeting presented the information gathered and alternatives developed to date. Mr. Kottschade attended this meeting.

13. The City includes the planned improvements to 40th Street SW in the 1998, 1999, and 2000 Capital Improvement Budgets.

14. Mr. Kottschade sends letter dated 2/1/00 to Richard Freese requesting "an individualized determination showing that any dedicated easement or contribution of money you require is related both in nature and extent to the impact of the proposed development" along 40th Street and 11th Avenue SW.

15. Mr. Kottschade files GDP #00-151 for the subject property on 2/23/00.

16. Public Works staff submit comments to Planning Department on GDP #151 indicating among other things that 50 feet of right-of-way is needed along the 40th Street and 11th Avenue frontages of the property.

17. Richard Freese prepares and sends on 3/8/00 a response to Mr. Kottschade's 2/1/00 letter.

18. City Planning Commission tables GDP #151 at their March 22, 2000 and April 26, 2000 meeting due to a lack of information.

19. Mr. Kottschade's attorney delivers a letter to Richard Freese on May 1, 2000 requesting that the City provide additional information to Mr. Kottschade describing the planned improvement to 40th Street SW.

20. Richard Freese offers to meet with Mr. Kottschade's attorney on 5/5, 5/8 or 5/9 in response to 5/1/00 letter requesting additional information on planned 40th Street improvements.

21. Mr. Kottschade's attorney and planning consultant meet with Richard Freese and Planning staff on May 9, 2000. All requested information is provided to Mr.

Kottschade's representatives. The Planning staff recommended conditions for GDP #151 are reviewed and agreement reached on all but three conditions.

22. Richard Freese prepares memorandum to the Planning Commission dated May 10, 2000, regarding the issue of right-of-way dedication as it relates to GDP #151.

23. Planning Commission approves GDP #151 on May 10, 2000 with 8 conditions, including the amended conditions that resulted from the 5/9/00 meeting with city staff.

24. Mr. Kottschade has a letter delivered to the office of Richard Freese on June 5, 2000 at 2:45pm requesting "an individualized determination showing that any dedicated easement or contribution of money required by you is related both in nature and extent to the impact of my proposed development, GDP #151". Mr. Kottschade's letter states that Richard Freese's March 8, 2000 response to this same question "did not adequately respond to my request". Mr. Kottschade's letter indicates that he needs an answer to 14 questions contained in his June 5, 2000 letter so that he can make an informed decision prior to the City Council's June 5, 2000 Public Hearing on his GDP #151.

25. The City Council continues the Public Hearing on GDP #151 to June 19, 2000 based on a written request from Mr. Kottschade's attorney.

Impacts:

The Willow Creek area is poised to become a significant growth area for the City of Rochester. Large tracts of vacant land are available to support a significant amount of additional development. City water and sewer is in place to serve this area. However, the transportation system is currently inadequate to handle the projected traffic that could result from the development of these large tracts of vacant land.

The US 63 South Corridor Study provided the community with information needed to make decisions on a comprehensive transportation network to serve the TH 63 South Corridor between TH 52 and Interstate 90.

The Final Report for the US 63 Corridor Study states that "the significant challenge which appears to face the community is that while fiscal constraints will limit how quickly the ultimate plan can be implemented, the demand for development will be continuous and actions will be needed to provide acceptable levels of interim traffic management while not precluding implementation of the long range plan. A concern expressed by the various governmental road authorities and others is that the lack of a long range plan for the corridor will result in implementation of traffic improvements that are driven solely by specific development proposals, with no overall unifying plan, resulting in significant

financial or physical barriers in the future when anticipated traffic and safety concerns drive the need to upgrade facilities."

The current TH 63 Layout Plan and Environmental Assessment Study is intended to investigate detail design issues, environmental issues, financing issues, the staging and timing of planned improvements, and identify needed right-of-way for preservation or reservation. The Public Hearing for the Environmental Assessment is tentatively scheduled for August 2000. The MnDOT announced on June 9, 2000 that $13,200,000 of state funding was being provided in addition to the existing $6,400,000 in federal funding for the TH 63 interchange construction at 40th Street and 48th Street and for associated local road (including 40th Street SW) improvements.

The impacts of the proposed GDP #151 would be significant if approved as submitted by the applicant and if the Planning Commission recommendations and staff conditions are not supported by the City Council.

1. The applicant proposes to locate a private street, to serve the GDP #151 development, within the right-of-way needed for the planned improvement to both 40th Street and 11th Avenue SW. If the applicant is allowed to construct the private street within the needed right-of-way for the planned improvements to 40th Street and 11th Avenue SW, then the public cost to remedy this decision could result in a total loss of access for the proposed townhomes. As a result, the City could end up being put in a position of having to acquire a large portion and possibly the entire property, rather than just the portion of the property needed for right-of-way. The City could also be placed in the position of having to pay relocation benefits for the occupants of approximately 80 townhomes.

2. If the applicant is allowed to grade the property such that it does not match the proposed profiles and cross sections for 40th Street and 11th Avenue, then the public cost to remedy this decision could result in a partial or possible total loss of access for the proposed townhomes because the access road and floor elevations were not built consistent with the planned improvements to 40th Street and 11th Avenue SW. As a result, the City could end up being put in a position of having to acquire a large portion and possibly the entire property, rather than just the portion of the property needed for right-of-way. The City could also be placed in the position of having to pay relocation benefits for the occupants of approximately 80 townhomes.

<u>Land Development Manual Criteria for Approval of a General Development Plan</u>

A. Paragraph 61.215 of the Rochester Zoning Ordinance and Land Development Manual lists the criteria for approval of a general development plan. Specifically subpararaph 4 states:

The proposed plan makes provisions for planned capital improvements and streets reflected in the City of Rochester's current 6-year Capital Improvement Program, adopted Thoroughfare Plan, the ROCOG Long-Range Transportation Plan, Official Maps, and any other public facilities plans adopted by the City. Street system improvements required to accommodate proposed land uses and projected background traffic are compatible with the existing uses and uses shown in the adopted Land Use Plan for the subject and adjacent property.

1. The proposed GDP #151 does not show, as required in the City's Land Development Manual Section (LDM) 61.215 (4), the planned improvements to 40th Street SW as reflected in the City's six year (2000-2005) Capital Improvement Program. The GDP application submitted by applicant's consultant indicates that "the details of the improvement are not known at this time". On May 9, 2000, I provided the applicant's attorney and consultant sufficiently detailed information, including a layout plan, profiles and cross sections, for the CIP planned improvements to 40th Street SW.

2. The street improvements shown on GDP #151 are required, pursuant to the provisions of the City's LDM Section 61.215 (4), to accommodate the proposed land uses for GDP #151 and projected background traffic for 40th Street SW. The street system improvements required to accommodate the proposed land use for GDP #151 is currently shown on the GDP within the planned 40th Street SW right-of-way needed to serve the proposed land use and the adjacent land uses, some of which are owned or partially owned by the applicant. Therefore, the proposed GDP #151 is not compatible with existing uses and uses shown in the adopted Land Use Plan for the subject and adjacent properties.

B. Paragraph 61.215 of the Rochester Zoning Ordinance and Land Development Manual lists the criteria for approval of a general development plan. Specifically subpararaph 7 states:

The lot, block, and street layout for all development and the lot density for residential development are consistent with the subdivision design standards contained in Section 64.100 and the compatible with existing and planned development of adjacent parcels.

1. As required in Section 64.121 of the LDM, the design of the proposed street system shall be consistent with the standards of the Comprehensive Plan, and provision shall be made for the major streets identified on the Thoroughfare Plan. Section 64.122 (1), (2), and (4) require the design of proposed streets take into consideration:

   a. (1) the location, width and grade of existing or planned streets;

   b. (2) existing and finished topographical conditions;

c. (4) the manner the streets will be integrated into the runoff control system.

GDP #151 does not comply with the provisions of the City's LDM Section 64.121 and Section 64.122 (1), (2), and (4). The proposed GDP fails these criteria because:

a. The location of the proposed private street is located within the proposed 40th Street SW right-of-way. The proposed grade of the proposed private street to serve GDP #151 has not been provided to the City by the applicant. Absent that information, the city staff has been unable to determine the design elevations of the private street and its compatibility with the proposed elevations of 40th Street as shown in the detailed information provided to the applicant's representatives on May 9, 2000.

b. The proposed topographic elevations of the proposed private street to serve GDP #151 have not been provided to the City by the applicant. Absent that information, the city staff has been unable to determine the design elevations of the private street and its compatibility with the proposed elevations of 40th Street.

d. The City approved a Grading Plan for the property earlier this year that provides for the conveyance of existing stormwater across the property. The GDP #151 does not show this stormwater conveyance channel and it does not provide a stormwater drainage easement to the City and it does not show how City officials will have access to the easement for stormwater maintenance and enforcement purposes. The Grading Plan does not show the location of the proposed private street to serve GDP #151. In an effort to determine the compatibility of the proposed elevations of the proposed private street and associated drainage facilities with the proposed cross sections of 40th Street SW, city staff has compared the proposed cross sections of 40th Street SW with the approved Grading Plan for the GDP #151 site. The city staff was unable to determine how the applicant proposes to design and grade the private street and integrate it into the 40th Street SW stormwater runoff control system because the private street has not been delineated on the grading plan and it is located in the proposed 40th Street SW right-of-way.

C. Paragraph 64.136 of the Rochester Zoning Ordinance and Land Development Manual specifically states:

Dedication Requirements: Development plans, construction plans, land subdivisions and site development plans shall identify needed right-of-way or easement locations necessary for the provision of utilities, drainage and vehicular or pedestrian circulation within the development and connecting to adjacent development which meet specified levels of service called for in

adopted City plans and regulations. Easements shall be granted and right-of-way dedicated to the public by the applicant as a part of the development approval process or through separate instrument, which shall be in the form approved by the City Attorney.

1. Generally speaking, the development of the property abutting a collector or higher order street generally results in the need for additional right-of-way to mitigate the safety and capacity impacts of site generated traffic on the collector or higher order classification street. The proposed GDP #151 creates the need for additional right-of-way, the existing right-of-way is insufficient to handle the projected traffic, and the transportation facilities must be designed and constructed to accommodate ultimate traffic demands, with proportionate right-of-way dedications needed to ensure that the facilities are economically sized and that no single landowner is required to dedicate a disproportionate share to the transportation facilities needed to handle traffic demands. In other words, the City's need for additional right-of-way along 40th Street SW occurs because the site generated traffic from GDP #151 and other abutting property creates the need for additional improvements to 40th Street SW; such as, turnlanes, median and auxiliary lanes, bus stops, sidewalks and other pedestrian facilities, and stormwater collection and conveyance facilities that can not be accommodated within the existing 66-foot wide right-of-way.

2. The design and construction of a public street requires some reasonable amount of lateral support for the finished edge of the urban street section, including the sidewalk or bike path. In addition, the design of roadway embankment or fill slopes must take into account vehicle safety and this has been defined in the January 1996 Edition of the Roadside Design Guide prepared by the American Association of State Highway and Transportation Officials (AASHTO). AASHTO classifies embankments or fill slopes parallel to the flow of traffic as recoverable, non-recoverable, or critical. Recoverable slopes are all embankment slopes 1:4 or flatter. Non-recoverable slopes are those embankment slopes between 1:4 and 1:3. A critical slope is a slope on which a vehicle is likely to overturn. Embankment or fill slopes steeper that 1:3 generally fall into this category. The staff has recommended that the applicant:

   a. dedicate 17 feet of additional right-of-way to provide a reasonable level of support for the 33 feet of the south half of the proposed street section for 40th Street SW, and

   b. grade the balance of the property to match the proposed 1:3 fill slope for the proposed street section at the right-of-way line thereby minimizing the amount of right-of-way dedication needed to provide the lateral support for the proposed 40th Street SW section.

3. The City Land Development Manual (LDM) at Section 64.230, Determination of Right-of-Way Widths, provides a formula to be used to identify where a right-of-

way width above the minimum shown in the Thoroughfare Plan may be needed for public and private roadways.

The formula is W = M+A+T+S+B+F where:

W = Right-of-Way width

M = Median Width (needed for left turn lanes, traffic separation, and future widening)

T = Width of Through Lanes

A = Width of Auxiliary Lanes (includes such items as parking lanes, additional width for bus stop bays, additional width for curb and gutter)

S = Sidewalk Width

B = Boulevard Width

F = Future Needs (includes anticipated or planned widening, and frontage roads)

Applying this formula to urban roadway section proposed for the 40th Street SW corridor from 11th Avenue SW easterly to Willow Ridge Drive SW would result in a right-of-way width W = 127 feet or 63.5 feet each side of the centerline of the existing right-of-way. The right-of-way width was calculated as follows:

M = 20 feet (12 foot wide left turn lanes at Willow Court and at 11th Avenue, with a 4 foot wide median and 2 foot gutter section on each side of the median)

T = 52 feet (2 lanes at 12 feet wide per lane and 2 lanes at 14 feet wide which include the gutter section)

A = 24 feet (12 foot wide right turn lanes for westbound traffic at Willow Ridge Drive, Willow Heights Drive and Willow Court, and for eastbound traffic at the entrance to GDP #151)

S = 15 feet (10 foot wide bituminous path on one side of road and 5 foot wide sidewalk on the other side of the road)

B = 16 feet (8 foot wide boulevard on each side of the road)

F = 0 feet (Future needs addressed in M and A above)

4. Under the provisions of Section 64.231 the City can request that GDP #151 reflect an urban section right-of-way width for 40th Street SW of 63.5 feet.

5. The Public Works Department limited the right-of-way dedication impact in this section of the 40th Street SW corridor to 50 feet. The recommended dedication of 50 feet of right-of-way is consistent with the right-of-way dedication associated with development along other collector roadways in Rochester. The Planning Commission and City Council have determined that 50-60 feet of right-of-way dedication is a reasonable design standard for the following residential development projects abutting roadways designated collectors on the Thoroughfare Plan:

   Kingsbury Subdivision along 55th Street NW
   Wedgewood Subdivision along 55th Street NW
   Golf View Estates Subdivision along 50th Avenue NW
   Bandel North First Subdivision along Bandel Road NW
   Eastwood Subdivision along Eastwood Road and 40th Avenue SE
   Southern Hills Subdivision along 11th Avenue SW
   Mayowood Commons Subdivision along Mayowood Road SW
   Bamber Ridge Subdivision along 18th Avenue SW
   Meadow Park South Subdivision along 20th Street SE

6. Alternatively, under the provisions of Section 64.231, the City can request that GDP #151 reflect a rural section right-of-way width for 40th Street SW of 74.5 feet. The Public Works staff could have recommended that the 40th Street SW be reconstructed as a rural section roadway (paved shoulders and open stormwater drainage ditches verses curb and gutter with storm sewer). Using the formula prescribed in Section 64.231 the required rural section right-of-way width W = 149 feet. The Boulevard Width, B, increases from 16 feet to at least 30 feet to accommodate the open stormwater drainage ditch and the Auxiliary Lanes, A, increases from 24 feet to 36 feet for paved shoulders and Through Lanes decreases from 52 feet to 48 feet as the curb and gutter is dropped in place of paved shoulders.

D. Paragraph 64.137 of the Rochester Zoning Ordinance and Land Development Manual specifically states:

   Cost Sharing: The City Engineer shall advise the Council regarding costs and right-of-way widths for major streets. The applicant shall provide right-of-way in accordance with the adopted Long-Range Transportation Plan, Official Map legislation and standards. However, an applicant may appeal a street dedication requirement to the Council and if the applicant provides sufficient evidence that the costs are not roughly proportional to the needs generated by the subdivision, the Council may decide to purchase a portion of the right-of-way that exceeds such rough proportionality.

1. The introduction of the ROCOG Thoroughfare Plan Roadway Design Standards indicates that one major goal is to "allow a greater degree of flexibility in roadway design". The Plan classifies roadways into six basic types ranging from freeways to

local streets, including collectors, and it establishes minimum standards that "are designed to minimize safety hazards, traffic congestion, and other negative impacts which can result when land use development is not carefully coordinated with the street and roadway system". The introduction further states that "the plan recognizes that modifications to the minimum standards may be made under certain circumstances". In Section 3.4, Collector, of the Thoroughfare Plan it states that "in large scale developments, it may be necessary to construct the road to a higher design standard than that of a collector". The design year projected traffic for the section of 40th Street SW abutting GDP #151 is 9,150 vehicles per day compared to 1,450 in 1998. The Thoroughfare Plan indicates that the ADT (average daily traffic) Range for a High Density Collector is 1,000-7,000 ADT and functions to connect traffic from the local and feeder streets to arterials and to serve local business districts. The Thoroughfare Plan is a guide to be used to establish minimum standards for right-of-way width and roadway width. It is not intended to be the sole basis for determining right-of-way and roadway widths and standards and right-of-way dedication requirements.

2. On May 9, 2000, the City provided the applicant sufficient information that will allow the applicant to prepare a revised Site Grading Plan and Plat that is compatible with the fill slopes and profile of the proposed 40th Street and 11th Avenue SW reconstruction scheduled for 2003. The requirement to grade the GDP #151 in a manner compatible does not mean that the applicant needs to construct the fill slopes for the road projects, but rather the applicant needs to grade the property to match the proposed street profile and cross-sections at the south right-of-way line of 40th Street SW and along the east right-of-way line of 11th Avenue SW. The amount of right-of-way that will need to be acquired by the City, will be determined during the Development Agreement negotiations and incorporated into the Plat for the property included in GDP #151.

3. The proposed right-of-way for 40th Street SW from TH 63 to 11th Avenue varies in width on the Draft Layout Plan being prepared by Yaggy Colby Associates for MnDOT, Olmsted County and the City of Rochester. The width varies due to the number of roadway lanes, including necessary turn lanes, and due to the embankment fill slopes at the 11th Avenue intersection and at the TH 63 interchange overpass bridge. Mr. Kottschade's representatives and I met with Yaggy Colby Associates staff on May 9, 2000 and were advised as to the recommended amount of right-of-way needed for the reconstruction of 40th Street SW. Mr. Kottschade's representatives were also advised that the final amount of right-of-way needed would be subject to change until the completion of the Project Hearing process later this year. Additional right-of-way needed by MnDOT, Olmsted County or the City of Rochester for the 40th Street SW improvements, beyond that acquired by dedication, would be acquired pursuant to MnDOT right-of-way acquisition policies and procedures.

   The amount of right-of-way that will need to be acquired by the City, in addition to the dedication requirements, will be determined during the Development Agreement negotiations and incorporated into the Plat for the property included in GDP #151.

4. The right-of-way being requested for dedication is proportionate in scale to the impact of the estimated traffic that will be generated by the property in GDP #151 relative to the estimated design year traffic along the frontage of the property. This determination is based on the following analysis:

   The property along the 1.25 mile segment of 40th Street SW, between 18th Avenue SW and TH63 South, is projected to generate approximately 9,150 average daily trips per day adjacent to the frontage of GDP #151. Of this amount, the proposed GDP #151 includes approximately 80 townhomes that are projected to generate an average of 600 trips per day. Therefore, GDP #151 will generate approximately 6.56% of the average daily trips on 40th Street SW adjacent to the frontage of GDP #151.

   A 100-foot wide right-of-way, for the planned improvement to the 1.25 mile segment of 40th Street SW, between 18th Avenue SW and TH63 South, encompasses 15.1 acres. The recommended right-of-way dedication of 17 feet equals 0.95 acres along the approximate 2,430 feet of GDP #151 frontage along 40th Street SW. Therefore, the recommended dedication of 17 feet of right-of-way along the 40th Street SW frontage of GDP #151 results in 6.29% of the additional right-of-way dedication for the proposed improvement to 40th Street SW being dedicated by the applicant.

   This conclusion is also supported by an acre per trip analysis. A 100-foot wide right-of-way extending from 18th Avenue SW to TH 63 encompasses 15.1 acres. The average daily traffic adjacent to the frontage of GDP #151 is projected to be 9,150 ADT. This computes into 71.89 square feet of right-of-way per trip. Based on the projected 600 trips generated from GDP #151, the right-of-way needed to support the development proposed by GDP #151 would be 43,134 square feet which equals 0.99 acres. The recommended right-of-way dedication of 17 feet equals 0.95 acres along the approximate 2,430 feet of GDP #151 frontage along 40th Street SW.

   Put another way, the amount of right-of-way dedication required from the applicant does not exceed the amount of right-of-way needed to accommodate the amount of traffic generated by the applicant's proposed GDP #151 development.

Findings:

1. The applicant has been aware since 1995 that the planned improvements to 40th Street SW and 11th Avenue SW would require a 100-foot of right-of-way.

2. The applicant's GDP #151 and its proposed use of the right-of-way needed for the planned improvements to 40th Street SW and 11th Avenue SW is inconsistent with the provisions of City Ordinance 61.215 (4) and (7).

3. The applicant's GDP #151 does not comply with the provisions of City Ordinance 64.122 relating to grading of the property to match the planned improvements to 40th

Street SW and 11th Avenue SW and integration into the stormwater runoff control system.

4. The applicant's GDP #151 does not comply with the provision of City Ordinance 64.136 and 64.137 relating to right-of-way dedication for 40th Street SW.

5. The amount of right-of-way dedication required from the applicant does not exceed the amount of right-of-way needed to accommodate the amount of traffic generated by the applicant's proposed GDP #151 development.

BEFORE THE COMMON COUNCIL

CITY OF ROCHESTER, MINNESOTA

In Re: General Development Plan #151 (40th Street)	Findings of Fact, Conclusions of Law, and Order

On June 5, 2000, the Common Council of the City of Rochester held a public hearing, upon notice to the public, to consider the Planning and Zoning Commission's findings of the public hearings held on March 22, 2000, April 26, 2000, and May 10, 2000, in response to General Development Plan #151. The Council's public hearing was continued until June 19, 2000.

On June 19, 2000, the Council resumed its consideration of the proposed General Development Plan #151. At the hearing, there was public testimony offered on the application.

During the public hearing, the Council considered those documents submitted to it by the Planning and Zoning Department staff (attached hereto and identified as Exhibit A) as well as the June 5, 2000, memo submitted to it by Charles Reiter, Senior Transportation Planner (attached hereto and identified as Exhibit B), a copy of the June 5, 2000, letter from the Applicant to the Public Works Director (attached hereto and identified as Exhibit C) and the June 15, 2000, Technical Report of Impacts of Proposed General Development Plan #151 (attached hereto and identified as Exhibit D).

Based upon the evidence presented at the hearing, the Common Council of the City of Rochester does hereby make the following findings of fact, conclusions of law, and order.

EXHIBIT
#2

FINDINGS OF FACT

1. At its March 22, April 26 and May 10, 2000, public hearings on this application, the Planning and Zoning Commission considered the issue of whether General Development Plan #151 satisfied the conditions of ROCHESTER, MINN., CODE ORDINANCES §61.215 (1999).

2. R.C.O. §61.215 provides that a general development plan must comply with all of the following criteria:

A. The proposed land uses are generally in accord with the adopted Comprehensive Plan and zoning map, or that the means for reconciling any differences have been addressed. A GDP may be processed simultaneously with a rezoning or plan amendment request.

B. The proposed development, including its lot sizes, density, access and circulation are compatible with the existing and/or permissible future use of adjacent property.

C. The mix of housing is consistent with adopted Land Use and Housing Plans.

D. The proposed plan makes provisions for planned capital improvements and streets reflected in the City of Rochester's current 6-Year Capital Improvement Program, adopted Thoroughfare Plan, the ROCOG Long-Range Transportation Plan, Official Maps, and any other public facilities plans adopted by the City. Street system improvements required to accommodate proposed land uses and projected background traffic are compatible with the existing uses and uses shown in the adopted Land Use Plan for the subject and adjacent properties.

E. On and off-site public facilities are adequate, or will be adequate if the development is phased in, to serve the properties under consideration and will provide access to adjoining land in a manner that will allow development of those adjoining lands in accord with this ordinance.

1. Street system adequacy shall be based on the street system's

ability to safely accommodate trips from existing and planned land uses on the existing and proposed street system without creating safety hazards, generating auto stacking that blocks driveways or intersections, or disrupting traffic flow on any street, as identified in the traffic impact report, if required by Section 61.523(C). Capacity from improvements in the first 3 years of the 6-year CIP shall be included in the assessment of adequacy.

2. Utilities are now available to directly serve the area of the proposed land use, or that the City of Rochester is planning for the extension of utilities to serve the area of the proposed development and such utilities are in the first three years of the City's current 6-Year Capital Improvements Program, or that other arrangements (contractual, development agreement, performance bond, etc.) have been made to ensure that adequate utilities will be available concurrently with development. If needed utilities will not be available concurrent with the proposed development, the applicant for the development approval shall stipulate to a condition that no development will occur and no further development permit will be issued until concurrency has been evidenced.

3. The adequacy of other public facilities shall be based on the level of service standards in Section 64.130 and the proposed phasing plan for development.

F. The drainage, erosion, and construction in the area can be handled through normal engineering and construction practices, or that, at the time of land subdivision, a more detailed investigation of these matters will be provided to solve unusual problems that have been identified.

G. The lot, block, and street layout for all development and the lot density for residential development are consistent with the subdivision design standards contained in Section 64.100 and compatible with existing and planned development of adjacent parcels.

3. R.C.O. §60.532 (5) authorizes the approving body to impose modifications or conditions to the extent that such modifications or conditions are necessary to insure compliance

with §61.215.

4. The Planning and Zoning Commission recommended the following findings:

A. This GDP proposes a low density residential development which is consistent with the land use designation on the Rochester Urban Service Area Land Use Plan. The applicant is also proposing to zone this property R-2 (Low Density Residential), which would be consistent with the low density residential land use designation. However, the R-1x (Mixed Single Family Extra) district may suit the proposed density better. The R-1x district allows townhome developments up to a density of 5.5 units per acre as a type I use with densities between 5.5 – 8.71 as a type II use. The zoning ordinance and land development manual does allow increases above the type I density up to the maximum type II density by the inclusion of certain design features in the development plan which qualifies the applicant to increase the density.

B. The proposed development is not compatible with existing use of the property and the adjacent property. Currently, conditional use permits number 97-23 and 97-29 affect the property. These conditional use permits allow the property to be used for activities associated with mining and excavation activities. The approved plans for these permits show stockpiles and haul roads being located on this property. The permits are approved for an 18-year period.

C. The development density is consistent with a low density residential land use designation of the Land Use Plan and is generally consistent with the Housing Plan.

D. Access to the site is proposed from 40th Street S.W., and 11th Avenue S.W. The adopted Thoroughfare Plan designates 40th Street S.W., and 11th Avenue S.W., as collector roadways. According to the City's current 6-year Capital Improvement Program, 40th Street S.W., is scheduled to be upgraded to a collector standard in the year 2002. The required right-of-way for a collector roadway (50 feet from centerline) needs to be dedicated for this reconstruction of 40th Street S.W., and eventually 11th Avenue S.W. A contribution will be required for the future reconstruction of 40th Street S.W., to a collector standard. Current City policy for substandard street requires a contribution of $30.00 per foot of frontage. The City may create a Transportation Improvement District in the area, which may result in a capacity

component being added to the substandard street reconstruction charge.

E. Improvements to 40th Street S.W., are scheduled for the year 2002, which will upgrade the roadway to a collector standard. The private roadway connection to public streets will need to meet the City intersection sight line standards. The applicant will need to enter into a Development Agreement with the City that will outline the developer's responsibility for improvements.

This area is within the Main Level Service Area, which is available for connection in 40th Street S.W.

The GDP does not propose any storm water detention ponds on the property. However, the grading plan submitted shows three sedimentation ponds on the property. The City has identified a possible Regional Stormwater Pond in this area. The owner and the City should jointly participate in the proposed City's Regional Stormwater Management Plan by sizing and constructing the detention pond to serve as a regional facility.

The adopted ROCOG Pedestrian Facility Plan identifies pedestrian facilities along 11th Avenue S.W., and 40th Street S.W. Since 40th Street S.W., is planned for reconstruction in the near future, a Pedestrian Facilities Agreement between the City and the owner will be required.

F. The applicant has submitted a grading and drainage plan for this property. The plans submitted are inconsistent with the proposed GDP layout. The grading and drainage plan identifies three sedimentation basins, while the GDP identifies zero. The entire site basically lies in the 100-year floodfringe and is subject to the additional standards of the "floodprone" overlay district. Any land filling or development in the "floodprone" area requires the issuance of a separate conditional use permit.

G. The lot, block and street layout and density appear to be generally consistent with the City of Rochester Zoning Ordinance and Land Development Manual. When the property is developed, the private roadway connections to public streets will need to meet City intersection sight line standards and a Performance Residential Development plan will be required to develop the townhomes.

5. Following its March 22, 2000, April 26, 2000, and May 10, 2000, public hearings on this proposed General Development Plan, the Planning and Zoning

Commission recommended approval with the following conditions:

A. The GDP should be revised to include the following:

- 50 feet of right-of-way shown as being dedicated for 40th Street S.W., and 11th Avenue S.W., consistent with the adopted Thoroughfare Plan;
- Pedestrian facilities along the east side of 11th Avenue S.W., and the south side of 40th Street S.W., consistent with the adopted Thoroughfare Plan;
- The site details (haul roads, stockpiles, proposed excavated ponds) of the approved conditional use permits covering this property and the adjacent properties;

B. Stormwater management must be provided for this development.

C. Controlled access must be provided along the entire length of 40th Street S.W., with the exception of the private street access that is shown across from Willow Heights Drive S.W., and along 11th Avenue S.W., with the exception of the private roadway shown in the southwest corner of the GDP. The existing access immediately east of Willow Court S.W., must be closed upon construction of the private roadway.

D. The applicant shall enter into a Development Agreement with the City that outlines the obligations of the applicant relating to, but not limited to, stormwater management, park dedication, traffic improvements, pedestrian facilities, right-of-way dedication, SAC and WAC fees and contributions for public infrastructure improvements and contributions for future reconstruction of 40th Street S.E Current City policy for substandard street requires a contribution of $30.00 per foot of frontage for residential developments. The City may create a Transportation Improvement District in the area that may result in a capacity component being added to the substandard street reconstruction charge.

E. If the development of this property occurs prior to the reconstruction of 40th Street S.W., grading of this property must be compatible with the street profile and cross-sections being proposed for the 40th Street S.W., reconstruction in the Street Layout Plan. The private roadway connections to public streets

must meet City intersection sight line standards.

F. The applicant agrees to dedicate a total of 50 feet of right-of-way from the centerline of 40th Street S.W. This dedication must be provided with the first plat of this development or when the City notifies the owner that a roadway improvement project is programmed, whichever comes first.

G. The applicant must agree to meet the parkland dedication requirement for this development in the form of cash in lieu of land. The development has a parkland dedication requirement of approximately 1.76 acres based on a maximum density of six units/acres.

H. A revised GDP shall be filed with the Planning Department reflecting all required modifications.

6. At the May 10th public hearing before the Planning and Zoning Commission, the Applicant's legal counsel objected to the following conditions proposed to be adopted by the Commission:

A. The required revision of the GDP to include 50 feet of right-of-way shown as being dedicated for 40th Street S.W., and 11th Avenue S.W., consistent with the adopted Thoroughfare Plan;

B. The required revision of the GDP to include the site details (haul roads, stockpiles, proposed excavated ponds) of the approved conditional use permits covering this property and the adjacent properties;

C. The current city policy for substandard street requires a contribution of $30.00 per foot of frontage for residential developments. The City may create a Transportation Improvement District in the area that may result in a capacity component being added to the substandard street reconstruction charge.

D. The requirement that, if the development of this property occurs prior to the reconstruction of 40th Street S.W., grading of this property must be compatible with the street profile and cross-sections being proposed for the 40th Street S.W., reconstruction in the Street Layout Plan. The private roadway connections to public streets must meet

City intersection sight line standards.

E. The requirement that the Applicant must dedicate a total of 50 feet of right-of-way from the centerline of 40th Street S.W. This dedication must be provided with the first plat of this development or when the City notifies the owner that a roadway improvement project is programmed, whichever comes first.

7. At the June 5 and June 19, 2000, public hearings, the Planning and Zoning Department staff recommended the addition of the following condition (see page one of Exhibit A):

I. The private roadway running parallel to 40th Street S.W., be relocated on the GDP outside of the proposed street profile and cross sections for 40th Street S.W., as indicated on the preliminary plans prepared for 40th Street S.W., as reflected in the street plan of the City of Rochester's current 6-year Capital Improvement Program.

8. At the June 19, 2000, public hearing before the City Council, Applicant's legal counsel entered into the record: (a) 13 pages of cross-section drawings, and one preliminary layout plan drawing as prepared by Yaggy Colby Associates, for 11th Avenue S.W., and 40th Street S.W.; (b) a copy of the June 5, 2000, letter from the Applicant to the Public Works Director (Exhibit C); and (c) a copy of the June 15, 2000, Technical Report of Impacts of Proposed General Development Plan #151, prepared by City Engineer Richard W. Freese (Exhibit D) and sent in response to the Applicant's letter.

9. After entering the above-described documents into the record, Applicant's legal counsel entered a general objection to each and every one of the conditions of approval recommended by the Planning and Zoning Commission. Legal counsel did not refer to the criteria stated by R.C.O. §61.215, make any statements as to how the Applicant satisfied any of the criteria, or explain why the proposed conditions of approval were arbitrary, capricious or

unreasonable. Legal counsel concluded his presentation to the Council by asking for approval of General Development Plan #151 without the imposition of any conditions.

10. The June 15, 2000, Technical Report of Impacts of Proposed General Development Plan #151 (Exhibit D), there is information provided in response to the approval criteria provided by R.C.O. §61.215. Essentially, the Technical Report makes the following findings:

A. The Applicant has been aware since 1995 that the planned improvements to 40th Street S.W., and 11th Avenue S.W., would require a 100-foot right-of-way.

B. The Applicant's GDP #151 and its proposed use of the right-of-way needed for the planned improvements to 40th Street S.W., and 11th Avenue S.W., is inconsistent with the provisions of Section 61.215(4), (7) of the Rochester Code of Ordinances.

C. The Applicant's GDP #151 does not comply with the provisions of Section 64.122 of the Rochester Code of Ordinances relating to grading of the property to match the planned improvements to 40th Street S.W., and 11th Avenue S.W., and integration into the stormwater runoff control system.

D. The Applicant's GDP #151 does not comply with the provision of Sections 64.136 and 64.137 of the Rochester Code of Ordinances relating to right-of-way dedication for 40th Street S.W.

E. The amount of right-of-way dedication required from the applicant does not exceed the amount of right-of-way needed to accommodate the amount of traffic generated by the Applicant's proposed GDP #151 development.

11. The Rochester Common Council concurs with the findings of fact and the conditions recommended by the Planning and Zoning Commission as well as the findings of the June 15, 2000, Technical Report, incorporates them within this document and adopts them as its own.

CONCLUSIONS OF LAW

1. R.C.O. §61.215 provides that the Council shall approve a general development plan if the following criteria are satisfied:

A. The proposed land uses are generally in accord with the adopted Comprehensive Plan and zoning map, or that the means for reconciling any differences have been addressed. A GDP may be processed simultaneously with a rezoning or plan amendment request.

B. The proposed development, including its lot sizes, density, access and circulation are compatible with the existing and/or permissible future use of adjacent property.

C. The mix of housing is consistent with adopted Land Use and Housing Plans.

D. The proposed plan makes provisions for planned capital improvements and streets reflected in the City of Rochester's current 6-Year Capital Improvement Program, adopted Thoroughfare Plan, the ROCOG Long-Range Transportation Plan, Official Maps, and any other public facilities plans adopted by the City. Street system improvements required to accommodate proposed land uses and projected background traffic are compatible with the existing uses and uses shown in the adopted Land Use Plan for the subject and adjacent properties.

E. On and off-site public facilities are adequate, or will be adequate if the development is phased in, to serve the properties under consideration and will provide access to adjoining land in a manner that will allow development of those adjoining lands in accord with this ordinance.

1. Street system adequacy shall be based on the street system's ability to safely accommodate trips from existing and planned land uses on the existing and proposed street system without creating safety hazards, generating auto stacking that blocks driveways or intersections, or disrupting traffic flow on any street, as identified in the traffic impact report, if required by Section 61.523(C). Capacity from improvements in the first 3 years of the 6-year CIP shall be

included in the assessment of adequacy.

2. Utilities are now available to directly serve the area of the proposed land use, or that the City of Rochester is planning for the extension of utilities to serve the area of the proposed development and such utilities are in the first three years of the City's current 6-Year Capital Improvements Program, or that other arrangements (contractual, development agreement, performance bond, etc.) have been made to ensure that adequate utilities will be available concurrently with development. If needed utilities will not be available concurrent with the proposed development, the applicant for the development approval shall stipulate to a condition that no development will occur and no further development permit will be issued until concurrency has been evidenced.

3. The adequacy of other public facilities shall be based on the level of service standards in Section 64.130 and the proposed phasing plan for development.

F. The drainage, erosion, and construction in the area can be handled through normal engineering and construction practices, or that, at the time of land subdivision, a more detailed investigation of these matters will be provided to solve unusual problems that have been identified.

G. The lot, block, and street layout for all development and the lot density for residential development are consistent with the subdivision design standards contained in Section 64.100 and compatible with existing and planned development of adjacent parcels.

2. R.C.O. §60.532 (5) authorizes the Council to impose conditions on its approval of a general development plan.

3. By the greater weight of the evidence and testimony presented at the June 19, 2000, hearing, it is hereby determined by the Common Council of the City of Rochester that General Development Plan #151 complies with the requirements of §61.215 if the Applicant satisfies the eight conditions recommended by the Planning and Zoning Commission and the

one condition recommended by the Planning and Zoning Department.

ORDER

The Common Council of the City of Rochester, pursuant to R.C.O. §61.215 does hereby approve General Development Plan #151 subject to the nine conditions described above.

Dated at Rochester, Minnesota this 5th day of July, 2000.

John Hunziker, President of the
Rochester City Council

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BEFORE THE COMMON COUNCIL

CITY OF ROCHESTER, MINNESOTA

In Re: Appeal #00-04 by Franklin Kottschade	Findings of Fact, Conclusions of Law, and Order

On December 18, 2000, the Common Council of the City of Rochester held a public hearing, upon notice to the public, to hear the appeal of Franklin Kottschade (hereinafter "Appellant") concerning a decision of the Rochester Zoning Board of Appeals denying Variance Request #00-32. The Variance Request occurred in response to the City Council's imposition of nine conditions upon its approval of the Applicant's General Development Plan #151. The Applicant requested a variance of either (1) the nine conditions of approval placed upon GDP #151, or (2) those provisions of the Rochester Code of Ordinances under which the Council imposed the nine conditions of approval upon GDP #151.

On October 4, 2000, the Zoning Board of Appeals denied Variance Request #00-32. Appellant appealed the Zoning Board of Appeals' decision to the City Council. The appeal hearing came before the Council on November 20, 2000. At that time, the Council remanded the issue to the Zoning Board of Appeals since the Board failed to adopt findings of fact within the time frame required by Section 60.414 of the Rochester Code of Ordinances ("R.C.O."). On December 6, 2000, the Zoning Board of Appeals, following the remand, denied Variance Request #00-32 for a second time. The Council's December 18th hearing followed the Zoning Board of Appeals' December 6th action.

EXHIBIT "3"

At the December 18th public hearing, the Applicant and William Tolnton spoke in favor of the variance. Members of the city staff, including Senior Planner Baker, Planning Director Wheeler, Assistant City Administrator Neumann, Land Development Manager Nigbur and Public Works Director Freese spoke in favor of the Zoning Board of Appeals' decision to deny the variance. The Council considered all material submitted in its agenda packet (attached hereto and identified as "Agenda Record") and all material formally submitted into the record by the Applicant (attached hereto and identified as "Applicant's Record").

Based upon the evidence presented at the hearing, the Common Council of the City of Rochester does hereby make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. In early 2000, the Applicant submitted General Development Plan #151 (40th Street) (hereinafter "GDP #151") to the Council for approval. GDP #151 proposed low density residential development for the property located south of 40th Street S.W., east of 11th Avenue S.W., and west of Highway 63 ("Site"). Agenda Record at 33-4. (The Site's legal description is found at Agenda Record at 12.)

2. The Council applied the criteria found at R.C.O. §61.215 in its analysis of GDP #151. Agenda Record at 40, 54-65.

3. On July 5, 2000, the Council adopted Findings of Fact, Conclusions of Law and Order concerning GDP #151. Agenda Record at 54-65.

4. By its July 5th action, the Council determined that GDP #151 satisfied the requirements of R.C.O. §61.215 if the Applicant satisfied the following nine conditions:

A. The GDP should be revised to include the following:

- 50 feet of right-of-way shown as being dedicated for 40th Street S.W., and 11th Avenue S.W., consistent with the adopted Thoroughfare Plan;
- Pedestrian facilities along the east side of 11th Avenue S.W., and the south side of 40th Street S.W., consistent with the adopted Thoroughfare Plan;
- The site details (haul roads, stockpiles, proposed excavated ponds) of the approved conditional use permits covering this property and the adjacent properties;

B. Stormwater management must be provided for this development.

C. Controlled access must be provided along the entire length of 40th Street S.W., with the exception of the private street access that is shown across from Willow Heights Drive S.W., and along 11th Avenue S.W., with the exception of the private roadway shown in the southwest corner of the GDP. The existing access immediately east of Willow Court S.W., must be closed upon construction of the private roadway.

D. The applicant shall enter into a Development Agreement with the City that outlines the obligations of the applicant relating to, but not limited to, stormwater management, park dedication, traffic improvements, pedestrian facilities, right-of-way dedication, SAC and WAC fees and contributions for public infrastructure improvements and contributions for future reconstruction of 40th Street S.E Current City policy for substandard street requires a contribution of $30.00 per foot of frontage for residential developments. The City may create a Transportation Improvement District in the area that may result in a capacity component being added to the substandard street reconstruction charge.

E. If the development of this property occurs prior to the reconstruction of 40th Street S.W., grading of this property must be compatible with the street profile and cross-sections being proposed for the 40th Street S.W., reconstruction in the Street Layout Plan. The private roadway connections to public streets must meet City intersection sight line standards.

F. The applicant agrees to dedicate a total of 50 feet of right-of-way from the centerline of 40th Street S.W. This dedication must be provided with the first plat of this development or when the City notifies the owner that a roadway improvement project is programmed, whichever comes first.

G. The applicant must agree to meet the parkland dedication requirement for this development in the form of cash in lieu of land. The development has a parkland dedication requirement of approximately 1.76 acres based on a maximum density of six units/acres.

H. A revised GDP shall be filed with the Planning Department reflecting all required modifications.

I. The private roadway running parallel to 40th Street S.W., be relocated on the GDP outside of the proposed street profile and cross sections for 40th Street S.W., as indicated on the preliminary plans prepared for 40th Street S.W., as reflected in the street plan of the City of Rochester's current 6-year Capital Improvement Program.

Agenda Record at 59-61.

5. At the time the Applicant submitted GDP #151 to the City Council, he did not request a variance from any provision of the Rochester Code of Ordinances. In addition, he did not, as part of the review process for GDP #151, submit any conceptual development design drawings for the City's review or comment.

6. R.C.O. §60.734 permitted the Applicant to appeal the Council's July 5th Findings of Fact, Conclusions of Law and Order to District Court within 30 days of his receipt of the July 5th document. Agenda Record at 35. The Applicant did not exercise his right to appeal the Council's July 5th decision. Agenda Record at 186-87.

7. On September 12, 2000, the Applicant filed Variance Request #00-32 seeking to vary either (a) the nine conditions of approval imposed by the Council on July 5, 2000, or (b) the ordinances under which the Council imposed the nine conditions which the Applicant listed and

described as follows:

A. 61.215(4),(5),(6),(7) (Criteria for Approval of General Development Plan)
B. 64.230, et. seq. (Determining Right of Way Width)
C. 64.133 (Funding Required Improvements)
D. 64.134 (Dedication Required)
E. 64.137 (Cost Sharing)
F. 64.138 (Drainage Easements Required)
G. 64.310 (Storm Water Run Off)
H. 64.227 (Trail Thoroughfare and Sidewalks)
I. 64.122 (Street Design Features)
J. 64.250 (Development Agreement with Regard to Street Easement and Right of Way Designations)
K. 64.400, et. seq. (Park Land Dedication)
L. 64.240 (Private Roadways)
M. 64.220, et. seq. (Public Roadway and Trail Thoroughfare Design Standards)

Agenda Record at 39.

8. On October 4, 2000, the Zoning Board of Appeals held a public hearing to consider Applicant's Variance Request #00-32. Following the close of the hearing, the Board voted to deny Variance Request #00-32. The Board adopted findings of fact at its next meeting on November 1, 2000. These findings of fact were not adopted within 21 days of its public hearing as required by R.C.O. §60.414. Agenda Record at 26-7.

9. On October 26, 2000, the Applicant appealed the Zoning Board of Appeals' decision to the Common Council as provided for in R.C.O. §60.733(2). The matter came before the Council on November 20, 2000. Since the Applicant alleged a violation of, and since the facts indicated a lack of compliance with, R.C.O. §60.414, the Council remanded the matter back to the Zoning Board of Appeals for a new hearing and adoption of findings of fact within the required time period. Agenda Record at 201-06.

10. On December 6, 2000, the Zoning Board of Appeals held another hearing on Variance Request #00-32 and, following the hearing, denied the request. At its December 6th public hearing, the Board adopted findings of fact in support of its decision. Agenda Record at 11-6. Pursuant to the Applicant's October 26, 2000, appeal, the matter was returned to the Common Council.

11. The Council considered the Applicant's appeal on December 18, 2000.

12. At the December 18th public hearing, the Applicant's engineering representative, William Tointon, testified that he and members of his firm prepared two drawings depicting a "Before" and "After" comparison of the Applicant's proposed development on the Site. The "Before" drawing depicted a proposed development design of the Site prior to the Council's imposition of nine conditions on its approval of GDP #151. The "After" drawing depicted the proposed development design of the Site after the Council's imposition of nine conditions on its approval of GDP #151.

13. Mr. Tointon stated that the "Before" drawing indicated 104 townhomes with two different styles: twinplexes and eight-unit townhomes. The "After" drawing indicated 26 townhomes. He stated that condition #1 (right of way needed for 40th Street S.W.) and condition #5 (grading of the site to be compatible with the future elevation of 40th Street S.W., and 11th Avenue S.W.) had the greatest impact upon the amount of developable land on the Site. He stated that, following imposition of the nine conditions, there was insufficient depth on the Site to allow the construction of most of the "Before" drawing's 104 townhomes.

14. Mr. Tointon stated that, with respect to the "Before" and "After" drawings, "I can tell you that Mr. Masterpole in our office did design this project in accordance with the appropriate standards of your Land Development Manual and Zoning Ordinance." (The "Land Development Manual and Zoning Ordinance" are those portions of the Rochester Code of Ordinances addressing land use and zoning issues.)

15. In response to a question, Mr. Tointon agreed with the City Attorney's summary of Mr. Tointon's earlier testimony that Mr. Masterpole prepared the "Before" drawing in compliance with the provisions of the Land Development Manual. After being shown page 7 of the Council Agenda (which listed the 13 sections of the Land Development Manual that the Applicant sought to vary in Variance Request #00-32; See Agenda Record at 27-8;), the City Attorney asked how Mr. Masterpole could prepare the "Before" drawing in compliance with the Land Development Manual without complying with the 13 sections of the Land Development Manual for which the Applicant was now seeking a variance. Mr. Tointon stated, "[w]hat I said was that he prepared the illustrative map which is not the general development plan that was submitted to the City. This is not the plan that was submitted, this was a plan that was prepared to show how the site would, how the general development plan would be utilized."

16. In response to a question from the City Attorney, Mr. Tointon stated there was an alternative design concept involving access to the site not from 40th Street or 11th Avenue S.W., but from another access to the south. He stated this alternative involved securing several permits from the Department of Natural Resources and from other entities. He described the permit processes involved as being difficult, but indicated the Applicant had not attempted to secure any of the permits. He stated that acquisition of these permits would be required in order

to integrate development of the Site with the adjacent parcels (which are also owned by the Applicant).

17. In response to a question from the Assistant City Administrator, Mr. Tointon stated that the "Before" and "After" drawings have not been approved by the Planning Department and are "illustrative examples" of how they anticipate the development of the Site might occur with and without the nine conditions.

18. At the December 18, 2000, public hearing, the Applicant testified that he acquired the property in question in 1992. See also Agenda Record at 6. The Applicant also testified that the nine conditions of approval imposed by the City create for him an undue hardship since the conditions prevent him from receiving an economic return on his development property. Agenda Record at 7, 21.

19. The Applicant stated the estimated total development costs per unit for the "Before" drawing conception is $22,378. The estimated total development costs per unit for the "After" drawing conception is $89,511. In the "After" drawing, the $89,511 figure increases to about $125,000 after including land value costs, transaction costs, developer overhead costs, legal expenses and developer profit. Based upon the "After" drawing conception of 26 units and the total cost of $125,000 per unit, the sale price of a townhome unit would be in the $500,000 - $600,000 range. This is based upon the "Five times" rule which states the selling price should be five times the land costs so as to allow for the improvement to be built upon the land. Agenda Record at 5, 226.

20. The Applicant provided real estate information showing the current retail market for townhomes. According to that information, the highest selling price for a townhome was

$255,000. Because the market would not allow a $500,000 - $600,000 sale price, the Applicant claimed he was unable to put his land to a reasonable use and, as such, incurred an undue hardship. Agenda Record at 5.

21. The Applicant stated he has current mining permits for this site. He stated that up front costs of $384,000 would be needed in order to open up the mining operation. Without a very large construction project, he stated it was not economically feasible to perform the mining operation. Agenda Record at 5-6.

22. The Applicant stated he is unaware of any developer who has experienced the imposition of conditions similar to those imposed in GDP #151.

23. In response to a question, Public Works Director stated that the listing of improvement items on Agenda Record 226 is driven by the configuration, size and frontage layout of the Applicant's property. The same computation used in determining the cost of public improvements for the Applicant's development is used for other developments. The actual configuration, size and frontage layout of the property determines the cost for each improvement requirement.

24. In response to a question, the Applicant stated that the development cost amount of $22,378 per unit under the "Before" scenario is on the high side of the retail market for townhomes. After adding in overhead costs, the figure of $22,378 becomes about $50,000. He stated that the application of the "Five Times" rule puts the selling cost of each unit at about $250,000 which starts to "price it out."

25. Council member Evans asked whether there was one or two conditions in particular which the Applicant found unduly burdensome in his desire to develop the site. The

Applicant stated that the Council's 1999 adoption of a new subdivision regulation ordinance created this development problem for him and caused development problems in general for other developers. In particular, the Applicant stated that the use of development agreements caused "an unholy and unruly situation" and has resulted in an increase in the cost of housing in Rochester. The Applicant stated, "[c]an I point to one? The truth is they are all cumulative." The Applicant stated, "I am not asking for special favors for myself as a developer. I want to be treated no different than any other developer."

26. Throughout his testimony, the Applicant consistently requested a variance for all nine conditions. He never singled out any particular conditions nor did he discuss any alternatives to any of the conditions.

27. In response to a question from Council Member Evans, Senior Planner Baker stated that the "After" drawing's depiction, and the provision of only 26 townhome units, appeared to be unrealistic. She stated that the "After" scenario depicted the private right-of-way within the development to be 50 feet in width. She stated, "I don't recall ever seeing a 50 foot wide right of way shown for a private roadway serving a fairly low density development."

28. Senior Planner Baker indicated the "After" drawing depicted two styles of townhome units. She indicated there are other styles which might work in this development.

29. Senior Planner Baker indicated "Another thing that I think could be considered here is if there are other performance standards which are prohibiting a higher density from being achieved such as a setback, a landscape area, a recreation space, an off-street parking standard. Are there minimum variances to other standards that could be considered to achieve a density similar to 104 units or somewhere in that range without completely waiving what are

minimum standards of our ordinance that other developers are subject to? ... Certainly seems there are other ways to take a look at this property."

30. Council Member Evans stated, "[w]e have a lot of things that come through here sometimes with even more conditions than nine on it and sometimes I wonder how developers can make them work but they always make them work."

31. Several council members indicated a desire to meet with the Applicant and city staff in an attempt to discuss and work out a possible compromise on applicable performance standards. It was pointed out that either the City or the developer can initiate an amendment to a general development plan.

32. Land Development Manager Nigbur stated that in 1992, when the Applicant purchased this property, all but three of the nine conditions (and their underlying ordinance provision) were in existence. He stated, "So, these are all things he should have been aware of as the buyer of the land." The three conditions are #D, #E and #I.

33. Senior Planner Baker stated, "[t]his property owner purchased the property in 1992. Effective January 1, 1992, we had many of these regulations already in place in very similar format to what we have today." She also stated, "[t]he granting of this variance request may be materially detrimental to the public welfare and may adversely affect the implementation of the comprehensive plan by not providing for dedication of lands for roadway improvements, providing for pedestrian facilities, providing for park land dedication, providing for stormwater management facilities, and providing for the extension of public utilities in compliance with minimum development standards and requirements of the adopted plans and ordinances of the city. ... Most of the conditions that were placed on this general development plan were simply

because the development itself did not meet the minimum design standards." Two members of the Zoning Board of Appeals made similar statements during the Zoning Board of Appeals' hearings. Agenda Record at 9.

34. R.C.O. §60.410 states that, pursuant to state law as found in Minn. Stat. §462.357, subd. 6, there is the opportunity "to vary the literal provisions of the ordinance ... by the creation of the variance procedure."

35. The Common Council reviewed the application for the variance and considered the criteria provided in §60.417. This ordinance provides that the Council may grant a variance to the provisions of the Land Development Manual if it finds that:

a) there are extraordinary conditions or circumstances, such as irregularity, narrowness, or shallowness of the lot or exceptional topographical or physical conditions which are peculiar to the property and do not apply to other lands within the neighborhood or the same class of zoning district; and

b) the variance is necessary to permit the reasonable use of the property involved; and

c) the variance will not be materially detrimental to the public welfare or materially injurious to other property in the area, is in harmony with the general purpose and intent of the ordinance, and will not adversely affect implementation of the Comprehensive Plan; and

d) the variance as granted is the minimum necessary to provide reasonable economic use of the property.

36. R.C.O. §60.417 also provides that extraordinary conditions or circumstances cannot be the result of an action of the applicant or property owner in control of the property.

37. R.C.O. §60.417 also provides that a variance cannot be granted if the development of the parcel in question can be integrated with the development of adjacent

parcels under the same ownership in such a manner so as to provide for the reasonable economic use of the total site in a manner consistent with the provisions of the ordinance.

CONCLUSIONS OF LAW

1. This variance appeal is properly before the Common Council pursuant to R.C.O. §60.733.

2. R.C.O §60.410 of the Rochester Code of Ordinances does not provide for a variance from conditions of approval imposed upon a general development plan. Instead, a party seeking to contest the validity of the Council's imposition of any condition of approval placed upon a general development plan must utilize the appellate procedure provided for in R.C.O. §60.734 (appeal to district court).

3. The Zoning Board of Appeals correctly concluded that it lacked the authority to vary the conditions of approval imposed upon a general development plan.

4. R.C.O. §60.410 of the Rochester Code of Ordinances does provide for a variance from one or more of the ordinances which formed the basis for the Council's imposition of conditions upon GDP #151.

5. R.C.O. §60.417 provides the criteria in the analysis of a request for a variance.

6. Since the granting of a variance to the Applicant allows him to use the property in a manner forbidden by the applicable ordinances, he has a "heavy burden" to show he has satisfied all of the criteria provided in R.C.O. §60.417. See Luger v. City of Burnsville, 295 N.W.2d 609, 612 (Minn. 1980).

7. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determines that the Applicant failed to show that there are extraordinary conditions or circumstances peculiar to his property and which do not apply to other lands within the neighborhood or the same class of zoning district. The Applicant's generalization that the nine conditions placed upon GDP #151 made his proposed development economically unfeasible because of increased costs and decreased developable land does not satisfy his burden of proof as to extraordinary conditions or circumstances. The Applicant acquired this property in 1992 and there was no testimony that the property characteristics changed in any way since that time. Furthermore, the Applicant did not show any evidence that the City arbitrarily applied any provision of R.C.O. §61.215 (Criteria for General Development Plans) to some developers, but not to others. Instead, there is testimony that the ordinances which gave rise to the nine conditions are applied equally to all development occurring within the City.

8. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determines that the Applicant failed to show that a variance is necessary to permit the reasonable use of his property. The Applicant has not provided any information to demonstrate how any of the ordinance provisions pursuant to which the nine conditions were imposed operate to prevent him from completing his proposed development. The Applicant's generalization that the nine conditions placed upon GDP #151 have a "cumulative" effect and make his proposed development economically unfeasible because of increased costs and decreased developable land does not satisfy his burden of proof. Economic considerations alone do not constitute an

undue hardship if reasonable use for the property exists under the terms of the ordinance. Minn.Stat. § 462.357, subd. 6(2).

The Applicant's principal testimony on this point is the "After" drawing conception plan which shows a decrease in the depth of the lots, and a corresponding decrease in the number of townhome units which could be constructed, following implementation of the Council's nine conditions. However, there is evidence that there are other alternatives available to the Applicant, including a waiver of performance standards and other styles of townhomes, which might allow additional townhome units. There is also evidence that there is an alternative design involving access from the south. The Applicant did not provide any information as to why these alternatives are not feasible.

There is also evidence that the comparison between the "Before" drawing and the "After" drawing is unreliable. It was stated the "Before" drawing complied with all of the provisions of the Land Development Manual portion of the Rochester Code of Ordinances. Yet, the "Before" drawing does not consider those 13 ordinance provisions of the Land Development Manual upon which the Council relied in imposing the nine conditions of approval upon GDP #151 and which are now the subject of Applicant's variance request. The "Before" drawing is simply a depiction of a possible site design which can only occur if the 13 ordinance provisions at issue in Variance Request #00-32 are waived and no additional conditions are imposed.

Furthermore, the Applicant stated that under the "Before" drawing scenario, the resulting sale price of $250,000 per townhome was on the high side of the current retail market and, as such, may not be marketable. In other words, even assuming the absence of the nine conditions, the Applicant believes he would have a difficult time selling his townhomes at a price

that makes economic sense.

Finally, the Applicant failed to show that he would like to use his property in a reasonable manner which is otherwise prohibited by the Rochester Code of Ordinances. There are potential alternatives available to the Applicant which may allow him to accomplish his development goals. There may be other minimal performance standards which could be varied to allow the Applicant to achieve his desired development goal.

9. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determines that the Applicant failed to show that a variance will not be materially detrimental to the public welfare or materially injurious to other property in the area, the variance is in harmony with the general purpose and intent of this ordinance, and the variance will not adversely affect implementation of the Comprehensive Plan. The Applicant provided no information concerning the impact of this variance upon other property in the area. To the contrary, there was testimony that the granting of the variance would impede the goals of the Comprehensive Plan in terms of the dedication of lands for roadway improvements and the provision of pedestrian facilities, parkland, stormwater management facilities, and the extension of public utilities.

10. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determines that the Applicant failed to show that the requested variance is the minimum necessary to provide reasonable economic use of the property. The Applicant has not provided any information to demonstrate how any of the objectionable ordinance provisions prevent him from completing his proposed development. The Applicant's generalization that the nine conditions

placed upon GDP #151 have a "cumulative" effect and make his proposed development economically unfeasible because of increased costs and decreased developable land does not satisfy his burden of proof. Economic considerations alone do not constitute an undue hardship if reasonable use for the property exists under the terms of the ordinance. Minn.Stat. § 462.357, subd. 6(2).

The Applicant's principal testimony on this point is the "After" drawing conception plan which shows a decrease in the depth of the lots, and a corresponding decrease in the number of townhome units which could be constructed, following implementation of the Council's nine conditions. However, there is evidence that there are other alternatives available to the Applicant, including a waiver of performance standards and other styles of townhomes, which might allow additional townhome units.

There is also evidence that the comparison between the "Before" drawing and the "After" drawing is unreliable. It was stated the "Before" drawing complied with all of the provisions of the Land Development Manual portion of the Rochester Code of Ordinances. Yet, the "Before" drawing does not consider those 13 ordinance provisions of the Land Development Manual upon which the Council relied in imposing the nine conditions of approval upon GDP #151 and which are now the subject of Applicant's variance request. The "Before" drawing is simply a depiction of a possible site design which can only occur if the 13 ordinance provisions at issue in Variance Request #00-32 are waived and no additional conditions are imposed.

Furthermore, the Applicant stated that under the "Before" drawing scenario, the resulting sale price of $250,000 per townhome was on the high side of the current retail market and, as such, may not be marketable. In other words, even assuming the absence of the nine

conditions, the Applicant believes he would have a difficult time selling his townhomes at a price that makes economic sense.

11. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determined that the Applicant failed to show that any extraordinary conditions or circumstances were not the result of the Applicant's action. There is uncontroverted evidence in the record indicating that ordinance provisions which support the imposition of six of the nine conditions of approval were in place and in effect prior to the time the Applicant acquired the property. A landowner who purchases property with actual or constructive knowledge that his desired use is not permitted by applicable ordinances is not entitled to a variance since any resulting hardship is self-inflicted. See Hedlund v. City of Maplewood, 366 N.W.2d 624 (Minn. Ct. App. 1985).

12. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determined that the granting of the variance in this case does not promote the public health, safety, morals, or general welfare. If granted, the variance would deprive the public of lands needed for roadway improvements, the provision of pedestrian facilities, parkland, stormwater management facilities, and the extension of public utilities.

13. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determined that Applicant's variance request is unreasonable. The Applicant could have approached City staff regarding his concerns with the nine conditions of approval in light of the "Before" and "After" drawings. The Applicant could have sought city staff assistance in working with

performance standards the varying of which might accomplish Applicant's development goals. However, there is no evidence indicating the Applicant attempted to bring his concerns to City staff. Furthermore, there is no evidence indicating the Applicant sought an amendment to GDP #151 which could have accomplished his development goals by making changes to his development design or by seeking variances to performance standards.

14. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determines that the Applicant failed to show that the development of the Site cannot be integrated with the development of adjacent parcels under the same ownership in such a manner so as to provide for the reasonable use of the total property in a manner consistent with the provisions of the Rochester Code of Ordinances. There is evidence that achieving such development integration would be difficult because of the need for various state permits in crossing a creek and city permits to allow development within a flood area. However, a simple claim that "it can be done, but it wouldn't be easy" does not satisfy the Applicant's heavy burden to show compliance with this variance criteria. The Applicant simply has not provided sufficient information as to the economic plausibility or viability of development integration between the Site and the adjacent parcels.

15. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determined that the Applicant failed to satisfy all of the criteria needed for the granting of a variance as required by R.C.O. §60.417 and, as such, the Council must deny Variance Request #00-32.

16. Based upon a substantial amount, and a preponderance, of the testimony and evidence received at the December 18, 2000, public hearing, the Common Council determined that there is no legal basis to reverse the decision of the Zoning Board of Appeals and that such decision should be affirmed consistent with this Findings of Fact, Conclusions of Law, and Order.

ORDER

The Common Council of the City of Rochester, pursuant to R.C.O. §60.733, does hereby affirm the decision of the Zoning Board of Appeals in Appeal #00-04 and does hereby deny the variance requested by the Appellant from the (a) nine conditions of approval imposed upon the approval of GDP #151 and (b) provisions of the Rochester Code of Ordinances under which the Council imposed the nine conditions of approval upon GDP #151.

Dated at Rochester, Minnesota this 2nd day of January, 2001.

John Hunziker, President of the
Rochester City Council

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D2000-045

ROCHESTER

Minnesota

GARY H. NEUMANN
Assistant City Administrator
City Administrator's Office
201 4th Street SE, Room 266
Rochester, MN 55904-3781
(507) 285-8082
FAX #(507) 287-7979

April 24, 2001

John Arnold
Dunlap & Seeger, P.A.
206 South Broadway, Suite 505
Marquette Bank Building
P.O. Box 549
Rochester, Minnesota 55903-0549

RE: Franklin P. Kottschade
General Development Plan

Dear Mr. Arnold:

I received your letter dated April 17, 2001. Thank you for your clarification regarding the reference to a "settlement" conference.

We were disappointed when we were advised in your letter that your client does not wish to have a meeting with City officials and staff on this GDP at this time. Our hope was to have a meeting to discuss options to facilitate your client's development of the property that was included in GDP #151, without the blanket variance that Mr. Kottschade requested from all nine conditions of approval of the GDP. We had hoped that such a meeting would lead to the development proceeding in a manner that was acceptable to both Mr. Kottschade and the City.

In the event that your client changes his mind on this matter, please give me a call and we will schedule a meeting as soon as possible.

Sincerely,

Gary Neumann
Assistant City Administrator

c: Mayor and Council
Stevan E. Kvanvold, City Administrator
Terry Adkins, City Attorney
Richard Freese, Director of Public Works
Phil Wheeler, Director of Planning and Housing

EXHIBIT
"4"

Mayor Chuck Canfield
201 4th Street SE - Room 281
Rochester, MN 55904-3782
Phone: (507) 285-8080 Fax: (507) 287-7979

May 18, 2001

Franklin P. Kottschade
3800 Highway 52 North, Suite 130
Rochester, Minnesota 55901

Dear Mr. Kottschade:

Thank you for your May 7, 2001, letter concerning General Development Plan #151. You claim the City Council's imposition of nine conditions upon the City's approval of your GDP results in a taking of your property for which the City must compensate you.

Actually, there is nothing in the record before the City Council which indicates that these nine conditions prevent any development of your property. Instead, there is information in the record which indicates your planned development can go forward while complying with all nine conditions. For example, the record indicates that the waiver of performance standards, the use of other townhome styles and the use of an alternative access would allow your planned development to occur. Additionally, you could seek variances to those R-2 zoning district's standards, found in R.C.O. Section 62.231, addressing minimum percent of landscape area, minimum percent of recreation space, permitted maximum height and required off-street parking. Variances to these standards would give you a tighter design within your planned development.

It is because there are options and alternatives available to you in making your planned development become reality that we expressed our disappointment to your legal counsel upon learning of your unwillingness to meet with city officials to discuss the options and alternatives. In his April 24, 2001, letter to your attorney, Assistant City Administrator Gary Neumann stated, "[o]ur hope was to have a meeting to discuss options to facilitate your client's development of the property that was included in GDP #151, without the blanket variance that Mr. Kottschade requested from all nine conditions of approval of the GDP. We had hoped that such a meeting would lead to the development proceeding in a manner that was acceptable to both Mr. Kottschade and the City."

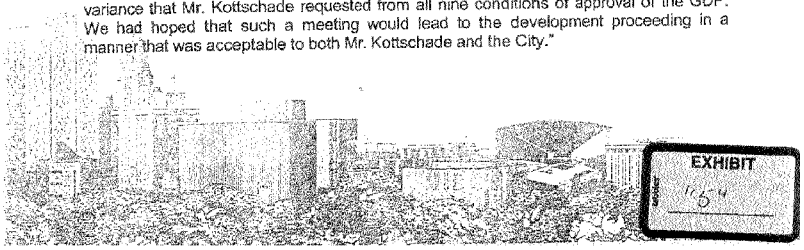

EXHIBIT
165

Obviously, the record does not support your takings claim and, for that reason, the City will not begin any condemnation action against your property. More importantly, I am disappointed that you deemed it in your best interests to sue the City rather than work with the City to identify and discuss options available to you in developing your property.

Sincerely,

Charles J. Canfield, Mayor
City of Rochester

c: Stevan E. Kvenvold, City Administrator
Gary Neumann, Assistant City Administrator
Terry Adkins, City Attorney
Phil Wheeler, Director of Planning and Housing

LETTER FROM RUDOLPH W. GIULIANI, MAYOR, CITY OF NEW YORK TO THE HONORABLE PATRICK J. LEAHY, DATED OCTOBER 28, 1997

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

The Honorable Patrick J. Leahy
Committee on the Judiciary
U.S. Senate
433 Senate Russell Office Building
Washington, DC 20510

October 28, 1997

Dear Senator Leahy:

I am strongly opposed to H.R. 1534 and S. 1256. These measures are a fundamental intrusion upon the City's authority over local land use decisions. On the strength of the provisions contained in these bills, private property owners would undoubtedly be suing the City in Federal court more frequently than they can under existing law, thereby exposing the City to increased costs that would be better applied to more pressing local needs. I am also seriously concerned that the bills would restrict the City's ability to enforce regulations concerning private property, placing Federal courts in the middle of disputes that should legitimately remain the domain of local governments.

Relying on these bills, the Federal courts might prematurely involve themselves in local land use disputes that local governments can best solve informally. It remains to be seen where the resources will come from to pay for these added burdens on the Federal judicial system and the local governments that would have to defend themselves in these proceedings.

There is no reason to alter judicial standards developed over the past 200 years by the United States Supreme Court to resolve claims under the takings clause of the Constitution's Fifth Amendment. There is even less reason to do so in an era when Congress is turning back more authority to local governments. These bills undermine the delicate balance that has been struck by the judiciary between the rights of private property owners and the rights of the public. I therefore reiterate my strong opposition to H.R. 1534 and S. 1256, and urge you to oppose these measures.

Sincerely,

Rudolph W. Giuliani
Mayor

cc: Senator Daniel Patrick Moynihan
Senator Alfonse D'Amato

LETTER FROM THE UNITED STATES CONFERENCE OF MAYORS TO THE HONORABLE ARLEN SPECTER AND THE HONORABLE PATRICK LEAHY, DATED JUNE 6, 2006

THE UNITED STATES CONFERENCE OF MAYORS

1620 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
TELEPHONE (202) 293-7330
FAX (202) 293-2352
URL: www.usmayors.org

President:
BEVERLY O'NEILL
Mayor of Long Beach
Vice President:
MICHAEL A. GUIDO
Mayor of Dearborn
Past Presidents:
JERRY E. ABRAMSON
Mayor of Louisville Metro
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THOMAS M. MENINO
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DONALD L. PLUSQUELLIC
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JOSEPH P. RILEY, JR.
Mayor of Charleston, SC
Trustees:
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Mayor of North Little Rock
SHARPE JAMES
Mayor of Newark, NJ
DANIEL P. MALOY
Mayor of Stamford
ARLENE J. MULDER
Mayor of Arlington Heights
RITA L. MULLINS
Mayor of Palmira
GREG NICKELS
Mayor of Seattle
METEKA E. OBIENDORF
Mayor of Virginia Beach
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Mayor of Nashville
DAVID W. SMITH
Mayor of Newark, CA
DAVID C. WALLACE
Mayor of Sugar Land
Advisory Board:
NICHOLAS H. PALMER, Chair
Mayor of Trenton
IRMA L. ANDERSON
Mayor of Richmond, CA
ALAN AUTRY
Mayor of Fresno
KAY BARNES
Mayor of Kansas City, MO
MARK BOSCH
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J. CHRISTIAN BOLLWAGE
Mayor of Elizabeth
JAMES BRAINARD
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MARTIN J. CHAVEZ
Mayor of Albuquerque
DAVID N. CICILLINE
Mayor of Providence
SHIRLEY FRANKLIN
Mayor of Atlanta
OSCAR B. GOODMAN
Mayor of Las Vegas
JAMES W. HOLLEY, III
Mayor of Portsmouth
RUSHERN L. IVES
Mayor of Redmond
ELIZABETH H. KAUTZ
Mayor of Burnsville
KWAME M. KILPATRICK
Mayor of Detroit
CARLOS MAYANS
Mayor of Wichita
PATRICK McCRORY
Mayor of Charlotte
LAURA MILLER
Mayor of Dallas
GAVIN NEWSOM
Mayor of San Francisco
MARTINO MALLEY
Mayor of Hallandale
BART PETERSON
Mayor of Indianapolis
JORGE A. SANTINI
Mayor of San Juan
JOHN F. STREET
Mayor of Philadelphia
L. DOUGLAS WILDER
Mayor of Richmond, VA
SHEILA YOUNG
Mayor of San Leandro
Executive Director:
TOM COCHRAN

June 6, 2006

The Honorable Arlen Specter
Chairman
Judiciary Committee
U.S. Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Judiciary Committee
U.S. Senate
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

Representing cities across the nation, we would urge you to preserve the use of eminent domain as a necessary and fundamental power of local governments. Eminent domain allows governments to undertake projects that benefit the whole community, while compensating property owners for the value of their property. It can be a critical tool for promoting sensible land use, revitalizing distressed communities, cleaning up polluted land, building new infrastructure, and alleviating the problems of unemployment and economic distress.

Governments do not lightly use eminent domain. State and local laws provide protections to individuals regarding the use of eminent domain, including fiscal, political and legal checks that prevent governments from arbitrarily exercising their eminent powers. Municipalities are already regulated by the Uniform Relocation Assistance and Real Property Acquisition Policies Act where Federal funds are involved, to provide relocation services and benefits which include: assistance in finding a comparable dwelling unit; replacement housing payments (the difference between comparable unit costs and just compensation for the property being acquired through eminent domain); all closing costs associated with the purchase of the comparable unit; all utility reconnecting costs; and actual moving costs.

The U.S. Supreme Court's decision in *City of New London v. Kelo* upheld the constitutional authority of State and local governments to use eminent domain but the Kelo case has resulted in the examination of the use of eminent domain at local, State and Federal levels. Congress has mandated a study by the Government Accountability Office on the use of eminent domain.

We urge that, if Congress adopts any additional federal legislation on eminent domain that it allow local government to continue to use eminent domain to construct: affordable housing; public infrastructure, including roads, bridges, streets, highways, pedestrian walkways and streetscapes; water supply facilities, wastewater treatment facilities, recycling facilities and brownfields rehabilitation and development; common-carrier functions that serve the general public and are subject to regulation and oversight by the government; arenas or stadiums that serve the general public; public utility functions, including use for the generation, transmission, or distribution of electric energy

for sale; educational institutions, including schools, universities, libraries, museums and cultural institutions; and hospitals.

Some have argued that eminent domain should be limited to construction of roads and parks but cities need eminent domain, as a last resort, in order to address the issues of dilapidated and dangerous housing, overcrowding, crime, and neighborhood renewal. It is a fundamental purpose of local governments to promote economic in order to provide jobs, hope and opportunity to communities. One of the biggest obstacles to the revitalization of our metropolitan areas, which include center cities and older inner-ring suburbs where more than 80 percent of the nation's population resides, is the difficulty of assembling parcels of land of sufficient size to allow for new economic development. Frequently, absent appropriate sites, economic development will not happen in the places that desperately need it.

Therefore we would urge that any Federal legislation allow the use of eminent domain for economic development to create or retain jobs and revitalize communities in redevelopment areas identified as blighted areas or similar statutorily created redevelopment project areas, which include areas that are unsafe, inadequate, unsanitary, deteriorated, dilapidated, vacant, and/or violent to the point where a threat to human health and safety may be present. We urge you to allow the use of eminent domain in support of neighborhood revitalization projects that are sponsored by community-based development organizations or faith -based institutions that provide goods, services or employment.

Finally, as Mayors we urge rejection of any Federal legislation preempting State and local judicial and political processes for resolving legal disputes arising from community zoning and land use regulation. We would support the longstanding requirement that claimants under the Takings Clause of the U.S. Constitution pursue available State compensation procedures before filing a federal Takings claim in Federal court.

Mayor's Name	City
John F. Street	Philadelphia
Mick Cornett	OKLAHOMA City
Edwin Harpa	Conway City
Thomas R. Miller	Franklin, TN
Jim Schmidt	Green Bay, WI
Joe Marine	McKinney, TX.

June 6, 2006
Page 3

Mayor's Name	City
Richard M. Daley	Chicago, Ill.
Michael R. Bloomberg	
[illegible]	Columbus, Ohio.
[illegible]	City of Hallandale Beach Florida
[illegible]	Cooper City, Fla.
Ken Hahn	Monrovia CA
[illegible]	
Jennifer Hosterman, Pleasanton, CA	
Katy Keolker	Renton, WA.
Bernard Kincaid	Birmingham, Al
Sam Pazzone	Roswell N.M.
[illegible]	Lauderdale, Fl
[illegible]	Alameda, CA
Gerald Jennings	Albany, NY.

June 6, 2006
Page 4

Mayor's Name	City
Janet Lockhart	Dublin, Ca.
Myron Kragness	Brooklyn Center, Mn
Wilson N. Butler Jr.	Chester, Pa.
[illegible]	NORTH MIAMI, FL
John F. Hanlon	Everett, Massachusetts
Wayne [illegible] Jr.	Hempstead, New York
Michael D. Brown	Riviera Beach, Fl.
Kevin C. [illegible]	Salem, OH
Michael Hagan	Grand Forks, ND
Doug Fahm	Trenton, MI
Tom L. Anderson	Richmond, Va
Michael A. Guido	Dearborn, MI
Elizabeth [illegible]	Burkesville, KY
Jerry R. [illegible]	Detroit, MI
[illegible]	Portsmouth, Va
[illegible]	Elizabeth, NJ
[illegible]	Northbrook, IL
[illegible] III	Tallahassee, FL
[illegible]	Wichita, Ks.
James E. "Jaime" Mayo	Monroe, LA.

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Page 5

Mayor's Name	City
[illegible]	Sumter, S.C.
[illegible]	Bartlett, IL
[illegible]	Lombard, IL 60148
Dani Moseley	Miramar, Fl.
[illegible]	Evanston, IL
[illegible]	Pinellas Park, FL
[illegible]	West Des Moines, Iowa
Thomas O'Grady	North Olmsted, OH
Kitty Piercy	Eugene, Oregon
[illegible]	Carol Stream Il. 601.
Steven B. Ferrer	Sunrise, Fl.
[illegible]	WPB, FL
[illegible]	Frisco, TX
Mary Lib Saxe	Euless, Texas
[illegible]	Deer Park, Texas
[illegible]	Bloomington, Illinois
John A. Spring	Quincy, Illinois
[illegible]	Sugar Land, TX
John M. Antaramian	Kenosha WI.
Roy D. Buol	Dubuque, IA.

June 6, 2006
Page 6

Mayor's Name	City
Jennifer L. Stultz	Asotoni, NC.
[illegible] Brummel	Carmel, Indiana
Patrick [illegible]	San Bernardino, CA
Johnny L. Dupree	Hattiesburg, MS
Janet Lockhart	Dublin, Ca.
Heather Fargo	Sacramento CA
[illegible]	Waco, Texas
Snyder Reid	Mansfield, Ohio
Ed Winn	Davenport, Iowa
Jim Dear	Carson, California
Dave McLin	Dayton, Ohio
Brenda Lawrence	Southfield MI
Tom Potter / Nyt	Portland, OR
[illegible]	West Columbia, SC
[illegible]	Rochester, N.Y.
Jim Humphrey	Fort Myers Fl 339
[illegible]	Mobile, Alabama
Jim Brainard	Carmel, Indiana
[illegible]	Valdosta, Georgia
[illegible] Longo	Garfield Hts., Ohio
[illegible]	Rio Rancho, New Mexico

June 6, 2006
Page 7

Mayor's Name	City
	Pembroke Pines FL
	ALEXANDRIA, VA
	Seattle, Washington
	City of Virginia Beach, V

LETTER FROM THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION TO THE HONORABLE STEVE CHABOT AND THE HONORABLE JERROLD NADLER, DATED JUNE 8, 2006

NATIONAL LEAGUE OF CITIES
U.S. CONFERENCE OF MAYORS
NATIONAL ASSOCIATION OF COUNTIES
NATIONAL CONFERENCE OF STATE LEGISLATURES
COUNCIL OF STATE GOVERNMENTS
INTERNATIONAL CITY MANAGEMENT ASSOCIATION

June 8, 2006

The Honorable Steve Chabot, Chair
Subcommittee on the Constitution
House Judiciary Committee
362 Ford House Office Building
Washington, D.C. 20515

The Honorable Jerrold Nadler, Ranking Member
Subcommittee on the Constitution
House Judiciary Committee
B-336 Rayburn House Office Building
Washington, D.C. 20515

Dear Subcommittee Chair Chabot and Ranking Member Nadler:

On behalf of the nation's state and local elected officials, we write to express our strong opposition to H.R. 4772, the *Private Property Rights Implementation Act of 2005*, pending before the House Judiciary's Subcommittee on the Constitution.

Our organizations opposed similar legislation during the 105th and 106th Congresses. Like those earlier bills, H.R. 4772 would fundamentally alter the procedures governing regulatory takings litigation established by the Supreme Court's Williamson County decision. Unlike earlier bills, H.R. 4772 seeks to make far-reaching substantive changes in the law, including to redefine the types of regulatory "exactions" subject to heightened scrutiny under the Takings Clause, override the so-called parcel-as-whole rule in certain takings cases, and prescribe a specific standard for the evaluation of claims under the Due Process Clause,

The procedural provisions of the bill would grant developers greater advantage in their negotiations with local communities and lead to greater federal court intrusion into land use decisions traditionally assigned to state and local governments. State and local elected officials are committed to the just defense of private property rights with established procedures to balance the protection of private property rights with the protection of public health and safety. The proposed bill would alter the current balance by allowing developers to short circuit local administrative procedures designed to resolve land use issues without resort to the courts, and by allowing developers to file takings claims in federal court, bypassing the state courts and other state procedures for awarding compensation in appropriate cases. Indeed, for its supporters, this bill is a hammer against local government that would give developers the unfair advantage of immediate federal court litigation.

Enactment of H.R. 4772 would also impose a major new, unfunded financial burden on state and local governments, both in terms of added litigation expenses and potential damages awards. By both expanding the scope of municipal liability and creating many new questions about the extent of local government liability, the bill would significantly interfere with local officials' ability to serve their communities.

Finally, the bill raises very serious constitutional questions. The Supreme Court has repeatedly stated that a takings claimant suffers no constitutional injury unless a state court has denied a

LETTER FROM W. PAUL FARMER, EXECUTIVE DIRECTOR AND CEO, AMERICAN PLANNING ASSOCIATION TO THE HONORABLE STEVE CHABOT AND THE HONORABLE JERROLD NADLER, DATED JUNE 11, 2006

June 11, 2006

The Honorable Steve Chabot
Chairman, House Subcommittee on the Constitution
Room B-336 RHOB
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member, House Subcommittee on the Constitution
Room B-336 RHOB
Washington, DC 20515

Dear Chairman Chabot and Ranking Member Nadler:

The American Planning Association supports private property rights as guaranteed by the U.S. Constitution and the land-use regulations that protect those rights for the benefit of all property owners. Our American system – arguably, the best in the world – is one of both property rights and property responsibilities and one in which rights are reciprocal among property owners. We urge you to oppose H.R. 4772, The Private Property Rights Implementation Act of 2005:

- H.R.4772 essentially federalizes local land-use decisions by allowing for the premature federal adjudication of takings claims. The bill undermines local control of land use and zoning decisions. Land use and zoning are the historic responsibilities of local government and local citizens. The bill would allow corporations and developers to burden localities with federal litigation if a developer's proposal is not approved. Merely the threat of this costly and time-consuming litigation would be enough to force many small communities to acquiesce to developers' demands. By changing the ripeness standard for takings claims, federal courts could become a primary refuge. Federal courts could be pulled into local land use disputes even before landowners and local officials were given the opportunity to consider alternatives and compromises.

- H.R. 4772 undermines the ability of local governments to control locally undesirable land uses. Instead of protecting private property rights, H.R. 4772 would actually endanger the private property rights of ordinary citizens while offering special advantages to developers and corporations willing to pay the costs of federal litigation. Local governments would be hampered in their efforts to protect the property rights of citizens from a range of undesirable land uses and environmental threats; Land use issues from adult entertainment and liquor stores to hog farms and incinerators would all be subject to federal court review, rather than local determination.

- H.R. 4772 creates an unfair presumption that local and state governments operate in bad faith when considering land-use or zoning cases. Currently, local governments resolve the vast majority of land use disputes without litigation. But H.R. 4772 makes sweeping, one-size-fits-all national changes under the misguided assumption that cities, counties and states are somehow denying and delaying justice. APA firmly believes that landowners receive fair treatment and just compensation when their property is taken under the Fifth Amendment. Procedural reform in these areas should take place at the local and state level. This bill only encourages federal litigation as a means of making local land-use decisions.

Thank you for your leadership and consideration. We look forward to working with you to ensure that federal, state and local governments continue to protect private property rights as guaranteed by the U.S. Constitution and the land- use regulations that protect those rights for the benefit of all property owners.

If you have questions or seek additional information, please contact Jason Jordan or Bridget Hennessey at (202) 234-1353.

Sincerely,

W. Paul Farmer, FAICP
Executive Director and CEO

LETTER FROM TIMOTHY J. DOWLING, CHIEF COUNSEL, COMMUNITY RIGHTS COUNSEL, TO THE HONORABLE STEVE CHABOT AND THE HONORABLE JERROLD NADLER, DATED JUNE 14, 2006

June 14, 2006

The Honorable Steve Chabot, Chair
Subcommittee on the Constitution
House Judiciary Committee
129 Cannon House Office Building
Washington, D.C. 20515

The Honorable Jerrold Nadler, Ranking Member
Subcommittee on the Constitution
House Judiciary Committee
2334 Rayburn House Office Building
Washington, D.C. 20515

Re: Subcommittee Hearing on H.R. 4772:
The "Private Property Rights Implementation Act"

Dear Subcommittee Chair Chabot and Ranking Member Nadler:

The Community Rights Counsel (CRC) is a nonprofit public interest law firm that promotes constitutional principles to help state and local officials defend laws that make our communities better places to live. CRC has filed legal briefs in the U.S. Supreme Court and lower courts on behalf of numerous clients, including the National Governors Association, National Association of Counties, National League of Cities, U.S. Conference of Mayors, National Conference of State Legislatures, Council of State Governments, International City-County Management Association, International Municipal Lawyers Association, Tahoe Regional Planning Agency, the municipal leagues of states across the country, American Planning Association, and American Public Health Association.

CRC strongly opposes H.R. 4772, the "Private Property Rights Implementation Act," for the reasons articulated since 1997 by the broad-based opposition to similar predecessor bills. This opposition has included our nation's cities, counties, and towns; the U.S. Catholic Conference, Religious Action Center for Reform Judaism, National Council of Churches of Christ, and other church groups; hunters, fishers, and environmentalists; the Conference of Chief Justices; 40 state Attorneys General; labor unions, planners, and historic preservationists; and many others.

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The bill is a severe affront to federalism that will further tilt the playing field in many local communities in favor of large developers, adult bookstores, corporate hog farms, massive waste dumps, and other corporate landowners at the expense of neighboring property owners and the public.

In addition to this reiteration of CRC's opposition, I am writing to correct a significant factual error that was repeated several times during the June 8, 2006 Subcommittee hearing on H.R. 4772. During much of the questioning, Subcommittee members either stated or assumed that it takes, on average, 9.1 years to litigate a regulatory takings claim in state court. For example, one Subcommittee member asked why takings claimants should be required to litigate for more than nine years in state court before proceeding to federal court.

In fact, the 9.1-year statistic refers to *federal* courts, not state courts. The statistic comes from page 17 of the testimony of Franklin P. Kottschade on behalf of the National Association of Home Builders (NAHB). The figure is derived from an NAHB-written article that appeared at 31 *Urban Lawyer* 195 (1999), which was updated by counsel for NAHB in May 2006. The NAHB testimony makes clear that the 9.1-year statistic refers to the time it took for federal courts to resolve certain cases.

To be sure, the NAHB materials discuss certain state court cases, but nowhere does NAHB attribute any significant portion of this 9.1-year statistic to state court proceedings. Indeed, to my knowledge, the extensive hearing records on prior bills similar to H.R. 4772 do not contain any comprehensive statistical analysis showing that state courts are dilatory or unfair in resolving regulatory takings claims.

It is worth noting that even with respect to federal courts, the 9.1-year statistic is highly suspect. It is based on just 18 appellate cases over a 16-year period (1990-2006), hardly an adequate sampling given the thousands of cases decided by federal courts each year that involve private property. And by focusing only on appealed cases, the statistic does not account for the many federal court cases that were quickly settled or expeditiously resolved in federal district court.

In addition, NAHB asserts that federal courts dismissed 82% of regulatory takings cases (Kottschade testimony, p. 15). But in the vast bulk of these cases, the claimant failed to seek compensation in state court. As the U.S. Supreme Court repeatedly has held, the claimant "suffers no constitutional injury" until the state court denies compensation. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999), citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."). One wonders why the dismissal rate is not closer to 100%.

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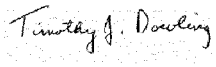
But putting aside these methodological flaws, it is uncontroverted that the 9.1-year statistic is derived from a review of federal court cases. It makes no sense for Congress to address alleged delay in federal courts through a bill that would add many more cases to the already overcrowded federal docket.

Sincerely,



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Chief Counsel

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