

NO. A08-143

State of Minnesota
 In Court of Appeals

Franklin Kottschade,

Appellant,

v.

City of Rochester,

Respondent.

 APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

- I. DID THE DISTRICT COURT FAIL TO VIEW THE RECORD EVIDENCE IN THE LIGHT MOST FAVORABLE TO PLAINTIFF/APPELLANT KOTTSCHADE, AND TO RESOLVE FACTUAL INFERENCES IN HIS FAVOR?

District Court: Resolved fact issues regarding the nature of the Common Council's action in favor of the City, the party that moved for summary judgment on jurisdictional grounds.

Grondahl v. Bulluck, 318 N.W.2d 240, 242 (Minn. 1982)

- II. DID THE DISTRICT COURT ERR IN HOLDING THAT KOTTSCHADE WAS BARRED FROM APPLYING FOR A VARIANCE OF CONDITIONS IMPOSED BY THE CITY COUNCIL ON A GENERAL DEVELOPMENT PERMIT, AND THUS THAT THE STATUTE OF LIMITATIONS FOR KOTTSCHADE'S FEDERAL TAKING CLAIM RAN FROM THE CITY'S IMPOSITION OF THOSE CONDITIONS RATHER THAN ITS DENIAL OF HIS VARIANCE APPLICATION?

District Court: Held that the City Council's July 5, 2000 action was a "final" action that ripened Kottschade's federal taking claim under the *Williamson County* finality doctrine, and that Kottschade had no right to seek a variance.

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985)

- III. DID THE DISTRICT COURT ERR IN HOLDING THAT, EVEN THOUGH THE CITY IMPOSED PERMIT CONDITIONS THAT MADE DEVELOPMENT IMPOSSIBLE, KOTTSCHADE NEEDED TO OBTAIN A "SUBSEQUENT DEVELOPMENT APPROVAL" WITHIN TWO YEARS OF THE CITY'S CONDITIONAL ACTION TO AVOID HIS FEDERAL TAKING CLAIM FROM BECOMING MOOT?

District Court: Held that Kottschade was obligated to obtain a subsequent development approval or start construction within two years of the City Council's action on GDP #151, and by not doing so his taking claim became moot.

STATEMENT OF THE CASE

This case is about the procedural maze a landowner must navigate to get a court to decide the merits of a federal claim for just compensation for a regulatory taking of property. This Court is not asked to decide the merits of this claim, but whether Franklin Kottschade will *ever* get those merits decided.

In July 2000, the City of Rochester Common Council approved a General Development Plan for the construction of residential townhomes on 16.4 acres adjacent to 40th Street S.W. and 11th Avenue S.W. In taking this action, however, the Council imposed approval conditions and demanded that Mr. Kottschade ("Kot-SHOD-ee") consent to a "Development Agreement" that would have made him responsible for more than \$2,000,000 of the cost of a regional, public transportation improvement plan that was not conceivably necessary to accommodate the off-site traffic impact of Kottschade's plan. In other words, the price of permission to build townhomes was Kottschade's acceptance of conditions and a contract under which he would convey to the City 17 feet of his property and a slope easement along more than 2,000 feet of frontage on the existing two-lane road, and then raise the elevation of his land by up to 20 feet, all so that the City (and the Minnesota Department of Transportation) could widen that existing public road to four lanes. The City and State made these demands even though the traffic impact of Kottschade's proposal was not even enough to warrant improving the existing two-lane road.

The City's conditions made residential development on the 16.4 acres physically and economically impossible. The conditions were an unconstitutional "exaction" from a private property owner of the cost of a public improvement, in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution. Exactions are not illegal *per se*. However, the U.S. Supreme Court has held that when government demands the dedication of land for a public use as a condition of private development, it must provide an "individualized determination" of the impacts of its demands on the landowner's plan,

and it must prove both an "essential nexus" and "rough proportionality" between the conditions it imposes and the development's impacts.

As required by federal takings jurisprudence known as the *Williamson County* "finality" doctrine, in September 2000, Kottschade applied to the Rochester Zoning Board of Appeals ("ZBA") for a variance from the conditions that he had identified as an unconstitutional exaction. After a hearing in October 2000, the ZBA denied the variance in November 2000. The ZBA disclaimed jurisdiction but decided the merits in the alternative. Kottschade then exercised his right of appeal of the ZBA decision to the Council, which affirmed the denial on January 3, 2001. The Council also addressed the merits in detail. It was *this* Council action that constituted the City's final exercise of discretion as to Kottschade's property and ripened Kottschade's federal taking claim.

Kottschade filed a Fifth Amendment taking claim in U.S. District Court in 2001. In 2003, the U.S. Court of Appeals for the Eighth Circuit affirmed a lower court ruling that Kottschade needed to bring his taking claim, albeit federal, in state court first. From 2003-06, Kottschade dealt with the Minnesota Department of Transportation and the City on several other fronts regarding his property and nearby tracts, but in December 2006, *within* the six-year statute of limitations measured from the Council's January 2001 action, refiled his taking claim in state court.

In response to Kottschade's state court claim, the City contended that its limitations on Kottschade's land had been complete, clear, and final when the City *first* approved the *conceptual* General Development Plan in July 2000. The City also asserted that the July 2000 permit had expired in 2002 because Kottschade had not obtained a subsequent development approval or actually started construction within two years of the City's July 2000 action on the GDP. The City argued that Kottschade's taking claim was moot and he had no standing to complain about the City's exactions.

The District Court accepted the City's arguments, granting summary judgment on jurisdictional grounds, that is, the statute of limitations and permit expiration, mootness, and standing.

This appeal, therefore, is not about the merits; Kottschade appeals from a trial court's jurisdictional dismissal, AA1.¹ The specific appeal issues are: (1) when Kottschade's taking claim became jurisdictionally ripe for adjudication and thus when Minnesota's six-year statute of limitations for taking claims started; and (2) whether Kottschade had to obtain a subsequent development approval within two years of the City's imposition of conditions to avoid the GDP from expiring, and whether the City's two-year ordinance superseded the statutory six-year limitation and rendered Kottschade's taking claim moot. Underlying both of these jurisdictional issues is whether the trial court properly applied summary judgment standards by viewing the record evidence in the light most favorable to Kottschade.

STATEMENT OF FACTS

The facts, set forth in public documents and exhibits contained in the record of this appeal and reproduced in the Appendix,² are undisputed.

A. The Subject 16.4 Acres; The City's Land Development Process.

Frank Kottschade has been a developer and home builder for more than 30 years. In 1992, he acquired an option to purchase, and in 1994 acquired the fee, to 16.4 acres of vacant land, the property at issue here. The property is rectangular, albeit with irregular east and south boundaries. It is located along the south side of 40th Street S.W. and the east side of 11th Avenue S.W. An illustrative map is at AA23.

¹ Olmsted County District Court, Third Judicial District, the Hon. Robert Birnbaum presiding.

² On AA23 and AA125-26, color and an explanatory label have been added for visibility and clarity.

During the 1990's, Kottschade proposed several development plans for the 16.4 acres and adjoining acreage, all of which were denied by the City. In 1998, he initiated a scaled-down plan of a residential townhome development on the 16.4 acres, at a density of 5.5 to 6.0 units per acre.

Land development in Rochester is governed by a Zoning Regulation and a Land Development Manual. AA24 (excerpts). These ordinances provide that the starting point for development is the landowner's preparation and filing of a General Development Plan ("GDP"). The GDP requires a zone change if the plan does not meet the requirements of the existing zoning. In a September 28, 2000 memo, AA44 (p. 2), the Rochester Planning Department described the conceptual and preliminary nature of a GDP:

A GDP is a concept plan for the future development of a property. Through the use of site plans and written materials, it serves as a guide to: the on and off site capital facilities required to meet the City's level of service standards for adequate public facilities; density; intensity; land uses; thoroughfare, pedestrian and bicycle ways; trails; parks; open space and future lot, street and drainage patterns. It is the intent of the General Development Plan requirement to insure that a landowner investigates the broad effects development of property will have not only on the site itself, but also on adjacent properties and the on-site and off-site public infrastructure system.

Because a GDP is merely a guide, once a zone change and a GDP have been approved, the City prepares a Development Agreement, which spells out the details of how the development must proceed. The Agreement, of course, is a negotiated document. If and when the City and the applicant implement the GDP by executing a Development Agreement, the applicant obtains a "subsequent development approval" – a more detailed approval known as Land Subdivision Permit – and begins construction. Rochester Ordinance § 61.216, provides that approval of a GDP shall remain valid "so long as the applicant receives a valid subsequent development permit within two years of the [GDP] approval."

B. The City's Imposition Of Conditions On GDP #151.

During the 1990's, the Minnesota Department of Transportation ("MnDOT") and the City developed a regional highway improvement plan. This was not a plan to serve Kottschade's property, but a plan that included an east-west thoroughfare that would serve the County and the region.³ That plan called for widening 40th Street S.W. for 1.25 miles, 2,340 feet of which encompasses the Kottschade's property, from a two-lane to a four-lane collector road, with the public right-of-way expanding from 50 feet to 100 feet. The regional plan also established the elevation of the widened road as higher than Kottschade's land – up to 20 feet higher at the western end of the frontage.

In February 2000, Kottschade applied to rezone the 16.4 acres from R-1 to a designation that permitted townhome development, and he submitted to the City a GDP application for a townhome development. AA63. These were not high-end townhomes, but to be built and priced for middle-income families. The City labeled the plan as GDP #151.

The City's Planning and Zoning Department reviewed Kottschade's rezoning application and in March 2000 recommended approval. AA63. With respect to the GDP, however, the City informed Kottschade that as a condition of building townhomes, he would have to convey to the City the acreage to widen 40th Street S.W. to four lanes and agree to raise the elevation of his land to match the regional, public improvement plan. Specifically, in March 2000, City staff informed Kottschade that he would be required to

³ In a June 15, 2000 memo, AA50 (p. 4), Rochester's Public Works Director Richard Freese explained why the City needed Kottschade to dedicate land: "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 However, the transportation system is currently inadequate to handle the projected traffic that *could result from the development of these large tracts of land.*" (Emphasis added.) Mr. Freese also explained that obtaining dedications now would avoid the City having to exercise eminent domain later (p. 5).

dedicate 17 feet of additional right-of-way along his entire 40th Street frontage, accommodate that widening with a slope easement, and fill and grade as necessary to achieve this. Id.

On May 10, 2000, AA67, the City's Planning and Zoning Commission recommended approval of GDP # 151 with eight conditions. In summary, these conditions, required Kottschade to:

- convey to the City enough of the 16.4 acres to allow for a 50 foot public right-of-way for 40th St. S.W. and 11th Ave. S.W.;
- build public sidewalks "consistent with the [City's] adopted Thoroughfare Plan";
- accept a "limited access" to the expanded collector road from his development [one entrance/exit];
- grade the property at his expense "compatible with the street profile and cross-section being proposed for the 40th St. S.W. reconstruction in the [City's overall] Street Layout Plan";
- pay the cash equivalent of a 1.7-acre parkland dedication requirement; and
- sign a "Development Agreement" with the City that would "outline the obligations of the applicant relating to, *but not limited to* [emphasis added], stormwater management, park dedication, traffic improvements, pedestrian facilities, right-of-way dedication, [sewer and water] fees and contributions for public infrastructure improvements, contributions for future reconstruction of 40th St. [S.W.]."

Id. During public hearings in June 2000, the Planning and Zoning Department recommended a ninth condition, requiring Kottschade's internal driveway to run parallel to 40th Street combined with the 50 foot right-of-way from the centerline of 40th Street. AA50.

C. Kottschade's Request For *Nollan/Dolan* Justification Of Proposed Conditions.

Kottschade protested the City's factual basis and legal authority to impose these conditions. Municipal, county, and state governments are allowed (assuming state or municipal law authorization) to impose exactions on private development; that is, they may require a private property owner to dedicate land to mitigate the impacts of a proposed development. The required dedication, however, must be based on an "individualized determination" of the impacts caused by the development, and then the government must prove both an "essential nexus" and "rough proportionality" – logic and balance – between the development's impacts and what the government exacts from the property owner. In takings law, this is known as the *Nollan/Dolan* doctrine, derived from *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In early 2000 Kottschade requested the City to provide him with "an individualized determination showing that the dedicated easement or contribution of money [reflected in the nine conditions] is related both in nature and extent to the impact of the proposed development." AA72. The Department of Public Works only responded that it needed 50 feet for "yet-to-be determined road upgrades," and that it was "impossible . . . to give you a definitive cost at this time for your share of the cost to improve 40th Street S.W." AA63. In June 2000, now faced with the City staff's formal recommendation, Kottschade again requested an "individualized quantitative analysis." AA73. On June 15, 2000, DPW produced a "Technical Report of Impacts of Proposed General Development Plan #151, AA50. The Technical Report merely cited the applicable ordinances, policies, and the regional transportation plan.⁴ It also contained substantial factual errors regarding traffic impact.

⁴ The City's staff purported to provide Kottschade with a calculation of "proportionality," but in doing so revealed its misunderstanding of exactions. In the

On July 5, 2000, the City's Council voted to impose the nine conditions. AA76. It is undisputed that this was the City's first, official regulatory action, and that the Council imposed overall limitations on the property, to be fleshed out in the Development Agreement, which Kottschade would then need to accommodate to obtain a subsequent development approval.

Kottschade then requested the Mayor veto the Council's action. The Mayor denied the veto request.

D. Draft Development Agreement.

In September, the City provided Kottschade with its draft Development Agreement. AA88. The Agreement contained the 17-foot dedication of right-of-way; agreement to reserve land for future acquisition or easements; agreement to a limited access onto 40th Street S.W.; grading "to match the proposed centerline profile and cross sections for the proposed reconstruction of 40th Street S.W. and 11th Avenue S.W."; agreement to construct any interim improvements that the City might require; a substandard street fee of \$30 per foot of roadway frontage along 40th Street S.W.; "capacity component charges"; and \$30,000 for stormwater management participation. The Development Agreement further required Kottschade to dedicate to the City two

(continued)

June 2000 Technical Report, the City asserted that the \$2 million in road improvement costs that it was imposing on Kottschade was proportional to the percentage of the anticipated Average Daily Traffic ("ADT") using 40th Street S.W. that would be generated by Kottschade's development plan. But the City's formula allocated a portion of the public, regional transportation plan without even examining whether the traffic from Kottschade's development *per se* even required any improvement to the existing two-lane road – which it did not. Kottschade's traffic engineer opined in an affidavit that Kottschade's townhomes would generate 609 trips per day, which the existing road would easily handle. A four-lane road is not necessary until ADT reaches 15,000 and two lanes can accommodate 10,000 trips. Existing traffic on 40th St. S.W. in 2000 was 1,713. Thus, the City and County were demanding that Kottschade pay for a public, regional traffic plan that bore no relation to his plan. Affidavits of Vernon Swing, P.E. and William Tointon, P.E., AA109-120.

ponds that, when linked together would create a 40-acre lake that would serve not only Kottschade's plan but also all "property upstream in the same drainage basin." Id. (¶¶ 3, 5).

E. Variance Application To ZBA; City Council Final Action.

As required by state law, Minn. Stat. § 462.354, AA99, Rochester has a Zoning Board of Appeals. The ZBA's jurisdiction is defined by statute – *not municipal ordinance* – and includes "requests for variances from the literal provision of the [city's land use] ordinance." *See* Minn. Stat. § 462.357, AA101. State law further provides that a landowner may not appeal a land use decision or action until he has exhausted administrative appeals. Minn. Stat. § 462.361, AA106. In addition, Minn. Stat. § 15.99, subd. 2 (AA107), the "60-Day Rule," requires the ZBA to act on a variance application or risk an automatic approval through nonaction. Rochester Ordinance 60.734, implements these state law directives, providing that an aggrieved person may appeal to the District Court only "[after] all administrative remedies and local appeals have been exhausted"

With the City's demands set forth in the nine conditions imposed on his conceptual plan, and details having been provided in the draft Development Agreement, and with state law and a local ordinance directing him to the ZBA for relief from the City's its ordinance as applied, Kottschade applied for a variance of the nine conditions. AA121.

The ZBA conducted a hearing on October 4, 2000. For the first time, Kottschade was able to quantify the impacts of the City's position.⁵ He testified that the cumulative effect of the nine conditions would be to:

⁵ That the conditions were not complete was not a bar to the variance application; rather, it was part of Kottschade's reason for seeking a waiver of all nine conditions. It was clear that the City was imposing conditions that made development physically and economically impossible, without complying with *Nollan/Dolan*.

- reduce the developable area to 4.9 acres;
- reduce the number of townhomes from 104 to 26;
- impose infrastructure and improvement costs of approximately \$2,300,000;
- increase the *per-unit* cost to comply with the permit conditions alone from \$22,378 to \$89,511;
- prevent the townhomes from being competitively priced in the Rochester market, where in the years 1999 and 2000 the average price was \$125,591; and
- delay construction until the State and City had finalized the design for 40th St. S.W.

AA122-32 (Affidavits of Vernon Swing, P.E. and William Tointon, P.E.); AA109-121.

For the ZBA hearing, Kottschade's engineer prepared "Before and After" illustrative maps, AA125 and AA126, showing how the combination of the land dedication, the slope easement, the limited access, the requirement of an internal driveway parallel to 40th Street S.W., and side, rear, and front setbacks combined to reduce the buildable area on the 16.4 acres to just a narrow linear strip totaling 4.9 acres. *See also* AA114-121 (Tointon). Kottschade also submitted a calculation of the financial impact of the conditions, AA127-28.

The ZBA denied the variance. AA129. The City then advised Kottschade that he had the right by City ordinance to appeal the denial to the Council, which he did. On January 3, 2001, the Council affirmed the denial. AA132. The Council's own Findings of Fact, Conclusions of Law, and Order contain an extensive discussion of the merits of the variance application. Id.

At this point, at the administrative level, for the first time, Kottschade had no other available options to have the City reconsider, rescind, or ameliorate the nine conditions.

On May 7, 2001, Kottschade served on the Mayor a demand that the City formally take the property by eminent domain and compensate him for it. AA152. The Mayor declined.

In summary, it is undisputed that (1) the Council first imposed the conditions at issue on July 5, 2000, when it issued GDP #151; (2) a GDP is a conceptual guide to future development, not a detailed site plan; (3) the City's July 2000 conditions were, on their face, incomplete and subject to further delineation in the Development Agreement, which the City provided to Kottschade *in draft* in September; (4) the full impact of the conditions on Kottschade's property *was not known until* the City proffered the Development Agreement; (5) a state statute expressly allowed Kottschade to seek relief from the conditions by applying to the Rochester Zoning Board of Appeals for a variance; (6) a statute required Kottschade to exhaust local administrative remedies before appealing to court; (7) Kottschade therefore applied for a variance; (8) Kottschade's first full delineation of the impact of the conditions occurred at the ZBA public hearing in October 2000; (9) the ZBA, though disclaiming jurisdiction, denied the variance on its merits; and (10) Kottschade appealed the denial to the Council, which affirmed the ZBA denial on January 3, 2001, addressing the merits in detail.

F. Kottschade's Federal Court Action.

Kottschade then filed a civil action in June 2001 in the U.S. District Court for the District of Minnesota. He alleged that the City's exactions imposed on GDP #151 violated the Takings Clause of the U.S. Constitution.

The City moved for summary judgment. The first line of its legal argument was: "[a] federal takings claim has never been an appropriate *first* response [original emphasis] to government conduct affecting property." The City went on to advise the court that "[An] owner must make every effort to obtain an 'authoritative determination of the type and intensity of development legally permitted on the subject property,'" citing *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). It then quoted

the holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) that municipalities must be given the opportunity "to exercise their full discretion in considering development plans for the property, *including the opportunity to grant any variances or waivers* allowed by law" (emphasis added). Nowhere in its 2001 brief did the City assert that its action was final under *Williamson County* as of July 2000; that Kottschade had no right to file the September 2000 variance application; or that Kottschade should have applied in the fall of 2000 for a GDP plan amendment.

The U.S. District Court dismissed the case, holding that Kottschade's claims were not ripe for adjudication because he had not first sued in the Minnesota state court system seeking payment of just compensation. The court did not reach the merits. The U.S. Court of Appeals for the Eighth Circuit while acknowledging *Williamson County* as a procedural anomaly in constitutional law, affirmed, *see Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003). The U.S. Supreme Court declined review, 540 U.S. 825 (2003).

As referenced earlier, from 2003-06, Kottschade was forced to confront other actions by the State and City with respect to the 16.4 acres, including further development of the State's regional plan for 40th St. S.W., the State's condemnation of adjacent or nearby parcels, and the City's attempt to impose special assessments on the 16.4 acres. On December 22, 2006, unable to wait any longer, Kottschade refiled his federal taking claim as directed by the federal Eighth Circuit, bringing this state court action.⁶

The City then moved for summary judgment on both jurisdictional grounds and the merits.

⁶ In 2005, in *San Remo Hotel L.P. v. City and County of San Francisco*, 543 U.S. 323 (2005), the U.S. Supreme Court held that state courts have original jurisdiction over federal Fifth Amendment taking claims.

G. State Court Action; Trial Court Dismissal.

The District Court's opinion, AA1, begins with a not-inaccurate summary of the undisputed facts, including some of Kottschade's efforts to develop the property prior to GDP #151; the City's staff's formulation of the permit conditions; Kottschade's protest that the conditions, especially the public transportation improvements, would make development economically impossible; the Council's July 5, 2000 adoption of the conditions; the draft Development Agreement; and Kottschade's variance application. Discussing the ZBA application, the decision refers to the September 28, 2000 memo from the City's Planning Department staff, AA44, – not a legal opinion from the City Attorney, but a planning staff memo – claiming that Rochester's Land Development Manual "provides only for the application for a variance to the provisions of the [manual]. It does not provide for . . . a variance to the conditions of approval." The court further quotes the staff: "[The] administration of the ordinance could be appealed to [a] higher administrative body and the appeal from an action or decision of the City Council would be to the District Court." Thus, the lower court quoted and relied on *an interpretation of a municipal ordinance by the City's non-lawyer planning staff* as authority for holding that the ZBA did not have the authority to vary conditions imposed by the Council on a GDP, and that Kottschade's only recourse after the Council's July 5, 2000 action was to appeal to the District Court.

The decision below then recounts the chronology of the ZBA denial, the Council's January 3, 2001 affirmation of that denial, and Kottschade's federal court action. The trial court notes that after the dismissal of the federal court action in 2003, "Kottschade did not develop his land in compliance with the permit and did nothing to challenge the nine conditions" until he refiled this action in state court in 2006. AA6-8.

On AA8-10, the lower court recites the standards for a summary judgment motion, including its obligation to view the evidence in the light most favorable to Kottschade.

Discussing the statute of limitations, the trial court first notes the agreement of the parties that the applicable statute is set forth in Minn. Stat. § 541.05, AA153, is six years, and that this limit was not suspended during the federal court action. AA11. The court then frames the issue as the City's claim that the Council's July 5, 2000 action was a final order, against Kottschade's claim that he had to exhaust all administrative remedies with the City before his claim ripened and the statute began to run, which occurred only when the Council affirmed the denial of his variance. "The City counters . . . that the fact that Kottschade filed a request for a variance is irrelevant because he did not have the right to do so under law. The pursuit of the variance was a futile procedure that was not required to ripen the claim. . . ." AA11.

The District Court then discusses *Williamson County's* holding that a taking claim is not ripe until the government "has reached a final decision regarding the application of the regulations to the property at issue," 473 U.S. at 186-87. It then correctly cites to *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001), in which the Supreme Court further explained *Williamson County*, holding that a taking claim is not ripe for adjudication until the property owner has "followed *reasonable and necessary* steps to allow regulatory agencies to *exercise their full discretion* in considering development plans for the property, *including the opportunity to grant any variances or waivers allowed by law*," AA12 (emphasis added). "As a general rule," said the lower court, "until these ordinary processes have been followed the extent of the restriction on property is not known" and a taking claim is premature. AA12.

Purporting to determine whether Kottschade had the opportunity and thus the obligation to apply for a variance, the trial court then quotes Rochester Ordinance § 60.734, AA12, which states: "After all administrative remedies and local appeals have been exhausted . . .," a property owner may appeal to court. The court then repeats the City's claim that a variance was non-existent. AA14.

Though dealing with federal constitutional law and its *sui generis Williamson County* administrative exhaustion requirement, the trial court, AA13, then turns to Minnesota administrative law, reciting Minnesota Supreme Court holdings that "Administrative remedies need not be pursued before litigation where such remedies would be futile. *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 72 (Minn. 1984)." It then adverts to the fact that the Rochester ZBA denied Kottschade's variance application on the ground that it had no jurisdiction, but in the alternative addressed the merits. AA13. The trial court then relies again on the City Planning Department's view that Rochester Ordinance § 60.410 did not permit Kottschade to obtain a variance, because that ordinance allows relief "from the ordinance," but not from permit conditions imposed by the Council. The trial court further notes that Kottschade's variance application did not cite a City ordinance section to be varied, but only referred to GDP #151 and its conditions. AA14.

The trial court then credits the City's position by noting that § 61.217 of the Ordinance allowed Kottschade to amend the GDP through a re-application to the Council. AA14.

The trial court then reverts to *Palazzolo's* holding that *Williamson County* requires the landowner to take "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion . . . , including to grant any variance on waivers *allowed by law*" (original emphasis). AA14. The court concludes: "In the instant case, the variance procedure was not one allowed by law . . . Pursuing the variance before the ZBA, which had no jurisdiction to consider it, was not an attempt to exhaust administrative remedies." AA14. The trial court concludes that the six-year statute of limitations thus expired on July 5, 2006, barring Kottschade's December 2006 refiling. AA15. The trial court, therefore, resolves the ZBA's jurisdiction without ever mentioning the state statutes governing the jurisdiction and authority of ZBA's; without any case citation as to ZBA jurisdiction; and by relying on an interpretation of municipal ordinances by non-lawyers.

The trial court then addresses the City's claim that the GDP had expired in July 2002 and thus the conditions had expired, Kottschade's claims were moot, and he had no standing. The court quotes Ordinance § 61.216, the two year "subsequent approval" provision. AA15. The trial court characterizes the City's position as: "A developer may ask the City Council for an extension on the time period for an approved Development Plan," but Kottschade did not do so. AA17. The court concludes: "[The City ordinance] is clear that a developer must do something to keep the GDP alive within a two-year period after it is approved. . . . [Kottschade] could have continued negotiations on the Draft Development Agreement He could have applied for whatever additional permit was required to actually begin construction." AA17. The court adds that, with GDP #151 expired, Kottschade would need to file again, and what conditions might be imposed this time were speculative. AA18. Thus, notwithstanding the six-year statute of limitations, the trial court decision holds that Kottschade's claim was extinguished two years after the July 2000 GDP. AA19-20.

In *dictum*, the trial court purports to address the merits of Kottschade's unconstitutional exaction claim under the *Nollan/Dolan* test. AA21. The court states that whether *Nollan/Dolan* is even applicable to this case is a factual issue not suited for resolution by summary judgment.

LEGAL ARGUMENT

I. STANDARD OF REVIEW: RIPENESS, MOOTNESS, AND STANDING ARE ISSUES OF LAW OVER WHICH THIS COURT'S REVIEW IS PLENARY.

Appellate review of whether a trial court applied proper summary judgment standards in the course of granting a motion is an issue of law. *See, e.g., STAR Centers Inc. v. Faegre & Benson LLP*, 644 N.W.2d 72, 76 (Minn. 2002).

The ripeness of a federal taking claim is an issue of law that is also reviewed *de novo*. See, e.g., *Brown v. City of Royal Oak*, No. 05-1238, 2006 U.S. App. LEXIS 26123, at *8 (6th Cir. 2006); *Gabhart v. City of Newport*, No. 98-6181, 2000 U.S. App. LEXIS 4146, at *5 (6th Cir. 2000) ("Ripeness is a determination as to subject matter jurisdiction."); *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 292 (5th Cir. 2006) ("Ripeness is a question of law that implicates this court's subject matter jurisdiction, which we review *de novo*").

Mootness and standing are jurisdictional and thus issues of law over which this Court's review is plenary. See, e.g., *Schiff v. Griffin*, 639 N.W.2d 56, 59 (Minn. App. 2002); *Isaacs v. American Iron & Steel, Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004).

SUMMARY OF ARGUMENT

Given the undisputed facts, under what is known as the "finality" requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), Kottschade's taking claim was *not* ripe for adjudication by a court *until* the Rochester ZBA denied Kottschade's variance request, *and* the Common Council denied Kottschade's appeal from that action. *Williamson County* and its progeny hold that a taking claim is not ripe for adjudication by any court unless and until the property owner has proposed a development plan and obtained the local government's full exercise of discretion as to what it will allow on the property by pursuing all available administrative avenues at the local level. Here, neither Kottschade nor the City knew the extent of the conditions and impacts until the draft Development Agreement was proposed. Neither Kottschade nor the City knew or could have known whether the City would persist with its conditions until Kottschade had calculated and presented his evidence about those impacts. Kottschade presented that evidence to the ZBA in October. Thus, the City's July 5, 2000 action was incomplete on its face and plainly not the City's full delineation of its position. And under state and local law, Kottschade had the *opportunity* to apply

for a variance, and therefore as a matter of federal law – *Williamson County* finality – he had the *obligation* to do so to ripen his claim.

The City Council's affirmation of the ZBA's denial of the variance on January 3, 2001 was the City's final position as to what development it would allow on Kottschade's property. Only at that point had Kottschade exhausted local administrative avenues, and only then did the statute of limitations commence.

The trial court declined to view the record evidence "in the light most favorable" to Kottschade. The July 2000 GDP, on its face and under the City's own ordinance, was a conceptual plan. Thus, the impacts of the nine conditions were not and could not have been known until the City proffered the Development Agreement in September. The impacts were not vetted publicly until the ZBA hearing in October. The trial court erred in holding that the City's July 2000 action factually defined the limits of what it would permit on the Kottschade property. The trial court also erred in not accepting Kottschade's factual claim that the GDP #151 conditions were so onerous as to make any subsequent development approval impossible.

The lower court also erred in holding that Rochester municipal ordinances barred Kottschade from seeking a variance of the permit conditions. The variance application was "allowed by law" and thus a required step for Kottschade. Minn. Stat. § 462.357(2), not Rochester's ordinances, establishes the jurisdiction of ZBA's, which includes relief from hardship resulting from the "literal provisions of [a city's] ordinance." As the City conceded in its summary judgment motion below, conditions imposed on a GDP *are an application of the City's land use ordinance*. Moreover, a state statute (§ 462.361) and a Rochester Ordinance (§ 60.734) prohibit any judicial appeal until administrative remedies have been exhausted. And it is axiomatic that administrative agencies must be provided an opportunity to determine their own jurisdiction before a court will review their actions. Kottschade had no basis in 2000 to bypass the ZBA. Under *Williamson County* and its

progeny, if a variance was *conceivably available*, Kottschade had to apply for one to ripen his federal taking claim.

The trial court misapprehended Kottschade's exaction claim, treating the City's July 2000 action as the issuance of a permit that Kottschade could build, and thus erroneously holding that Kottschade had an obligation within two years to file for and obtain a more detailed approval. But because the conditions made any development impossible, Kottschade had no ability after January 2001 to take his General Development Plan and make it more detailed. From January 2001 through 2006, Kottschade did not have a permit, but a violation of his federal civil rights and a lawsuit. The trial court holding is akin to holding that a victim must ask a tortfeasor to re-injure him within the limitations period or the victim's claim becomes moot. The trial court erred in depriving Kottschade of the six-year statute of limitations.

II. THE TRIAL COURT ERRED BY NOT VIEWING THE RECORD EVIDENCE IN THE LIGHT MOST FAVORABLE TO KOTTSCHADE.

The trial court did not adhere to summary judgment rules regarding the record evidence and factual inferences, and these errors played a key role in the trial court's erroneous jurisdictional dismissal.

On summary judgment, the district court must view the evidence in the light most favorable to the nonmoving party. *E.g., Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982); *Valletta v. Recksiedler*, 355 N.W.2d 314, 317 (Minn. App. 1984). "All doubts and factual inferences must be resolved against the nonmoving party." *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981).

Here, the district court resolved each factual matter implicated by the City's jurisdictional motion *in the City's favor*, to the point of distorting the legal analysis.

First, the trial court accorded the City the benefit of factual inferences regarding whether the Council's action of July 5, 2000 constituted "the exercise of full discretion" regarding what the City's regulatory agencies would allow on the Kottschade property.

The trial court gave no significance to the facts that (1) the July 5 action was the City's *first* official imposition of the permit conditions; (2) the July 5 conditions were, on their face, *incomplete* because they provided for the negotiation and execution of a Development Agreement that would contain details of the exactions and additional demands *that had not yet been identified*; (3) the extent of the conditions *did not become known* until the City provided the draft Development Agreement; and (4) Kottschade's first opportunity to evaluate the extent of the conditions and explain their impact on his property did not occur until he appeared at the October 4, 2000 ZBA public hearing. The record demonstrates that the Council's July 2000 action was simply not anywhere near a complete delineation of the City's intended limitations on the 16.4 acres.

The trial court also ignored the ZBA's conduct. The ZBA was required by the 60-Day Rule, Minn. Stat. § 15.99, subd. 2 to *process* Kottschade's variance application to avoid automatic approval, but the court disregarded the fact that reaching the merits as the ZBA did was *discretionary*. Kottschade was entitled to a factual inference that the ZBA concluded that the variance application was *potentially* within its jurisdiction.

In addition, although the trial court, AA6-7, listed the physical and economic impacts of the permit conditions as Kottschade explained them at the ZBA public hearing (units reduced from 104 to 26, infrastructure/improvement costs of \$2.3 million, per unit cost increase of 400 percent, costs that would not allow competitive pricing), it declined to provide Kottschade with the inference that these conditions made further steps toward development pointless. Kottschade was entitled to an inference that the permit, as conditioned, provided *no rights or ability to proceed with further permitting or any aspect of construction*. Had the trial court viewed this evidence in the light most favorable to Kottschade, it would not and could not have concluded that what the City issued to Kottschade in July 2000 was a "permit" that gave him any rights, any reason to preserve the permit, or any basis for spending time and money on a subsequent development approval or starting construction.

The City also argued below that Kottschade's only recourse from the Council's July 2000 imposition of conditions was to reapply to the Council itself to amend the GDP. But the facts are that a permit holder only applies for an amendment if he intends *to alter the plan itself*, as opposed to seeking relief from conditions; and at no time in 2000 did the City direct Kottschade, when he challenged the conditions, to apply for a plan amendment. The trial court was thus obligated to conclude that in 2000, the City itself did not consider a plan amendment as the next required or available step when the issue was the legality and impact of the permit conditions. The trial court ignored the City's own conduct in analyzing the legal options available to Kottschade at that time.

The trial court thus distorted the analysis of the two substantive legal issues by giving the City the benefit of factual inference as to (a) when its action became final and (b) the nature of its conditions.

III. KOTTSCHADE'S TAKING CLAIM FIRST BECAME RIPE WHEN THE COUNCIL AFFIRMED THE ZBA'S DENIAL OF HIS VARIANCE APPLICATION, AND THUS KOTTSCHADE FILED WITHIN THE STATUTE OF LIMITATIONS.

The parties agree that takings claims brought in Minnesota courts are subject to a six-year statute of limitations, Minn. Stat. § 541.05, AA153, which begins to run upon accrual of the cause of action. *See Beer v. Minn. Power & Light Co.*, 400 N.W.2d 732, 736 (Minn. 1987).

A. The U.S. Supreme Court's "*Williamson County* Finality" Rule Of Ripeness For Taking Claims.

1. *Williamson County*.

In *Williamson County*, 473 U.S. 172 (1985), the Supreme Court held that a taking claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. In that case, after the county had approved a preliminary plat for a

residential subdivision, it amended its subdivision regulations so as to make the preliminary plat non-compliant and impossible to build. *See id.* at 178. The property owner raised eight objections to the application of the revised regulations to his property. The landowner then brought a taking claim against the regulation changes, without first seeking variances. *Id.* at 175-76.

The Court determined that a final decision had not been made and the landowner's claim was not ripe. *Id.* at 188. It noted that a variance was available from the zoning board of appeals. *Id.* "Resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed." *Id.* at 193.

The Supreme Court explained that the existence of a final decision is critical because, in determining whether government regulation constitutes a taking for the purposes of the Fifth Amendment, a court must consider the extent of the impact of the challenged action. *Id.* at 191. A final agency decision, therefore, is required so that there will exist "a final, definitive position regarding how [the agency] will apply the regulations at issue to the particular land in question." *Id.*

In formulating this finality requirement, the Court distinguished between whether the governmental decision-maker(s) had arrived at a definitive position as to the scope of its regulation of the limits on the use of the property, and procedures by which an injured party "may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* at 193. Thus, to satisfy Williamson County and ripen a taking claims, a property owner must pursue all available local avenues for determining the scope of *what* the government will let him build, but need not exhaust review of the legality of that action. *See id.* at 186-93.

2. Later Supreme Court cases.

The Supreme Court applied *Williamson County* in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986). The county affirmed the Planning Commission's

rejection of a landowner's one submitted subdivision plan. *Id.* at 342. The Court held that, because only one development plan had been submitted and denied, the landowner had failed to satisfy the requirements of *Williamson County*. *Id.* at 351. Indeed, the Court found that the possibility existed that "some development will be permitted." *Id.* at 351-52. The record indicated that there remained the possibility that further development would be permitted, and thus the Court was left "in doubt regarding the antecedent question whether appellant's property has been taken." *Id.* at 352. The Court noted, however, that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final decision]." *Id.* at 350, n.7.

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736-37 (1997), the Court confirmed that a claim is not ripe where there exists even the possibility of a variance or other administrative remedy which would permit development according to the applicant's original specifications. "Where the regulatory regime offers the *possibility* of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim." *Id.* (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 297 (1981) (original emphasis)). On the other hand, *Williamson County* does not require a landowner to take additional steps when it is clear that an agency or municipality has no further discretion or control over the landowner's use of the property in question. 520 U.S. at 739.

In *Palazzolo v. Rhode Island*, 533 U.S. 606, 609 (2001), the Court reiterated that "A takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law."

Summarizing *Williamson County* finality: To ripen a taking claim, a landowner must make an application to every local agency that possibly has the authority to exercise discretion over a development plan and to provide relief from a regulation or condition alleged to be a regulatory taking. This obligation expressly includes variances. The only steps not required are remedial appeals, piecemeal litigation, and unfair procedures.

3. Federal Circuit decisions.

The federal appeals courts have consistently held that a property owner, in order to ripen a taking claim, must seek a variance from the regulations or conditions of which she complains.

In *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269, 1273 (8th Cir. 1994), the court confirmed that *Williamson County* finality applies to permit conditions. The county required the developer to make provisions for the disposal of stormwater as required by local regulations. *Id.* at 271. The developer sought hardship relief from the regulations. *Id.* The county determined that, while the developer ultimately only needed to pay a proportionate share of the costs of the drainage system, it must pay the entire cost upfront and then seek reimbursement. *Id.* at 271-72. The Eighth Circuit determined that, although this case involved a conditional approval of a development plan rather than a denial, "the same kind of finality requirements applied to the property at issue." *Id.* at 1273.

Federal circuit court cases are uniform that if a variance is potentially available, which is something that cannot be determined without an application, the property owner must apply. The Sixth Circuit has held that when there is any possibility of administrative relief, the developer must pursue it in order to ripen a Fifth Amendment taking claim. *Gabhart v. City of Newport*, No. 98-6181, 2000 U.S. App. LEXIS 4146, at *8 (6th Cir. 2000). *Gabhart* held that when a landowner is faced with permit conditions, the landowner must pursue a variance from the regulations or ordinances on which the conditions are based. *Id.* at *8. The landowner submitted a subdivision plan,

which the Planning Commission approved and recorded. Id. at *2. Later, the landowner arranged to auction off the subdivided lots. Id. at *2-3. However, the City Attorney intervened and told the auction company that the auction would be halted if the landowner either did not pave a gravel road that ran through the subdivided plots or refused to pay a cash bond in lieu of paving the road. Id. at *3. The landowner then filed his claim, in the form of a permanent injunction, in the federal district court. Id. The Court held that the "City's decision is not final because [the plaintiff] has failed both to submit his plat to the . . . Planning Commission and to seek a variance from the regulations." Id.

The Second Circuit has explained the purposes which underlie the *Williamson County* ripeness requirement:

First, . . . requiring a claimant to obtain a final decision from a local land use authority aids in the development of a full record Second, and relatedly, only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel Third, a variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes Finally, since *Williamson County*, courts have recognized that federalism principles also buttress the finality requirement. Requiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.

Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 348 (2nd Cir. 2005). The court went on to state that, "[I]n sum, absent a futility or remedial finding, prong-one ripeness reflects the judicial insistence that a federal court know precisely how a property owner may use his land before attempts are made to adjudicate constitutionality of regulations purporting to limit such use." *Murphy*, 402 F.3d at 349. As such, where a landowner may be able to obtain a variance and the landowner fails to submit a variance application, that landowner's taking claim is not ripe. *See id.* at 353. The court in *Murphy* stated that until the variance and appeals process "is exhausted and a final, definitive decision from

local zoning authorities is rendered, [a] dispute remains a matter of unique local import over which [the judiciary] lack[s] jurisdiction." *Id.* at 354.

In *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998 (7th Cir. 2004), the Seventh Circuit underscored that *Williamson County* requires an application if there is any possibility of administrative attention or relief. Sprint sued in federal court before seeking a special use permit to construct its antenna. *Id.* The Court reasoned that, "until Sprint is told definitely whether or not it is permitted to install an antenna and equipment shelter, it is mere speculation of whether it even has an injury to complain of." *Id.* at 1004. Sprint argued "that it would be futile to go back to the zoning board because [Sprint] is not eligible for a special use permit or subdivision plat approval." *Id.* But the Court rejected this argument and held that "[t]hese are precisely the types of issues *that should be presented first to the local land use authority. . . .*" *Id.* at 1004 (emphasis added).

Other federal circuit decisions holding that a variance application is necessary to establish *Williamson County* finality include: *Urban Developers, LLC v. City of Jackson*, 468 F.3d 281 (5th Cir. 2006); *Sameric Corporation of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582 (3rd Cir. 1998); *Robert Childers Co. v. County of San Diego*, 1991 U.S. App. LEXIS 10364 (9th Cir. 1991).

4. Minnesota case law adopts *Williamson County* finality.

Consistent with *Williamson County*, this Court, under state law, has held that a takings claim "cannot be evaluated until after a final application of the regulations to the land in question." *Thompson v. City of Red Wing*, 455 N.W.2d 512, 516 (Minn. App. 1990). Thus, the Minnesota courts have imposed a finality requirement parallel to that of *Williamson County*.

In *Wheeler v. City of Wayzata*, 511 N.W.2d 39 (Minn. App. 1994), this court held that, in order "to establish that a zoning regulation constitutes a taking, the landowner bears the burden of showing not only that all primary uses are unreasonable, but also that

no reasonable secondary use (one permitted by special use permit or variance) is available." In that case the claimant had not applied for a conditional use permit, nor commenced the reclassification application process to build according to its original specifications, despite the adverse zoning regulations. *Id.* at 42-43. This court determined that, because the claimant had not applied for and been denied a variance and had not attempted to modify the zoning specifications, there did not exist a final decision from which to seek review. *Id.* at 43. Furthermore, the court rejected the claimant's argument that seeking a variance or applying for rezoning would be futile based upon a statement by the city manager that the city "does not want any development of the property. . . ." *Id.*

Other Minnesota state decisions are in accord. See *Unger v. County of Dodge*, 2007 Minn. App. Unpub. LEXIS 1033, at * (Minn. App., Oct. 16, 2007) (unpublished) (AA158); *Hunkins v. City of Minneapolis*, 508 N.W.2d 542, 544 (Minn. App. 1993); *Hay v. City of Andover*, 436 N.W.2d 800, 804 (Minn. App. 1989).

B. Kottschade's Taking Claim Was Not Ripe Until The Council Affirmed The ZBA's Denial Of His Variance Application.

Williamson County and its progeny set forth two requirements for taking claim finality: (1) an administrative record demonstrating that all government agencies have been given the opportunity to exercise discretion and state their position specifically, so as to allow a court to determine regulatory impacts; and (2) evidence that the property owner, as a matter of law, has pursued all available administrative avenues. Both are mixed issues of law and fact, but the first is more fact-dependent and the second focuses primarily on the availability of an administrative remedy under state law.

1. On its face, the City's July 5, 2000 action did not constitute the full exercise of the City's discretion concerning Kottschade's development.

The City's July 5, 2000 action plainly fails the first criterion because the GDP, by the City's own admission, was conceptual, a "guide" to future development of the property; and the nine conditions were incomplete both as to the details of the types of exactions demanded and what was to be exacted. The July 5, 2000 action was the City's "final" action *with respect to formulating the nine conditions, but it was neither final nor complete with respect to the resulting, overall limitations on the Kottschade property,* nor did it represent the full input of the City's land use agencies with respect to development of the 16.4 acres.

Here, had Kottschade not sought a variance, the district court reviewing the merits would have been unable to effectively evaluate Kottschade's exaction claim because it would not know which permit conditions might have been relieved or altered by the ZBA. The Council's July 2000 decision approving Kottschade's development plan with nine conditions did not make clear the extent of permissible development. Only the ZBA action and the City Council's affirmation did.

Thus, the City's July 2000 action was not qualitatively a final action under federal takings jurisprudence.

2. Minn. Stat. § 462.357 allowed a variance and § 462.361 required exhaustion of administrative remedies, and thus under *Williamson County* Kottschade was required to apply for such a variance.

The City of Rochester's effort to establish a statute of limitations defense by arguing that Kottschade was barred by local ordinance from seeking a variance is unprecedented, unique, and bizarre. Indeed, the appellant has found no other case in which a municipal defendant in a takings case has tried to impose a statute of limitations defense by arguing that its *initial* regulatory action was a ripening action under *Williamson County*. The federal reporters teem with cases where municipal governments

have sought dismissal by arguing that a taking is not ripe for lack of finality, but none in which has argued that its very first action created a ripe regulatory taking claim.

The takings claim in *Williamson County* was not ripe because the landowner "did not seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations." 473 U.S. at 187. The Court determined that the municipal body's "refusal to approve the preliminary plat does not determine [whether the landowner has been denied all reasonable beneficial use of the property]; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances." *Id.* at 193.

As noted above, *MacDonald*, *Suitum*, and *Palazzolo*, and federal court decisions, make it clear that applying for a variance is governed by a minimal standard.

The trial court, relying exclusively on non-lawyer staff's interpretation of a City ordinance, held that the variance procedure "was not one allowed by law." The lower court decision does not even mention the state statutes that establish ZBA jurisdiction, nor any case holding that a permit condition (in Rochester or anywhere else in Minnesota) cannot be appealed to the ZBA. The opinion below does not mention this court's own state law decisions that require the equivalent of *Williamson County* finality, including variance applications. Finally, the decision below does not explain how the action of the ZBA and the Council in reviewing a ZBA decision do not constitute the further exercise of local discretion regarding the Kottschade property, and it ignores the ZBA's and the Council's discretionary decision to address the merits of Kottschade's variance application.

In the face of these material omissions in the trial court's analysis, it is important to point out that Kottschade's variance application was *expressly* allowed by state statute, and thus *Williamson County* required Kottschade to pursue it to ripen his claim.

"Minnesota municipalities with zoning ordinances are required by statute to provide for a board of appeals and adjustments to hear requests for zoning variances." *City of Greenwood v. Plowman*, No. C1-95-1498, 1996 Minn. App. LEXIS 371, at *9 (Minn. App. 1996) (unpublished) (AA154). The duties and obligations of the Rochester Zoning Board of Appeals are dictated by Minn. Stat. §462.354 and § 462.357, subdiv. 6, (2), AA99 and AA101, which state that boards of appeal have the power "[t]o hear requests for variances from the literal provisions of the ordinance in instances where their strict enforcement would cause undue hardship because of circumstances unique to the individual property under consideration, and to grant such variances only when it is demonstrated that such actions will be in keeping with the spirit and intent of the ordinance." While a board of appeals, as a city agency, is created by local ordinance, *its powers are set by state statute*. Municipalities, by ordinance or interpretation, may not constrain the scope of jurisdiction granted by state statute. *See Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 815-16 (Minn. 1966); *see also State v. Kuhlman*, 729 N.W.2d 577 (Minn. 2007); *State v. Burns*, 2007 Minn. App. Unpub. LEXIS 257 (Minn. App. 2007).

The next issue that arises is whether Kottschade's exaction claim implicates "the literal provisions of the ordinance." While arguing the merits of *Nollan/Dolan* in its summary judgment motion below, the City expressly stated: "Because Kottschade's claims involve a 'challenge to a citywide, legislative land-use regulation, Dolan's 'rough proportionality' test does not apply.'" City's Memorandum, July 30, 2007, at 22. In other words, arguing that its exactions were substantively proper, the City's position was that it was simply *applying its ordinance*. Put another way, the GDP #151 conditions are in fact the city's ordinance as applied to Kottschade's property.

Kottschade's decision to seek a variance was also informed by Minn. Stat. § 461.354 and its municipal counterpart, § 60.734, both of which contain a blanket

exhaustion of remedies prerequisite to court action. The trial court assumed, with no factual or statutory basis, that Kottschade was authorized to ignore these directives.

Contrary to the trial court's acceptance of the non-legal opinion of the City's non-lawyer staff that the ZBA could not alter a permit condition imposed by the Council, the appellant respectfully directs this court's attention (in addition to the incompleteness of the Council's July 2000 action), to the state statute on ZBA jurisdiction, the state statute and local ordinance requiring exhaustion, the ZBA's decision on the merits, the Council's decision on the merits, and the City's concession that GDP conditions apply the ordinance. The trial court failed to consider these matters in its analysis.

3. Administrative agencies must be given opportunity to decide their own jurisdiction; it may not be assumed.

In addition, Kottschade did not have the option to assume that the ZBA did not have jurisdiction because it is a well-established principle of administrative law that agencies should, in the first instance, be allowed to determine the reach of their own jurisdiction. *See Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57-58 (1938); *West v. Bergland*, 611 F.2d 710,719 (8th Cir. 1979); *Sprint Spectrum*, 361 F.3d at 1004; *Deltona Corp. v. Alexander*, 682 F.2d 888, 893 (11th Cir. 1982); 2 AM. JUR. 2D Administrative Law § 284 (2004) ("If a statute authorizes an administrative agency to act in a particular situation, it necessarily confers upon the agency authority to determine whether the situation is one in which the agency is authorized to determine the coverage of the statute – a question that cannot be initially decided by the court."). Indeed, there is a strong government interest in having agencies "perform functions within [their] special interest," one of which is to "resolv[e] disputes concerning the meaning of the agency's [own] regulations." *West*, 611 F.2d at 715. The court in *West* held that, where a dispute over agency jurisdiction over a particular adjudication requires the determination of intricate questions of fact and/or the

interpretation of agency regulations, the question of agency jurisdiction is better left with the agency. *See id.* Kottschade had to adhere to this principle.

4. The trial court erred in treating Kottschade's variance application as an issue of futility under state law of exhaustion of remedies, and deferring to the City's staff.

The trial court erred in one other respect, when it analyzed Kottschade's opportunity and obligation to comply with *Williamson County* finality by reviewing Minnesota state law of exhaustion of remedies. The Sixth Circuit, in *Bowers v. City of Flint*, 325 F.3d 758 (2003), differentiated exhaustion of remedies from finality:

Exhaustion, the Supreme Court has held, "generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate," and is not required before a plaintiff may bring a suit predicated upon 42 U.S.C. § 1983. [*Williamson County*, 473 U.S. at 193.] Finality, on the other hand, "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"

Id. at 762. *Williamson County* and its progeny establish a procedural requirement for the ripening of a federal Fifth Amendment taking claim. The obligation is shaped by the predicates of a taking claim, that is, the need for a complete determination of government's restrictions on the use of a particular parcel of land. As discussed above, the plaintiff's obligation is to apply to all local agencies that conceivably exercise discretion over the use of that property. Thus, under *Williamson County* cases, whether a further application for a permit or variance is necessary depends on whether a particular agency has any remaining authority or discretion over development of the land at issue. A landowner who claims that an application to an agency would be futile as part of ripening a taking claim faces a rigorous standard, because the standard is whether there is any possibility of relief. *See Suitum*, 520 U.S. at 736-37.

The trial court here analyzed Kottschade's attempt to seek a variance under state law of exhaustion of remedies. It held that Kottschade was authorized by local ordinance

to proceed to District Court review of the conditions, and as to availability of a variance, deferred to the ZBA staff's view of its jurisdiction under local ordinances. ("It is instructive that the ZBA told Kottschade that it lacked jurisdiction . . .") Thus, the trial court did not address whether state statutes provided a conceivable opportunity to apply for a variance and whether a variance proceeding would further shape the City's position. Instead, it relied solely on the mere availability of judicial review and on whether the ZBA's non-lawyer staff thought they had jurisdiction based on City ordinances. Thus, the trial court looked to the wrong law and relied on an uninformed interpretation.

5. The trial court erred in its statute of limitations analysis.

Factually, the City's July 5, 2000 action was not a full or nearly-full delineation of its limits on the subject property. The factual record was developed in October before the ZBA. For several legal reasons explained above, a variance application was possible, and thus, it was required. The City did not finish its work on Kottschade's property until the City Council affirmed that it would not alter the ZBA's refusal to ameliorate or extinguish the permit conditions, and that occurred on January 3, 2001.

IV. THE TRIAL COURT ERRED IN CONCLUDING THAT KOTTSCHADE'S TAKING CLAIM BECAME MOOT BECAUSE HE DID NOT OBTAIN A SUBSEQUENT DEVELOPMENT APPROVAL WITHIN TWO YEARS OF THE CITY'S ACTION ON GDP #151.

The trial court's opinion on "Standing and Mootness" is plainly incorrect. The court, AA19-20, held that Kottschade's federal taking claim was moot because he failed to obtain a subsequent development approval or to commence a state court action challenging the City's conditions within two years of their imposition. But the statute of limitations is six years, and Kottschade was not able to seek a further approval.

As discussed earlier, the lower court's opinion appears to regard the City's action (without regard to when it became ripe for adjudication) as a permit that allowed Kottschade to commence construction at his convenience, as opposed to an action that

not only violated the federal Bill of Rights but prevented Kottschade from doing anything other than bringing a lawsuit to challenge an illegal exaction. Kottschade was entitled to the factual inference that the City's action provided no basis to proceed with GDP #151 and thus no reason to preserve or extend it.

The only right that needed to be preserved was the right to sue, and that right, whether pursued in a state or federal court, had only to be exercised within six years.

The trial court also erred in stating that it was "speculation for Kottschade to assert his property will have the same nine conditions placed upon it if he were to re-file a GDP application." That is not only a factual inference in the City's favor but one with no basis in the record of this case. The record contains no facts as to how City ordinances or their interpretation by City staff may have changed.

V. CONCLUSION.

For these reasons, plaintiff/appellant Kottschade respectfully requests that the District Court's holding be reversed, and this action be remanded and restored to the docket.

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