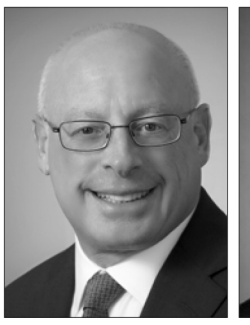
Real Estate/Municipal Law

Ripeness in Local Land Use Disputes – Williamson is Here to Stay



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I. Supreme Court Declines Invitation to Revisit Williamson Test

The U.S. Supreme Court recently denied certiorari[1] in a case urging the Court to revisit its precedent that was the subject of our previous article that appeared in the October 2015 edition of the Nassau Lawyer. The Court's disposition came in *Arrigoni Enterprises LLC v. Town of Durham*. In our original article, "When is a Local Land Dispute Ripe for Federal Court Review?" we discussed the application of the test established by the U. S. Supreme Court in W*illiamson County Regional Planning Commission v. Hamilton Bank*[2] for determining when local land use disputes are ripe for federal court review. The Court's denial of certiorari in *Arrigoni* signals that ripeness in local land use disputes has become a pervasive federal issue; it also means that (despite a scathing dissent from Justices Thomas and Kennedy[3]) *Williamson* is likely here to stay.

II. E.D.N.Y. Applies Williamson in Local Land Use Dispute

In a particularly interesting case, the Eastern District for New York, in *William Stephen Dean (a/k/a Billy Dean, et. al.) v. The Town of Hempstead,* applied the *Williamson* test to determine whether the Town violated plaintiff's constitutional rights by denying special exception permits, certificates of occupancy, and public assembly licenses for two cabaret establishments owned and operated by the plaintiff (hereinafter "Billy Dean").[4] By way of background, Billy Dean previously instituted an Article 78 proceeding against the Town's Board of Appeals for rescinding permit approvals for one of its establishments but was unsuccessful.[5]

Billy Dean filed the instant federal action in August of 2014 seeking redress for the Town's alleged constitutional violations as they relate to the cabaret establishments it owned and operated in the Town of Hempstead. Facing a motion to dismiss by the Town on ripeness grounds, the court, quoting *Williamson*, held that "the Town has not 'arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'"[6] With regard to Billy Dean's First Amendment claims, the court noted that the ripeness doctrine is somewhat relaxed, and that when determining whether to apply the *Williamson* final decision test in the First Amendment context, a court must consider: "(1) whether the [plaintiffs] experienced an immediate injury as a result of [the Town's] actions and (2) whether requiring the [plaintiffs] to pursue additional administrative remedies would further define their alleged injuries."[7]

Applying these principles, the court concluded that Billy Dean's complaint "insufficiently alleges immediate injury," and found that plaintiff could have taken a number of additional administrative steps at the Town to obtain the relief they sought including appealing to the Board of Appeals or by seeking mandamus relief. Thus, Billy Dean's claims did not qualify for the "relaxed ripeness" standard applied to First Amendment claims because, in the court's view, Billy Dean did not suffer an immediate, irreparable injury from the Town's denial of approvals and because plaintiff could have further defined their alleged injuries by making appropriate applications with the Town for the appropriate relief. Summarizing its application of the final decision requirement in First Amendment claims, the court stated that:

> The application of the final decision prong to First Amendment claims in this case also promotes the core reasons behind *Williamson's* final decision requirement: a fuller record will be developed, it is possible that the plaintiffs will get the relief they seek without having a court decide a constitutional issue, and it accords respect for federalism by allowing local resolution of zoning disputes.[8]

Finally, the court analyzed plaintiffs' futility claim. Even assuming plaintiffs made at least one meaningful application for each branch of relief sought, the court held that that it would not be futile for them to pursue further administrative avenues outlined by the Town, including remedying non-discretionary building and zoning code deficiencies and violations. Furthermore, the court applied the expanded futility exception set forth in *Sherman v. Town of Chester*,[9] which we highlighted in our previous publication. In *Sherman* the Second Circuit held that, due to the unreasonable, duplicative and unjust tactics employed by the town, seeking a final decision was futile. The court found the present case distinguishable because in *Billy Dean*, although the Town imposed several burdensome steps on Dean, such as re-filing or amending previous applications, the Town did not continually change its zoning regulations, issue a moratorium on development, or engage in other unreasonable, duplicative or unjust tactics that would excuse the plaintiff from pursuing a final decision from the Town.[10]

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III. New York Courts Applying Williamson

There have been a growing number of decisions from New York courts applying the *Williamson* test in local land use disputes. In a recent case by the Second Department, the court dealt with claims that a town violated a land owners rights to due process and equal protection and the court applied the *Williamson* final decision test, confirming its application in New York jurisprudence.[11]

In *Loskot-D'Souza v. Town of Babylon*, plaintiffs purchased a property within the Town of Babylon in December 2007. They intended to operate a counseling center for recovering drug and alcohol users. After applying for a building permit, the Town's Planning Department informed the plaintiffs that they would need to submit a site plan review application with the Planning Board for a change of use in order to operate the facility. After the Planning Board refused to accept plaintiff's "architectural site plan" submitted in lieu of the full set of drawings requested by the Board, plaintiffs immediately commenced a 42 USC § 1983 action for alleged violations of their constitutional rights to due process and equal protection. The Supreme Court denied the Town's motion to dismiss the complaint and the owners appealed. The Second Department reversed and plaintiffs' complaint was dismissed for failure to obtain a final decision from the Town with respect to its land use application and thus their claims were not ripe for judicial review.

In reviewing plaintiffs' due process, equal protection and just compensation claims under the Fifth and Fourteenth Amendments of the U.S. Constitution, the court ruled that "such claims are not justiciable until the municipality has 'arrived at a definitive position on the issue that inflicts an actual and concrete injury.'"[12] The *Williamson* final decision test requires a landowner to obtain a final, definitive position from a local municipal agency regarding the precise use of the property in question, or the applicability of a local law or regulation to the property before bringing an action in court.

The Second Department also ruled that the plaintiffs did not demonstrate that continuing with the Town's application process would be futile due to alleged statements made by certain Town officials. The futility exception requires a plaintiff to demonstrate that the relevant decision making body either lacks the discretion to grant the necessary relief, or has "dug in its heels" and has unequivocally stated it will deny any application for relief; demonstrating that continuing with the municipal application process would be futile. In *Loskot-D'Souza*, the court ruled that the alleged statements made by unnamed Town representatives "do not demonstrate that the plaintiffs were unlikely to receive an unbiased review from either the Planning Board or the Board of Zoning Appeals."

IV. Conclusion

As more cases are filed alleging deprivation of Constitutional rights, State and Federal courts alike are applying *Williamson* to reject these claims on ripeness grounds, except in the most egregious situations. We expect continued litigation in this area as land owners seek to assert federally protected rights in local land use disputes.

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1. *Arrigoni Enterprises LLC v. Town of Durham*, 136 S.Ct. 1409 (2016).
2. 473 U.S. 172 (1985).
3. 136 S.Ct. 1409 (2016).
4. No. 14-CV-04951(JG)(SMG), 2016 WL 660884 (E.D.N.Y. Feb. 18, 2016) [hereinafter *Billy Dean*].
5. *Matter of Green 2009, Inc. v. Weiss*, 114 A.D. 3d 788 (2d Dept. 2014), *leave denied Green 2009, Inc. v. Weiss*, 23 N.Y.3d 903 (2014).
6. *Billy Dean*, 2016 WL 660884, at *14 (quoting *Williamson*, 473 U.S. at 191).
7. Id. at *16 (quoting *Murphy v. New Milford Zoning Com'n*, 402 F.3d 341, 351 (2d Cir. 2005)).
8. Id. at 17.
9. 752 F.3d 554 (2d Cir. 2014).
10. *Billy Dean*, 2016 WL 660884, at *21-22.
11. *Loskot-D'Souza v. Town of Babylon*, 2016 NY Slip Op. 01469 (2d Dept. Mar.2, 2016).
12. Id. (quoting *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 50 (1996)).