General/OCA

When Is A Local Land Use Dispute Ripe for Federal Court Review?

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A number of recent federal court decisions have dismissed constitutional claims in land use disputes on ripeness grounds. The ripeness doctrine is based on the "case or controversy requirement" of Article III, Section 2 of the U.S. Constitution.[1] When dealing with land use disputes, ripeness is evaluated under a two-prong test that the U.S. Supreme Court established in *Williamson County Regional Planning Commission v. Hamilton Bank*.[2] First, this article will explain the *Williamson* test and its application in recent cases. The second part will analyze the "futility" exception to the *Williamson* test.

The *Williamson* Test

The first prong of *Williamson* states that a land use claim is not ripe for review unless the plaintiff establishes that the applicable governmental agency has reached a "final, definitive position" regarding the precise use of the property in question, or the applicability of a local law or regulation to the property.[3] The second prong requires that a plaintiff exhaust all "reasonable, certain, and adequate state procedures" before filing suit in federal court for an alleged governmental taking.

In *Williamson*, the respondent filed suit in District Court for the Middle District of Tennessee alleging that the Williamson County Regional Planning Commission ("Commission") caused a regulatory taking of its property without paying just compensation when the Commission refused to approve respondent's proposed residential development. The district court dismissed the respondent's claims. On appeal, the Sixth Circuit reversed, finding that the record supported the respondent's taking claims. The U.S. Supreme Court granted certiorari and reversed, dismissing respondent's takings claims on two separate grounds.

First, the Court reasoned that the respondent's claims were not ripe because the respondent did not apply to the local board of zoning appeals for variances from the Commission's objections to the proposed development. The Court explained that "the Commission's denial does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a *final, reviewable decision*."[4]

The second ground for dismissal was that the respondent did not exhaust all of the "reasonable, certain and adequate" state law procedures available for obtaining just compensation for the alleged taking.[5] Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation.[6] Since respondent was not able to show that the inverse condemnation procedure was unavailable or inadequate, the Court held that until it had utilized that procedure, its taking claim was not ripe.[7]

The Final Decision Requirement in the Second Circuit

Federal courts have applied the *Williamson* test to a wide variety of claims arising under the U.S. Constitution in the land use context.[8] Below are several cases demonstrating the application of the *Williamson* test in the Second Circuit.

In *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*,[9] the Second Circuit dismissed petitioner's due process and equal protection claims, but found petitioner's First Amendment retaliation claim was not subject to the *Williamson* test and was ripe for review.[10] In this case, the court held that "First Amendment rights are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss." Thus, *Dougherty* demonstrates the Second Circuit's application of a "relaxed ripeness" standard when confronted with alleged First Amendment violations in land use disputes.

More recently, the Second Circuit has applied the *Williamson* test to alleged violations of the Americans with Disabilities Act ("ADA") and the Fair Housing Act ("FHA"). In *Sunrise Detox V, LLC v. City of White Plains*,[12] the Second Circuit held that the ripeness requirement applies to ADA claims. In that case, a building inspector determined that the petitioner needed a variance to operate a facility for individuals recovering from drug and alcohol addiction. Instead of filing for a variance or appealing the inspector's determination, the petitioner immediately brought an action in federal court alleging intentional discrimination and failure to grant a reasonable accommodation in violation of the ADA. In light of the administrative avenues for relief outlined in the zoning ordinance, the Second Circuit held that the petitioner's claims were not ripe for review.[13]

The District Court for the Eastern District of New York reached the same holding in *Safe Harbor Retreat, LLC v. Town of East Hampton*[14] when it dismissed plaintiff's alleged ADA and FHA violations.[15] Similar to *Sunrise Detox*, Safe Harbor also operated a facility for individuals recovering from drug and alcohol addictions and, after a building inspector determined that a special permit was needed to operate its facility, Safe Harbor applied to the town's zoning board to appeal the building inspector's determination. The zoning board upheld the building inspector's determination and instead of applying for a special permit from the town, petitioner filed an action alleging violations of the FHA and ADA. Relying on *Sunrise Detox*, the court held that the petitioner's claims were not ripe for judicial review because it failed to bring an application for a special use permit.

Application of the Futility Exception to *Williamson*

In *Sherman v. Town of Chester*,[16] the Second Circuit reinstated the plaintiff's takings claim which was dismissed by the district court.[17] The case involved more than a decade-long dispute between plaintiff Steven M. Sherman and the Town of Chester for subdivision approval of a vacant, 400 acre tract of land. Ultimately, the court reasoned that seeking a final decision from the town would have been futile because the town employed "repetitive and unfair procedures in order to avoid a final decision."[18]

The colorful opinion by the Second Circuit began with an analogy comparing the plaintiff's plight to that of Captain Joe Yossarian, the protagonist from Joseph Heller's novel, Catch-22. This is a must read for students of literature. Much like Yossarian's relationship with his commanding officer Colonel Cathcart, for more than a decade the town subjected Sherman to ever-increasing demands and a never-ending labyrinth of red tape that prevented Sherman from obtaining a final determination from the town on how he could develop his land. Every time the plaintiff met one town requirement, the town came up with a new and different requirement.

Sherman's war of attrition with the town began in March of 2000 when he applied for subdivision approval while in process of purchasing a nearly 400 acre piece of undeveloped land for $2.7 million. In 2001, the town announced a six-month moratorium on all development which was extended several

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times until January 2003. In 2003, the town enacted a new zoning ordinance requiring Sherman to redraft his development plan. The town would go on to change its zoning regulations four more times, totaling five zoning amendments in five years.

On top of the shifting sands of zoning regulations and the moratorium on development, the town employed other tactics to obstruct Sherman's development. For one, town officials required Sherman to resubmit studies he had already done. The town also required Sherman to pay $25,000 in consultants' fees before he could obtain a public hearing on the proposed development. Likening the town's course of conduct to Colonel Cathcart, the court stated:

> When the Town insisted that Sherman pay $25,000[,] . . . he might have thought, "The Colonel will just raise it again." And he would have been right. After paying the $25,000, he was told he owed an additional $40,000, and that he would also have to respond to a lengthy questionnaire.[19]

By the time Sherman filed suit in federal court, over ten years had passed since his initial application with the town. Sherman had become financially exhausted, spending $5.5 million on top of the original acquisition cost of $2.7 million. Despite all of this, the district court ruled that Sherman's takings claim was not ripe because he did not receive a final decision from the town on how he may use his property. The district court held that seeking a final determination would *not* be futile even though Sherman may have to jump through more hoops in the future. Harkening back to Col. Cathcart, the Second Circuit facetiously commented that, "[t]o Sherman, this must have sounded a lot like: 'Perhaps he won't raise the number this time.'"[20]

The Second Circuit reversed the district court and reinstated Sherman's takings claims finding that, due to the unfair and repetitive tactics employed by the town, seeking a final decision was futile. The Second Circuit rejected the district court's narrow definition of the futility exception which required the plaintiff to establish that a municipal agency has constructed a proverbial "brick wall" between the plaintiff and a final determination from the agency. In its reversal, the Second Circuit stated:

> This analysis does not account for the nature of the Town's tactics. The Town will likely never put up a brick wall in between Sherman and the finish line. Rather, the finish line will always be moved just one step away until [Plaintiff] collapses.[21]

Yet, despite this finding, the Second Circuit did not provide a bright-line test for the futility exception and actually injected more uncertainty into the mix, stating, in part:

> Every delay in zoning approval does not ripen into a federal claim. . . . But when the government's actions are so unreasonable, duplicative, or unjust as to make the conduct farcical, the high standard is met.[22]

This standard makes the futility exception a fact-intensive inquiry. Whether the futility exception applies requires a case-by-case analysis. However, lengthy delays in rendering a final decision, standing alone, do not trigger the futility exception.[23]

Conclusion

Williamson's "final decision" test requires landowners to obtain a final determination regarding the precise use of property or the application of a specific regulation before petitioning a federal court to resolve a local land use dispute on constitutional grounds. Yet, in some circumstances, courts have held that claimants are not required to obtain a final determination if it would be futile to do so. This exception applies when the relevant decision-making body either lacks discretion to grant variances or has "dug in its heels" and has unequivocally stated that it will deny any application for relief. This is a factual analysis that requires an in-depth understanding of the procedural and substantive issues of each case.

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1. U.S. Const. art. III § 2.
2. 473 U.S. 172 (1985).
3. *Id*. at 191; *see also Twersky v. Town of Hempstead*, No. 10-CV-4573 (MKB), 2012 WL 4928901, at *3 (E.D.N.Y. Oct. 16, 2012).
4. *Williamson*, 473 U.S. at 193-94 (emphasis added).
5. *Id*. at 194 (internal quotation mark omitted) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)).
6. Tenn. Code Ann. § 29–16–123 (1980).
7. *Williamson*, 473 U.S. at 173.
8. *See, e.g., Twersky*, 2012 WL 4928901, at *3-6 (dismissing First Amendment Free Exercise claims); *Easton LLC v. Inc. Village of Muttontown*, 505 F. App'x 66, 67 (S.D.N.Y. 2012) (dismissing Federal Takings, Substantive Due Process and Equal Protection claims); *Quick Cash LLC v. Village of Port Chester*, No. 11-CV-5608 (CS), 2013 WL 135216, at *9-11 (S.D.N.Y. Jan. 10, 2013) (dismissing Substantive Due Process and Equal Protection claims); *Riverhead Park Corp. v. Cardinale*, No. 07-CV-4133 (ADS) (ARL), 2013 WL 1335600, at *6-13 (E.D.N.Y. Mar. 28, 2013) (dismissing Substantive Due Process and Procedural Due Process claims); *Adam J. v. Village of Greenwood Lake*, No. 10-CV-1753 (CS), 2013 WL 3357174, at *3-8 (S.D.N.Y. July 23, 2013) (dismissing Federal Takings, Due Process and Equal Protections claims).
9. 282 F.3d 83 (2d Cir. 2002).
10. 282 F.3d at 90-91.
11. *Id*. at 90 (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532.3 (1984)).
12. 769 F.3d 118 (2d Cir. 2014).
13. *Id*.at 124.
14. No. 14-CV-2017 (LDW) (GRB), 2015 WL 918771 (E.D.N.Y. Mar. 2, 2015), *appeal filed*, No. 15-797 (Mar. 17, 2015).
15. *Id*. at *6.
16. 752 F.3d 554 (2d Cir. 2014).
17. *Id*. at 569.
18. *Id*. at 561.
19. *Id*. at 557.
20. *Id*.
21. *Sherman*, 752 F.3d at 563.
22. *Id*.
23. See *Williamson*, 473 U.S. at 176-82 (holding that claim not ripe despite eight-year delay in rendering final decision); *see also Dougherty*, 282 F.3d at 90 (holding that a five-and-a-half-year delay occasioned by defendant Board's requirement that plaintiff submit an Environmental Impact Statement, although not sympathetic, did not make application to the Board futile).