

Case No. A08-143

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

**Franklin Kottschade,**

*Appellant,*

v.

**City of Rochester,**

*Respondent.*

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**BRIEF OF RESPONDENT CITY OF ROCHESTER**

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## STATEMENT OF THE ISSUES

1. In July 2000, the City Council approved Kottschade's development plan subject to conditions. Kottschade initiated this lawsuit in December 2006, challenging those conditions as "unconstitutional" exactions. Does the six-year statute of limitations bar Kottschade's claim?

The district court held that the six-year statute of limitations bars Kottschade's lawsuit because his claim accrued when the City approved the development plan with conditions.

Apposite Legal Authorities:

*Dolan v. City of Tigard*, 512 U.S. 374 (1994)

*Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)

*McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997)

*Rocky Mountain Christian Church v. Board of County Com'rs. of Boulder County, Colo.*, 481 F.Supp.2d 1213 (D. Colo. 2007)

2. After the City Council had approved Kottschade's development plan subject to conditions, Kottschade submitted a "variance" application to the Zoning Board of Appeals, asking that the conditions "be waived." The Zoning Board of Appeals lacked legal authority to waive the conditions that the City Council had imposed. Did the "variance" application delay the running of the six-year statute of limitations?

The district court held that the six-year statute of limitations bars Kottschade's lawsuit because his claim accrued when the City approved the development plan with conditions, and not after Kottschade pursued a "variance" application that was unauthorized by law.

Apposite Legal Authorities:

*Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984)

*Hay v. City of Andover*, 436 N.W.2d 800 (Minn. App. 1989)

*Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)

*Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005)

3. The City's approval of a development plan expires by operation of ordinance if certain action does not occur on it for any two-year period. After the City Council approved Kottschade's development plan subject to conditions in July 2000, no action on it occurred for more than two years. Kottschade bases his lawsuit on the plan approval with conditions that expired under the ordinance. Does a justiciable controversy exist, and does Kottschade have standing?

The district court held that, since the plan approval with conditions expired by operation of the ordinance, no justiciable controversy exists, the claim is moot, and Kottschade lacks standing.

Apposite Legal Authorities:

*Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996)

*Rice Lake Contracting Corp. v. Rust Env't. & Infrastructure, Inc.*, 549 N.W.2d 96 (Minn. App. 1996)

*Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13 (Minn. App. 2003)

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**STATEMENT OF THE CASE**

When Kottschade's "Statement of the Case" purports to describe circumstances other than the disposition of "the Case" as required by Minn. R. App. P. 128.02, it mischaracterizes those events and their legal effect. Those errors are corrected below.

On December 22, 2006, Franklin Kottschade brought an inverse condemnation claim against the City of Rochester, alleging that the City's approval of his proposed development plan with conditions amounted to an unconstitutional taking of his property without just compensation. On August 28, 2007, the Honorable Robert Birnbaum, Judge of Olmsted County District Court, Third Judicial District of Minnesota, heard the City's Motion for Summary Judgment. On November 21, 2007, the district court issued an

order granting the City's motion and dismissing Kottschade's complaint. Kottschade then initiated this appeal.

### STATEMENT OF FACTS

**A. Kottschade owned 218 acres of land, and he decided to pursue developing a 16.44-acre site with "low density residential dwellings."**

Kottschade owned 218 acres of land that he decided to develop in segments. Kottschade had acquired the 218 acres in 1993, and he subsequently determined that a 16.44-acre site north of Willow Creek was suitable for separate development. (RA76; RA83-84.) That site is an elongated, rectangular shape with irregular east and south boundaries, located along the south side of 40th Street SW, east of 11th Avenue SW, City of Rochester, Minnesota. (Compl. ¶ 8.) The site rapidly slopes down from 40th Street SW to Willow Creek. (*Id.*)

In February 2000, Kottschade submitted to the City an application proposing to develop the 16.44-acre site with "low density residential dwellings" along the south side of 40th Street SW and east of 11th Avenue SW. (RA01.) At the same time, Kottschade also applied to the City for re-zoning of the 16.44-acre site to accommodate a townhouse development. (Compl. ¶ 10.) Kottschade's development application was called General Development Plan No. 151 ("the Plan"). (RA01.)

During preliminary discussions with Kottschade about the Plan, City staff informed him that they would recommend approval of the Plan subject to conditions. (RA85.) City staff recommended in a memo dated March 17, 2000 that Kottschade's 16.44-acre site be rezoned to allow the development. (Compl. ¶ 11.) City staff also

recommended conditions of approval for the Plan. Those conditions addressed the need for facilities and design necessities concerning issues such as vehicular and pedestrian traffic, storm water management, infrastructure improvements, and parkland arrangements.

**B. In March and April 2000, the City's Planning and Zoning Commission held public hearings about Kottschade's proposed development Plan and City staff's recommended conditions for it.**

Months before the matter finally reached the City Council for a decision, the City's Planning and Zoning Commission held multiple public hearings about Kottschade's Plan and City staff's recommended conditions. (AA76.) At a public meeting on March 22, 2000, the Planning and Zoning Commission considered the Plan and the conditions that City staff recommended for the Plan. (RA03.) Kottschade's legal counsel explained concerns that Kottschade had about some of the conditions. (RA05-07.) For example, he objected to the condition requiring Kottschade to dedicate 50 feet of right-of-way, and stated that Kottschade was "being asked to dedicate more than what is needed." (RA06.) At another public meeting on April 26, 2000, the Planning and Zoning Commission further considered the conditions that City staff recommended for the Plan. (RA14.) And again, Kottschade's legal counsel expressed Kottschade's position with respect to the conditions. (RA14-17.) He specifically objected to the condition requiring Kottschade to dedicate 50 feet of right-of-way. (RA15.) Kottschade wanted to dedicate only 41 feet. (*Id.*)

**C. In May 2000, the City's Planning and Zoning Commission recommended approving Kottschade's Plan subject to conditions.**

At a public meeting on May 10, 2000, the Planning and Zoning Commission again considered Kottschade's Plan and rezoning request. The Planning and Zoning Commission recommended approval of rezoning the property from R-1 to R-2 low-density residential. (RA21.) The Planning and Zoning Commission also recommended approval of Kottschade's Plan subject to eight conditions. (RA23-24)

During the Planning and Zoning Commission's meeting on May 10, 2000, Kottschade's legal counsel raised concerns about some of the conditions. (RA22-23.) For instance, Kottschade wanted his Plan approved with just 41 feet dedicated for the right-of-way, rather than 50 feet. (*Id.*) Kottschade had the opportunity to explain his objections to the conditions before the Planning and Zoning Commission. (*Id.*) After hearing Kottschade's objections, the Planning and Zoning Commission nevertheless decided to endorse the conditions. (RA23.)

In June 2000, City staff recommended adding a ninth condition to the Plan. (Compl. ¶ 15.) City staff also prepared a 13-page Technical Report detailing the impacts of Kottschade's proposed Plan on the City's infrastructure. (AA50-62.) For instance, the Technical Report explained why the amount of right-of-way dedication required from Kottschade did not exceed the amount of right-of-way needed to accommodate the amount of traffic that would be generated by Kottschade's development Plan. (*Id.*)

**D. On July 5, 2000, the City approved Kottschade's Plan with nine conditions.**

The City Council held an initial public hearing on June 5, 2000 concerning the Plan and the conditions. (RA25.) That public hearing was continued. At another public hearing on June 19, 2000, the City Council resumed its consideration of the Plan and the Planning and Zoning Commission's findings from the public hearings held on March 22, 2000, April 26, 2000, and May 10, 2000. (RA25.)

Kottschade's legal counsel spoke at the City Council's hearing on June 19, 2000. He "entered a general objection to each and every one of the conditions of approval recommended by the Planning and Zoning Commission." (RA32) Kottschade's legal counsel asked the City Council to approve the Plan "without the imposition of any conditions." (RA33)

On July 5, 2000, the City Council approved the Plan subject to nine conditions. (RA36) Those nine conditions addressed the need for the developer to provide for facilities and design necessities concerning issues such as vehicular and pedestrian traffic, storm water management, infrastructure improvements, and parkland arrangements. The nine conditions in the City Council's order dated July 5, 2000 read as follows:

- 1) The GDP should be revised to include the following:
  - 50 feet of right-of-way shown as being dedicated for 40<sup>th</sup> Street S.W., and 11<sup>th</sup> Avenue S.W., consistent with the adopted Thoroughfare Plan;
  - Pedestrian facilities along the east side of 11<sup>th</sup> Avenue S.W., and the south side of 40<sup>th</sup> Street S.W., consistent with the adopted Thoroughfare Plan;

- The site details (haul roads, stockpiles, proposed excavated ponds) of the approved conditional use permits covering this property and the adjacent properties;
- 2) Stormwater management must be provided for this development.
  - 3) Controlled access must be provided along the entire length of 40<sup>th</sup> Street S.W., with the exception of the private street access that is shown across from Willow Heights Drive S.W., and along 11<sup>th</sup> Avenue S.W., with the exception of the private roadway shown in the southwest corner of the GDP. The existing access immediately east of Willow Court S.W., must be closed upon construction of the private roadway.
  - 4) The applicant shall enter into a Development Agreement with the City that outlines the obligations of the applicant relating to, but not limited to, stormwater management, park dedication, traffic improvements, pedestrian facilities, right-of-way dedication, SAC and WAC fees and contributions for public infrastructure improvements and contributions for future reconstruction of 40<sup>th</sup> Street S.E. Current City policy for substandard street requires a contribution of \$30.00 per foot of frontage for residential developments. The City may create a Transportation Improvement District in the area that may result in a capacity component being added to the substandard street reconstruction charge.
  - 5) If the development of this property occurs prior to the reconstruction of 40<sup>th</sup> Street S.W., grading of this property must be compatible with the street profile and cross-sections being proposed for the 40<sup>th</sup> Street S.W., reconstruction in the Street Layout Plan. The private roadway connections to public streets must meet City intersection sight line standards.
  - 6) The applicant agrees to dedicate a total of 50 feet of right-of-way from the centerline of 40<sup>th</sup> Street S.W. This dedication must be provided with the first plat of this development or when the City notifies the owner that a roadway improvement project is programmed, whichever comes first.
  - 7) The applicant must agree to meet the parkland dedication requirement for this development in the form of cash in lieu of land. The development has a parkland dedication requirement of approximately 1.76 acres based on a maximum density of six units/acres.
  - 8) A revised GDP shall be filed with the Planning Department reflecting all required modifications.

- 9) The private roadway running parallel to 40<sup>th</sup> Street S.W., be relocated on the GDP outside of the proposed street profile and cross sections for 40<sup>th</sup> Street S.W., as indicated on the preliminary plans prepared for 40<sup>th</sup> Street S.W., as reflected in the street plan of the City of Rochester's current 6-year Capital Improvement Program.

(RA30-32.) Conditions one through eight were identical to the eight conditions that the Planning and Zoning Commission had recommended almost two months before. (RA23-24.) Following the multiple public hearings about Kottschade's Plan and the conditions, the City Council's order of July 5, 2000 was the final action on the conditions under procedures prescribed by the ordinance.

**E. Kottschade submitted a "variance" application asking the Zoning Board of Appeals to waive all conditions that the City Council had placed on the Plan.**

Kottschade did not exercise his right to appeal the City Council's approval of the Plan with nine conditions to the district court. Instead, Kottschade requested a "variance" from the City's Zoning Board of Appeals, asking it to "waive" all nine conditions that the City Council had just placed on the Plan. (Comp. ¶ 23.) The City ordinance authorizing variances provides that if hardships "would result from strict enforcement of the literal provisions of this ordinance, application may be made to vary or modify any regulation or provision of the ordinance." R.C.O. § 60.410. Kottschade's application, however, did not include a request to "vary or modify any regulation or provision of the ordinance." (RA40; AA46.) Kottschade's application requested a "variance" from the Zoning Board of Appeals, asking that the nine conditions imposed on the Plan "be waived." (RA37.)

**F. The Zoning Board of Appeals and City Council concluded that Kottschade's "variance" application was not authorized by ordinance or statute.**

The Rochester Zoning Board of Appeals ("Appeals Board") determined that Kottschade's "variance" application was not authorized by either the Rochester Code of Ordinances or Minn. Stat. § 462.357, subd. 6. It also found that the "Zoning Board of Appeals is not a higher administrative body than the City Council." (RA50.) In the alternative, besides the jurisdictional defect, the Appeals Board found that the application lacked sufficient evidence to justify a variance. (RA50-51.) The Appeals Board thus denied Kottschade's request for a variance. (RA51.) Kottschade appealed the denial to the City Council.

The City Council affirmed the denial of the "variance" request, finding that the Appeals Board "lacked authority to vary the conditions of approval imposed upon a general development plan." (RA66.) The City Council stated that "the Rochester Code of Ordinances does not provide for a variance from conditions of approval imposed upon a general development plan." (RA66.) The City Council also found—alternatively—that insufficient evidence existed to justify a variance. (RA67-73.)

**G. Kottschade litigated in federal court from 2001 to October 2003.**

Kottschade filed a federal lawsuit in 2001 challenging the conditions on the Plan. The federal district court dismissed Kottschade's lawsuit for lack of subject matter jurisdiction. *Kottschade v. City of Rochester*, No. 01-898, 2002 WL 91641, at \*4 (D. Minn. Jan. 22, 2002) ("this Court does not have jurisdiction")(RA90-93). The federal district court held that "until [Kottschade] seeks relief in a state court inverse

condemnation action and relief is denied, the claim of taking without just compensation is not ripe for decision by a federal court.” *Id.* The federal district court never reached the merits of Kottschade’s taking claims.

Kottschade sought to avoid the federal ripeness rule. This rule states that “a property owner simply has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation.” *Id.* Kottschade unsuccessfully appealed to the Eighth Circuit. *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003). The Eighth Circuit confirmed that “[Kottschade] has not yet pursued a postdeprivation remedy in state court, as is required by *Williamson* [*County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)] and subsequent jurisprudence.” 319 F.3d at 1041. The United States Supreme Court denied Kottschade’s petition for writ of certiorari on October 6, 2003. *Kottschade v. City of Rochester, Minn.*, 540 U.S. 825 (2003).

**H. For more than three years after the federal litigation ended, Kottschade did nothing to pursue his taking claim in state court.**

After the Eighth Circuit had instructed him to pursue a “remedy in state court,” *Kottschade*, 319 F.3d at 1041, and after the United States Supreme Court declined to hear his case, Kottschade waited *over three years* before filing the present action in state court. Kottschade suggests an explanation for the delay by stating that he was “forced to confront other actions by the State and City” from 2003 to 2006. (App. Br. at 12.) But

Kottschade's attention remained focused on the conditions that the City had placed on his Plan for the property, although he directed his efforts toward changing the law.

On June 8, 2006, Kottschade testified in the United States House of Representatives before the Subcommittee on the Constitution of the Committee on the Judiciary.<sup>1</sup> (RA94-96.) His testimony supported a proposal to change the law that had resulted in the dismissal of his federal lawsuit. Kottschade testified to support H.R. 4772, the "Private Property Rights Implementation Act," which would have allowed property owners "to bring takings claims directly to Federal court." (RA95.) He spoke about his property in Rochester, Minnesota, the nine conditions that the City had imposed on his Plan, and the federal court's dismissal of his lawsuit. (*Id.*) Although H.R. 4772 passed in the House of Representatives on September 29, 2006, it never became law.

**I. On December 22, 2006, Kottschade filed this action in state district court.**

Kottschade filed this action before the Olmsted County District Court on December 22, 2006. Kottschade alleged two claims. First, Kottschade alleged a state-law claim for inverse condemnation under the Minnesota Constitution. (Compl. ¶¶ 40-48.) Second, Kottschade alleged a federal regulatory-taking claim under the U.S. Constitution and 42 U.S.C. § 1983. (Compl. ¶¶ 49-52.) Subsequently, in his

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<sup>1</sup> This Court may take judicial notice of matters of public record, such as testimony to Congress. *See, e.g., Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168 n.12 (10th Cir. 2000) (taking "judicial notice of the content of hearings and testimony before the congressional committees and subcommittees"); *Wheeler v. City of Wayzata*, 533 N.W.2d 405, 406 n.1 (Minn. 1995) (taking judicial notice of minutes from planning commission meeting); *United Power Ass'n v. Comm'r of Revenue*, 483 N.W.2d 74, 77 n.3 (Minn. 1992) (taking judicial notice of permit as "a matter of public record"); *In re Estate of Turner*, 391 N.W.2d 767, 771 (Minn. 1986) (finding that appellate court may consider "a matter of public record").

memorandum opposing the City's summary judgment motion, Kottschade conceded that the only taking claim at issue in his lawsuit is a "land-use exaction violating the standards set forth in *Nollan* and *Dolan* that implicates the doctrine of unconstitutional conditions." The district court issued an order on November 21, 2007, granting the City's motion for summary judgment and dismissing Kottschade's complaint.

### **SUMMARY OF LEGAL ARGUMENT**

On July 5, 2000, the City Council approved Kottschade's development Plan with nine conditions. City staff had recommended those conditions. The Planning and Zoning Commission endorsed the conditions after multiple public hearings in which Kottschade's legal counsel participated and objected to the conditions. After the Planning and Zoning Commission's vote, the proposal went to the City Council for final action on the application. Further hearings occurred. Kottschade's legal counsel presented the City Council with his objections to the conditions. The City Council voted to approve the Plan, but with the nine conditions to which Kottschade had objected.

This vote constituted the City's final decision on the conditions placed on Kottschade's Plan. As such, Kottschade could have filed suit in state court, challenging the conditions as unlawful. There were no additional steps in the City's land-use process required to be taken before this decision was ripe for judicial review.

Kottschade did not file a lawsuit in state court. He elected to do so in federal court. But the federal court dismissed his action, instructing Kottschade that he must first seek remedies for an alleged taking claim in state court. Kottschade still did not file suit

in state court. Instead, Kottschade appealed to the Eighth Circuit, and ultimately to the United States Supreme Court, which denied certiorari.

When Kottschade had exhausted all federal appeals, he still had three years to file a taking claim in state court. But he elected not to do so. Instead, Kottschade testified before Congress, on June 8, 2006, in support of legislation to change the law to allow landowners to bring taking claims directly to federal court. On July 5, 2006, the statute of limitations expired, barring the claim now before this Court.

Kottschade bases his present lawsuit, which he filed December 22, 2006, on the *Nollan-and-Dolan* doctrine of “unconstitutional conditions.” The statute of limitations begins to run when the right to institute and maintain a lawsuit arises. When the City Council approved Kottschade’s Plan with conditions on July 5, 2000, the statute of limitations began to run on Kottschade’s claim that those conditions were “unconstitutional.” The six-year statute of limitations bars Kottschade’s claim.

Kottschade attempts to revive his claim by misapplying law governing regulatory-taking claims to his claim that the conditions of approval are confiscatory under *Nollan* and *Dolan*. *Williamson*’s final-decision requirement does not apply to a development approval with conditions. The purpose for the final-decision requirement applies to regulatory-taking claims under *Penn Central* based on denials of development applications. It does not apply to *Nollan-and-Dolan* claims based on approvals with conditions. When government denies a proposal for re-zoning to accommodate a land use preferred by the owner, a court is not in a position to evaluate whether that single action constitutes a “regulatory taking” because the government may be willing to

consider different or less intense land uses. Accordingly, when evaluating regulatory-taking claims, the courts require owners to “ripen” their claims by proposing alternative uses in an effort to confirm the scope of the government restriction in the use of their property.

But Kottschade has not asserted a regulatory-taking claim under *Penn Central*. He claims that the conditions that the City imposed on the Plan approval are “unconstitutional” land-use exactions under *Nollan* and *Dolan*. There is no need for a landowner to test the breadth of government regulation on use of property where the allegation is that the government exceeded its authority to impose the condition in the first place. *Williamson*’s final-decision requirement is inapplicable in the “special context” of land-use exactions presented by *Nollan-and-Dolan* claims.

Even if *Williamson*’s final-decision rule applied here, a futility exception exists. Kottschade’s attempt to invent a “variance” procedure—which he now cites in an effort to find a later triggering date for the statute of limitations—was futile. Neither Minnesota statutes nor the City’s ordinance authorize a zoning board of appeals to grant a variance waiving conditions of approval imposed by a city council. Because the Zoning Board of Appeals is not a higher administrative body than the City Council, it lacked the legal authority to overturn the City Council’s decision to approve the Plan with conditions. In short, Kottschade’s “variance” application was futile because it was not allowed by law. The so-called “variance” process did not toll the running of the statute of limitations. The limitations period began to run when the City Council approved the Plan with conditions on July 5, 2000.

Kottschade may not indefinitely extend the statute of limitations by pursuing a variance remedy that is futile and not allowed by law. Under the logic of Kottschade's argument, if he submitted a variance application five years after the City had approved the Plan with conditions, he would have extended the limitations period six more years. The law does not allow Kottschade to extend the statute of limitations at his pleasure.

The application of the six-year limitation period serves the public interest—providing neighbors as well as planners with certainty regarding development affecting nearby properties and facilitating future planning. Six years is a long limitations period. This is not a situation where Kottschade was ambushed by the time limit. He made choices about how to assert his interests and objections regarding his development proposal for his land. Kottschade pursued federal litigation through to the Eighth Circuit and the Supreme Court. He made efforts to change the law at the federal level. There is no excuse for Kottschade not to have filed his taking claim as prescribed by law under the ample time periods afforded him. This Court should affirm the district court's conclusion that the statute of limitations bars Kottschade's lawsuit. This Court also should affirm because the district court properly held that no justiciable controversy exists, Kottschade lacks standing, and his claim is moot.

## LEGAL ARGUMENT

### I. THE SIX-YEAR STATUTE OF LIMITATIONS BARS KOTTSCHADE'S TAKING CLAIM UNDER *NOLLAN* AND *DOLAN* BECAUSE HIS CLAIM ACCRUED WHEN THE CITY APPROVED THE PLAN SUBJECT TO CONDITIONS.

#### A. The statute of limitations bars Kottschade's claim because the City approved the Plan with conditions on July 5, 2000, and Kottschade did not file this lawsuit until December 22, 2006.

The six-year statute of limitations applies to Kottschade's taking claim. (AA11; App. Br. at 21; Opp'n. Mem. at 23.)<sup>2</sup> Under the statute of limitations, Kottschade had six years in which to bring his claim. *Beer v. Minn. Power & Light Co.*, 400 N.W.2d 732, 736 (Minn. 1987). The six-year statute of limitations began to run on July 5, 2000, when the City Council approved the Plan with nine conditions. Under Minnesota law, the statute of limitations begins to run "when the right to institute and maintain a lawsuit arises, when the action can be brought in a court of law without dismissal for failure to state a cause of action." *Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 803 (Minn. 1989).

The legal claim that Kottschade asserted in this action was an allegation that the City's imposition of conditions on a development approval amounted to a unconstitutional taking under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (App. Br. at 1; Opp'n. Mem. at 9.) Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an

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<sup>2</sup> Citations to Kottschade's Appellant Brief will be abbreviated as "App. Br." Citations to Kottschade's Memorandum in Opposition to the City's Motion for Summary Judgment will be abbreviated as "Opp'n. Mem." Citations to Respondent's Appendix will be abbreviated as "RA."

easement allowing public access to her property as a condition of obtaining a development permit. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005). In those cases, the Court began with the premise that, had the government simply appropriated the easement in question, it would have been a *per se* physical taking. *Id.* *Nollan* and *Dolan* represent what is often called the “doctrine of unconstitutional conditions.” *Id.* at 547. The remedy under *Nollan* and *Dolan* is to “invalidate” the unconstitutional condition. 483 U.S. at 829. Kottschade’s *Nollan*-and-*Dolan* claim arose when the City approved the Plan with nine conditions on July 5, 2000. Since the City’s approval of the Plan with conditions occurred more than six years before Kottschade filed this action on December 22, 2006, the statute of limitations bars Kottschade’s claims.

Kottschade previously agreed that the City’s final decision occurred on July 5, 2000. Kottschade told the Eighth Circuit Court of Appeals that the City Council’s order approving the Plan subject to conditions was a final decision:

[T]he City did not deny Mr. Kottschade’s application. It granted a permit subject to conditions, plainly indicating what level of development is acceptable to it on Mr. Kottschade’s property. We have, in the Supreme Court’s words, “a final and authoritative determination of the type and intensity of development legally permitted on the subject property.” And we know “how far the regulation goes.” The only remaining issue involves the legality of the conditions—i.e., whether the City, in imposing those conditions, “has gone too far.” The City believes its conditions are proper; Mr. Kottschade believes they are unconstitutionally confiscatory. Whichever, they are certainly final.

(RA88.) Now that the statute of limitations has expired, Kottschade disavows his prior statement that “final and authoritative determination” occurred when the City approved the Plan with conditions on July 5, 2000.

Kottschade's *Nollan-and-Dolan* claim arose on July 5, 2000 when the City approved the Plan with conditions. When a condition is imposed on a development approval, the statute of limitations begins to run on a claim that the condition is unconstitutional. *Rocky Mountain Christian Church v. Board of County Com'rs. of Boulder County, Colo.*, 481 F.Supp.2d 1213, 1226 (D. Colo. 2007). In *Rocky Mountain*, the plaintiff claimed that the condition that the county had imposed on a development approval was unconstitutional under *Nollan* and *Dolan*. The county contended that the claim was barred because the statute of limitations had expired. The county argued that "any inverse condemnation claim based on the conservation easement accrued in 1998, when the easement was made a condition of the county's approval of the 1997 special use application." 481 F.Supp.2d at 1226. The plaintiff countered that its *Nollan-and-Dolan* claim ripened later, when the county denied another related application. *Id.* The court agreed with the county, holding that the claim must be dismissed because it was barred by the statute of limitations. *Id.* Consistent with *Rocky Mountain*, the district court properly held that Kottschade's *Nollan-and-Dolan* claim accrued on July 5, 2000 when the City imposed conditions on its approval of the Plan. The six-year statute of limitations thus bars Kottschade's action.

**B. *Williamson's* final-decision requirement applies to regulatory-taking claims under *Penn Central*, but not *Nollan-and-Dolan* claims in the "special context" of development approval with conditions.**

Kottschade may not invoke *Williamson's* final-decision requirement here to save his claim from the statute of limitations. Kottschade's lawsuit—based on the *Nollan-and-Dolan* doctrine of "unconstitutional conditions"—seeks to challenge the City Council's

decision to approve the Plan with conditions. The underlying rationale for *Williamson's* final-decision rule does not apply to the *Nollan-and-Dolan* doctrine of unconstitutional conditions. Rather, it applies to regulatory-taking claims under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Two distinctions illustrate this point.

First, a claim alleging unconstitutional land-use exactions under *Nollan* and *Dolan* is distinct from a regulatory-taking claim under *Penn Central*. A regulatory taking may result when the government goes “too far” in its regulation and unfairly diminishes the value of an individual’s property. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005)). Regulatory takings are governed by the standards set forth in *Penn Central*. *Lingle*, 544 U.S. at 538; *Wensmann*, 734 N.W.2d at 632-33. The *Penn Central* factors for the analysis of regulatory-taking claims include: (1) the economic impact of the regulation on the person suffering the loss; (2) the extent to which the regulation interferes with distinct investment backed expectations; and (3) the character of the government action to assess whether the complained of action affected a taking of private property for public use. *Wensmann*, 734 N.W.2d at 632-33. Kottschade does not allege a regulatory-taking claim under *Penn Central*. (Opp’n. Mem. at 18.) He contends that the conditions are unconstitutional land-use exactions under *Nollan* and *Dolan*. Claims of land-use exactions, however, present a distinct and “special context.” *Lingle*, 544 U.S. at 538. To evaluate such claims, courts “first determine whether the ‘essential nexus’ exists between the ‘legitimate state interest’ and the permit condition exacted by the city.” *Dolan*, 512 U.S. at 386 (citing *Nollan*, 483 U.S. at 837). Then, courts determine whether an

individualized determination—no precise mathematical calculation is required—demonstrates that the nature and extent of the dedication is roughly proportional to the impact of development. *Dolan*, 512 U.S. at 391. The legal analysis under *Nollan* and *Dolan* is distinct from the three *Penn Central* factors.

Second, an approval of a development request with conditions is distinct from a denial of a development request. The City did not *deny* Kottschade's development application. It *approved* the Plan with conditions. The Supreme Court has recognized the distinction between decisions conditioning approval of development on the dedication of property to public use and decisions denying development applications. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703, (1999) ("the landowner's challenge is based not on excessive exactions but on denial of development"). Kottschade, too, recognized that regulatory denials of development requests are distinct from "grants of development requests with unconstitutional conditions attached." (Opp'n. Mem. at 32; *see also* RA79-80.)

These two distinctions are significant here. The rationale for exhausting administrative remedies applies to *Penn Central* claims based on denials of development applications. But it does not apply to *Nollan-and-Dolan* claims based on approvals with conditions. The reason for the final-decision requirement is that the factors significant to evaluating a regulatory-taking claim under *Penn Central* include "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Williamson*, 473 U.S. at 191. Those factors are not at issue in the *Nollan-and-Dolan* doctrine of unconstitutional conditions. The federal cases discussing

exhaustion and finality arose in the distinct context of regulatory denials of development requests where the *Penn Central* factors applied.

In *Williamson*, the Court found that “the Commission’s *denial of approval* does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.” 473 U.S. 172, 194 (1985) (emphasis added). The Court insisted that it could not evaluate the *Penn Central* factors for a regulatory taking “until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.” 473 U.S. at 191. In *MacDonald, Sommer & Frates v. Yolo County*, the “Planning Commission *rejected* the subdivision plan.” 477 U.S. 340, 342 (1986) (emphasis added). The Court again observed that it was unable to analyze the *Penn Central* factors for a regulatory taking until the property owner obtained a final decision regarding the application of the regulations to its property. 477 U.S. at 349.<sup>3</sup> In *Suitum v. Tahoe Regional Planning Agency*, the agency “*denied* permission to build.” 520 U.S. 725, 731 (1997) (emphasis added). In *Palazzolo v. Rhode Island*, “petitioner’s development proposals were *rejected* by respondent Rhode Island Coastal Resources Management Council.” 533 U.S. 606, 611 (2001) (emphasis added). All those cases

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<sup>3</sup> This Court also has recognized that the *Penn Central* factors for regulatory-taking claims drive the need for the final-decision rule because “[e]conomic impact and interference with expectation interests 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).

were predicated on regulatory denials of development requests and regulatory-taking claims under *Penn Central*.<sup>4</sup>

Kottschade does not assert a regulatory-taking claim under *Penn Central* based on any denial of development. Instead, Kottschade challenges the City's decision to approve the Plan with conditions under the *Nollan-and-Dolan* doctrine of unconstitutional conditions.<sup>5</sup> The underlying rationale for *Williamson's* final-decision rule does not apply to *Nollan-and-Dolan* claims.

This conclusion gains further support because *Nollan* and *Dolan* were premised on an analogy to physical takings. Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that landowners dedicate an easement allowing public access to their property as a condition of obtaining a development permit. *Lingle*, 544 U.S. at 546. The Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se physical* taking. *Nollan* and *Dolan* involved “dedications of property so onerous that, outside the exactions context, they would be deemed *per se physical* takings.” *Lingle*, 544 U.S. at 546. The Supreme Court has refused to extend *Nollan* and *Dolan* “beyond the special context of exactions—land-use decisions

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<sup>4</sup> Both *Suitum* and *Palazzolo* found that the regulatory-taking claims were ripe for review.

<sup>5</sup> Kottschade told the district court that his taking claim is based on the “doctrine of unconstitutional conditions” under *Nollan* and *Dolan*, and is not based on any other taking claim, such as a *Penn Central* regulatory-taking claim. (Opp’n. Mem. at 18.) Kottschade conceded that the only taking claim at issue in his lawsuit is a “land-use exaction violating the standards set forth in *Nollan* and *Dolan* that implicates the doctrine of unconstitutional conditions.” (Opp’n. Mem. at 18.)

conditioning approval of development on the dedication of property to public use.” *City of Monterey*, 526 U.S. at 702.

Kottschade’s taking claim under *Nollan* and *Dolan* arose when the City Council approved his Plan subject to the conditions that required dedications of land. An approval with conditions constitutes a final decision. In *Daniels v. Area Plan Comm’n of Allen County*, 306 F.3d 445, 454 (7th Cir. 2002), the court held that “an approval of a plat vacation and the imposition of a condition on a plat vacation constitutes a final decision” to satisfy the *Williamson* requirement. In *McKenzie v. City of White Hall*, 112 F.3d 313, 315-16 (8th Cir. 1997), the plaintiffs brought a taking claim alleging that the city conditioned approval of permits on the dedication of the plaintiffs’ privacy-buffer land for use as a public street. Citing *Nollan*, the Eighth Circuit observed that the city’s conditional easement for a public right-of-way would lead to a “future physical occupation” of the plaintiffs’ land. *Id.* at 317. The Eighth Circuit reasoned that a “physical taking is by definition a final decision.” *Id.* The court thus concluded that the plaintiffs had satisfied the *Williamson* final-decision requirement. *Id.* Moreover, as an alternative basis for finding finality, the Eighth Circuit cited a *letter* from the *planning commission* as evidence of the city’s final decision. *Id.* And here, the City Council’s order of July 5, 2000 is even more conclusive of finality than the letter in *McKenzie*.

A case Kottschade offers, *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994), concluded that the decision to approve with conditions was final. In *Christopher Lake*, the plaintiffs brought taking claims alleging that the county conditioned its approval for a development on the plaintiffs’ construction of a drainage

system for an entire watershed area. *Id.* at 1273. The Eighth Circuit determined that the plaintiffs' "claims are ripe for review." *Id.* The court found that the county had arrived at a "definite position" on an issue that inflicted "an actual, concrete injury" to the plaintiffs. *Id.* at 1274. In *Christopher Lake*, the court held that the decision to approve the development subject to conditions was a final decision.<sup>6</sup>

Although the amicus argues that the City Council's order was not a "final decision" because the conditions did not contain everything that the future development agreement would require, their argument fails for two alternative reasons. It either does not save Kottschade's claims, or it exposes why the final-decision requirement applies to *Penn Central* regulatory-taking claims arising from denials of development applications, not *Nollan-and-Dolan* claims arising from approvals with conditions. First, since Kottschade received a draft development agreement in September 2000, the statute of limitations could have begun to run then. Kottschade's claims would still be barred. And considering the logic of the amicus's argument a second way, it means that no "final decision" even exists today because the parties still have not yet fully negotiated and finalized the development agreement. Either way, the amicus's argument is untenable.

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<sup>6</sup> Kottschade's brief actually misquotes *Christopher Lake*, by asserting that "the same kind of finality requirements applied to the property at issue." (App. Br. at 24.) The actual text of *Christopher Lake* reads, "Although we recognize that *Williamson County* involved claims that the denial of a zoning permit resulted in a taking . . . the same kind of finality requirements guide us in determining that the Partnership's claims are ripe for review. 35 F.3d at 1273.

The logic of Kottschade's argument fares no better than the amicus. Kottschade concedes that the City Council's order on July 5, 2000 was the City's final action on the conditions imposed on the Plan:

*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.*

(App. Br. at 28 (emphasis added).) And while he concedes that the City Council's order of July 5, 2000 was final, Kottschade attempts to qualify his concession with vague assertions about "overall limitations" and "full input." (App. Br. at 28.) No land-use agency in the City of Rochester possessed higher authority than the City Council, which had approved the Plan subject to conditions. The City Council's order was final. Kottschade's oddly-qualified concession further demonstrates why the final-decision requirement applies to *Penn Central* regulatory-taking claims based on denials of development applications, rather than *Nollan-and-Dolan* claims based on approvals with conditions.<sup>7</sup>

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<sup>7</sup> Kottschade has narrowed the focus of his claim in this action: he alleges only a *Nollan-and-Dolan* claim. (Opp'n. Mem. at 18.) In contrast, Kottschade's complaint in federal district court was broader, alleging that the conditions "deprived Kottschade of all economically-viable use of his property, thereby constituting a categorical, total taking of the Property," and that the conditions constitute "a regulatory taking of the Property." (Complaint, ¶¶ 28-29, *Kottschade v. City of Rochester*, No. 01-898 (D. Minn.)) When the City moved to dismiss the complaint in the federal court, the City was forced to present defenses to a *Lucas* categorical-taking claim (RA81), and a *Penn Central* regulatory-taking claim. Those defenses included both prongs of *Williamson*. The federal district court only accepted the second (state-procedures requirement), and dismissed on that basis. (RA90-93.)

The statute of limitations on Kottschade's taking claim began to run when the City approved the Plan with the conditions that Kottschade complains of. In *Mobley Construction Co. v. United States*, 68 Fed. Cl. 434, 436 (Fed. Cl. 2005), the court held that the plaintiff's taking claim was time barred because it accrued when the Corps issued a permit with restricting conditions. The court rejected the plaintiff's argument that it did not initially know the exact economic consequences resulting from the restrictions on the permit. *Id.* "Accrual of a claim need not be delayed until plaintiff can measure its damages with precision." *Id.* at 438. So even if Kottschade did not know the exact economic ramifications of the conditions on the Plan at the time the City imposed them, he had notice of their effect. *Id.* And he had objected to all the conditions. The district court correctly held that the statute of limitations began to run on Kottschade's claim that the conditions were "unconstitutional" under *Nollan* and *Dolan* when the City Council approved the Plan with conditions on July 5, 2000.<sup>8</sup>

**C. Kottschade is not entitled to any tolling of the statute of limitations.**

At the district court, Kottschade did not contend that his federal lawsuit tolled the statute of limitations. (AA11.) Although Kottschade does not argue for tolling, he now complains that he "was forced to confront other actions by the State and City with respect to the 16.4 acres" during the more than six years in which he failed to initiate this action. (App. Br. at 12.) But those events provide no basis for tolling. Kottschade is not entitled

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<sup>8</sup> The remedy under *Nollan* and *Dolan* is to "invalidate" the unconstitutional conditions. 483 U.S. at 829. If the conditions are unconstitutional, then the appropriate remedy would be an injunction against enforcement of the conditions because mandamus to compel eminent domain is an appropriate remedy only where the taking is "irreversible." *Thompson v. City of Red Wing*, 455 N.W.2d 512, 518 (Minn. App. 1990).

to any tolling of the six-year statute of limitations. Minnesota law is quite strict in disallowing extension of a statute of limitations outside the period provided for by the Minnesota Legislature. See *Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc.*, 190 N.W.2d 77, 81 (Minn. 1971) (“Courts have no power to extend or modify statutory limitations periods.”); *DeMars v. Robinson King Floors, Inc.*, 256 N.W.2d 501, 504 (Minn. 1977) (“public policy requires reasonable diligence in bringing litigation to a close and will not allow parties to delay suits for an unreasonable length of time.”). Kottschade is not entitled to any tolling.<sup>9</sup>

**D. Williamson’s second rule—the state-procedures requirement—bars Kottschade’s taking claim under federal law.**

By waiting for over six years to seek relief under state law, Kottschade doomed both his state-law and federal-law claims. Kottschade should be familiar with *Williamson’s* second rule—the state-procedures requirement. See *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040 (8th Cir. 2003). In *Williamson*, the Supreme Court also

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<sup>9</sup> Kottschade’s federal lawsuit did not toll the statute of limitations. Under Minnesota law, “the commencement of an action in a Federal district court which lacks jurisdiction does not toll the statute of limitations.” *Bonhiver v. Graff*, 311 Minn. 111, 126, 248 N.W.2d 291, 300 (1976). In January 2002, the federal district court granted the City’s motion to dismiss Kottschade’s lawsuit for lack of subject matter jurisdiction, and the Eighth Circuit affirmed that dismissal. *Kottschade v. City of Rochester*, No. 01-898, 2002 WL 91641, at \*1 (D. Minn. Jan. 22, 2002), *aff’d*, 319 F.3d 1038 (8th Cir. 2003). The federal court thus conclusively determined that it lacked jurisdiction over the claim. *Kottschade*, 2002 WL 91641, at \*4 (“this Court does not have jurisdiction”). The fact that Kottschade chose to file his taking claim in a federal forum, and that the federal court dismissed the claim for lack of jurisdiction without a ruling on the merits, does not provide a basis to toll the statute of limitations under Minnesota law. *DeMars*, 256 N.W.2d at 505. The Minnesota Supreme Court has stated that “if a claim is dismissed without a determination on the merits, the result is the same as if it had never been filed and the statute of limitations had never been tolled.” *Id.*

held that “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation.” *Williamson*, 473 U.S. at 195. This rule requires that a property owner must seek compensation through adequate state-law procedures before bringing federal claims. No violation of the Just Compensation Clause in the Fifth Amendment occurs until after the state-law process denies just compensation for a taking of property. *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006). Minnesota law provides a procedure—inverse condemnation—by which individuals may seek a remedy. *Koscielski*, 435 F.3d at 903 (citing *Wilson v. Ramacher*, 352 N.W.2d 389, 394 (Minn. 1984)). The Eighth Circuit has been “unable to find a case in which this court has declared a state’s inverse condemnation procedures to be inadequate.” *Cormack v. Settle-Beshears*, 474 F.3d 528, 531 (8th Cir. 2007).

Kottschade did not file a state-law claim before the six-year statute of limitations expired under Minnesota law. Kottschade thus failed to comply with *Williamson*’s second rule. *Kottschade*, 319 F.3d at 1040. By failing to bring a timely state-law claim, Kottschade forfeited his federal-law claim:

[I]t is too late for any state law cause of action. *Williamson County* requires the pursuit of state remedies before a taking case is heard in federal court. Adequate state remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim.

*Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94 (1st Cir. 2003). The Eighth Circuit has stated that a plaintiff may not obtain jurisdiction in the federal courts simply by waiting until the statute of limitation bars a state-law remedy. *See Harris v.*

*Missouri Conservation Comm'n*, 790 F.2d 678, 681 (8th Cir. 1986) (“The state provided a remedy, but plaintiffs failed to pursue it. They cannot obtain jurisdiction in the federal courts simply by waiting until the statute of limitation bars the state remedies”). Kottschade may not circumvent the *Williamson* rule by waiting to bring state-law claims until after the statute of limitations expired:

Any other rule would allow plaintiffs to circumvent state court by failing to comply with state procedural requirements for bringing inverse condemnation claims, thereby nullifying *Williamson County*'s requirement that the plaintiff avail itself of the available state procedures for obtaining compensation. . . . Because the time for bringing an inverse condemnation action in Louisiana state court has expired, Liberty Mutual's takings claim is permanently unripe. The district court's dismissal for lack of jurisdiction is AFFIRMED.

*Liberty Mut. Ins. Co. v. Brown*, 380 F.3d 793, 798 (5th Cir. 2004). Kottschade forfeited any claim based on the federal takings clause by “booting” his state-law remedies.<sup>10</sup>

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<sup>10</sup> *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993) (“By booting her state compensation remedies she forfeited any claim based on the takings clause to just compensation. . . . [A] claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open.”). See also *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2d Cir. 2002) (“[A] claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open.”); *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002) (“Harbours Pointe failed to pursue its state remedies in a timely fashion and has forfeited its right to assert a claim for just compensation under either Wisconsin or federal law”).

**II. KOTTSCHADE’S “VARIANCE” APPLICATION DID NOT DELAY THE RUNNING OF THE SIX-YEAR STATUTE OF LIMITATIONS BECAUSE IT WAS A FUTILE PROCEDURE THAT WAS NOT ALLOWED BY LAW.**

**A. Under Minnesota law and federal law, administrative remedies need not be pursued if they are nonexistent, futile, or not allowed by law.**

Even assuming that *Williamson’s* final-decision requirement applied to *Nollan-and-Dolan* claims, it does not save Kottschade’s claim from the statute of limitations. The futility exception to that requirement applies here. After the City Council approved the Plan with conditions in the order dated July 5, 2000, Kottschade filed an unauthorized application for a “variance” with the Rochester Zoning Board of Appeals, stating his “request that the nine conditions be waived.” (RA37.) Kottschade’s “variance” application was not authorized by statute or ordinance. *See infra*, § II(B). The Minnesota Supreme Court has stated that administrative remedies need not be pursued before litigation where such administrative remedies are “nonexistent,” “inadequate,” or “futile.” *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 71 (Minn. 1984). Minnesota law incorporates this futility exception to exhaustion into the analysis of the first *Williamson* ripeness rule:

For a claim to be ripe for a taking, the party must apply for a variance from the regulations which might have allowed development of the property. *See Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 187, 105 S.Ct. 3108, 3116-17, 87 L.Ed.2d 126 (1986). [sic] However, the Minnesota Supreme Court has consistently held that administrative remedies need not be pursued before litigation is commenced if it would be futile to pursue such administrative remedies.

*Hay v. City of Andover*, 436 N.W.2d 800, 804 (Minn. App. 1989). Under Minnesota law, Kottschade did not need to submit a futile application for a “variance” with the Appeals Board for his taking claim to ripen.

Similar to Minnesota law, federal law recognizes a futility exception to the first *Williamson* ripeness rule. The U.S. Supreme Court has specifically excused a failure to show finality in the face of administrative futility. In *Palazzolo*, the Court found that further applications were not necessary to ripen the taking claim due to the “unequivocal nature” of the regulations and “the Council’s application of the regulations to the subject property.” 533 U.S. at 619. The Court explained that *Williamson* requires a landowner to follow “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*.” *Id.* at 620-21 (emphasis added). *Palazzolo* held that federal ripeness rules do not require the submission of “futile” applications. *Id.* at 626. *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992) (noting that *Williamson*’s final-decision rule did not preclude taking claim because an application for a variance is not required when it “would have been pointless”).

Federal courts—before and after *Palazzolo*—have recognized the futility exception to the first *Williamson* ripeness rule. The Second Circuit acknowledged that the final-decision requirement “is not mechanically applied.” *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 349 (2d Cir. 2005). A property owner need not pursue applications if an appeal to a zoning board of appeals would be futile or if a zoning board

lacks authority to grant variances. *Id.* *Murphy* explained that, under *Williamson*, a property owner is not required to litigate before a zoning board of appeals if it sits purely as a remedial body and is not empowered to participate in the final decision-making. *Id.* (citing *Williamson*, 473 U.S. at 193). Here, the Appeals Board lacked the power to waive the conditions that the City Council placed on the Plan in the final order of July 5, 2000.

Futility exists where a variance application is not a “viable option.” *Herrington v. County of Sonoma*, 857 F.2d 567, 570 (9th Cir. 1988). In *Herrington*, the court held that *Williamson*’s final-decision rule had been satisfied because “pursuit of a variance was not a legally viable option.” *Id.* Any application for a variance would have been futile. *Id.* The court found “no reason to require the pursuit of relief that cannot be granted.” 857 F.2d at 570 n.2. Federal courts recognize that there is “no reason to require the pursuit of relief that cannot be granted.” *Id.* at 570 n.2. *See also DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004) (stating that Sixth Circuit recognizes “futility exception” to *Williamson* finality requirement); *Cienega Gardens v. United States*, 265 F.3d 1237, 1245 (Fed. Cir. 2001) (observing that “*Palazzolo* recently reaffirmed the futility exception to the final decision rule”); *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 98 (2d Cir. 1992) (recognizing futility exception to final-decision requirement); *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) (observing that futility may be found in circumstances where an application is not a “viable option”). Kottschade even cited a case that recognized the “futility exception.” *Gabhart v. City of Newport*, 2000 WL 282874, at 3 n.3 (6th Cir. 2000) (noting that “a futility exception to the final-decision requirement exists”).

Applying Minnesota law and federal law, including *Palazzolo*, the district court properly concluded that Kottschade did not need to submit a futile application for a variance with the Appeals Board before his taking claim under *Nollan* and *Dolan* ripened. That futile application did not extend the statute of limitations. *Williamson's* final decision rule cannot save Kottschade's claim from the statute of limitations.

Kottschade desires the power to extend the statute of limitations at his discretion. By the logic of Kottschade's argument, if he submitted a variance application seeking unauthorized, nonexistent administrative remedies in the fifth year, he would have extended the limitations period six more years. That is an untenable legal position. Kottschade may not stash his claims away from the running of the limitations statute by pointing to a "variance" application that was not allowed by law.

**B. Kottschade's "variance" application, which lacked any basis in law, may not extend the time when the statute of limitations began to run.**

The six-year statute of limitations began to run on July 5, 2000, when the City Council approved the Plan with conditions, not after Kottschade pursued a "variance" application that was not allowed by law. The law does not require the submission of "futile" applications seeking administrative remedies that cannot be granted or that are not a viable option. In short, a variance application is not required when it "would have been pointless." Kottschade's "variance" application to the Appeals Board sought an administrative remedy without any legal basis. The City Council had issued its order approving the Plan with conditions. (RA25-36.) Kottschade requested a "variance" from the Appeals Board, asking that the nine conditions on the Plan "be waived." (RA37.)

His request to the Appeals Board was similar to his request to the City Council at the hearing on June 19, 2000, where Kottschade's legal counsel objected "to each and every one of the conditions of approval," and asked the City Council to approve the Plan "without the imposition of any conditions." (RA32-33.) Kottschade's application "requested a variance from the City's Zoning Board of Appeals . . . to waive the Nine Conditions imposed by the Common Council." (Opp'n. Mem. at 12.) But neither the statute nor the ordinance allow a zoning board of appeals to grant a variance waiving conditions imposed by a city council.

**1. The Minnesota Statutes did not allow the Appeals Board to waive conditions that the City Council had imposed.**

The Appeals Board is not a higher administrative body than the City Council. So it lacks statutory authority to overturn conditions that the City Council had imposed. The City Council created the Appeals Board under section 462.354 of the Minnesota Statutes, which requires a "governing body of any municipality" with a zoning ordinance in place to "provide by ordinance for a board of appeals and adjustments." Minn. Stat. § 462.354, subd. 2. The Appeals Board has limited authority, possessing only "the powers set forth in section 462.357, subdivision 6 and section 462.359, subdivision 4." *Id.* Neither of those sections provides authority for a variance from conditions that a city council imposed on an approval of a development plan.

Section 462.357 of the Minnesota Statutes does not provide for a variance from the conditions that the City Council attached to its approval of the Plan in the order dated July 5, 2000. Under section 462.357, the Appeals Board has power to hear appeals

regarding “conditions imposed by the zoning ordinance.” Minn. Stat. § 462.357, subd. 6. But Kottschade’s “variance” application to the Appeals Board did not cite any literal provision of the zoning ordinance that imposed conditions. (RA37.) The City Council had imposed the conditions on the Plan. (RA25-36.) Kottschade’s application asked the Appeals Board to “waive” all nine conditions that the City Council had placed on the Plan. (RA37.) Section 462.357 does not authorize the Appeals Board to waive conditions that the City Council had imposed when approving the Plan.

The subparts of section 462.357, subd. 6, do not provide for a variance from conditions that a city council imposed on a development approval. One subpart of that statute confers the Appeals Board with authority to hear and decide appeals alleging “that there is an error in any order, requirement, decision, or determination *made by an administrative officer in the enforcement* of the zoning ordinance.” Minn. Stat. § 462.357, subd. 6(1) (emphasis added). But the City Council is not merely an “administrative officer” enforcing the ordinance. The City Council is the governing body of the municipality—the highest authority through which the City operates. This subpart of the statute does not give the Appeals Board any power to waive the conditions as Kottschade requested.

Another subpart of the statute gives the Appeals Board authority to hear “requests for variances *from the literal provisions of the ordinance* where their strict enforcement would cause undue hardship.” Minn. Stat. § 462.357, subd. 6(2) (emphasis added). Authority to grant variances cannot exceed the powers granted by statute. *Sagstetter v. City of St. Paul*, 529 N.W.2d 488 (Minn. App. 1995). Again, Kottschade’s “variance”

application to the Appeals Board did not seek relief from any zoning ordinance provision—his application did not identify any “literal provisions” of the ordinance that caused an undue hardship. (RA37.) Rather, Kottschade’s application to the Appeals Board asked that the nine conditions that the City Council had placed on the Plan “be waived.” (RA37.) Kottschade asked the Appeals Board to do something that it had no legal basis to do. The Appeals Board lacked statutory authority to waive or vary the City Council’s conditions.

The “administrative remedy” or “final decision” that Kottschade sought to obtain through his “variance” application to the Appeals Board did not exist as a matter of law. The City Council had imposed the conditions that Kottschade now seeks to challenge as “unconstitutional conditions” under *Nollan* and *Dolan*. The Appeals Board could not trump the City Council’s order approving the Plan with conditions. The Appeals Board—which the City Council created—lacked statutory authority to overrule the City Council. It would be a watershed change in Minnesota law to say that that a municipal zoning board of appeals has the power to trump a city council’s order. Kottschade’s “variance” application to the Appeals Board was the epitome of futility.

**2. The ordinance did not allow the Appeals Board to waive conditions that the City Council had imposed.**

Kottschade’s “variance” application to the Appeals Board also lacked any basis in the ordinance. The Rochester Code of Ordinances, consistent with section 462.357, provides a variance procedure for seeking to vary the literal provisions of the ordinance:

The opportunity to vary the literal provisions of the ordinance is provided for as required in Chapter 462.357 (sub. 6) of the Laws of Minnesota by the creation of the variance procedure. When practical difficulties or unnecessary hardships unique to an individual property under consideration, and not mere inconvenience, would result from strict enforcement of the literal provisions of this ordinance, application may be made to vary or modify any regulation or provision of the ordinance, subject to the findings in paragraph 60.417, so that the spirit of the ordinance is observed and substantial justice is done. A variance is one remedy available where the zoning administrator has determined that no zoning certificate or development permit may be issued without varying or modifying the regulations or provisions of the ordinance.

R.C.O. § 60.410. The ordinance does not provide for a variance from conditions that the City Council places on the approval of a general development plan. Contrary to Kottschade's suggestion, the Appeals Board could not have "relieved or altered" the conditions that the City Council had imposed on the Plan.

Kottschade's "variance" application to the Appeals Board was not authorized under the variance ordinance, R.C.O. § 60.410. Kottschade's application did not include a request to "vary or modify any regulation or provision of the ordinance." (RA40; AA46.) Kottschade's application asked the Appeals Board to waive the nine conditions that the City Council had placed on the Plan. (RA37.) But the ordinance did not authorize any application for a variance to conditions of approval. A party seeking to challenge the City Council's imposition of any condition of approval on a general development plan must go to state district court. (RA41; AA46.)

The Rochester Code of Ordinances provides for judicial review by the District Court of Olmsted County. R.C.O. § 60.734. This ordinance provision permitted Kottschade to appeal the City Council's order of July 5, 2000 to the state district court.

(AA46.) So, after the City Council approved the Plan subject to conditions, Kottschade had the right under the ordinance to take his challenge to the nine conditions to state district court. (RA41.) But Kottschade did not do so.

While it could be argued that Kottschade filed his “variance” application so that the City Council would reconsider its order of July 5, 2000, that argument would be wrong. The Rochester Code of Ordinances does not provide for a motion to reconsider. The City Council abides by Robert’s Rules of Order, which only allows a motion to reconsider made by council members who voted with the prevailing side. ROBERT’S RULES OF ORDER NEWLY REVISED, § 37, at 304 (10th ed. 2000). *See also Chanhassen Estates Residents Ass’n v. City of Chanhassen*, 342 N.W.2d 335, 338 (Minn. 1984) (“a motion for reconsideration can be made only by one who voted with the prevailing side”). No ordinance provision authorizes a member of the public to cause the City Council to reconsider an action. Kottschade may not create a motion to reconsider through procedural maneuvering that lacks a basis in the ordinance.

Kottschade’s attempt to seek an unauthorized variance from the Appeals Board did not somehow render the City Council’s order of July 5, 2000 any less final. The City Council had issued its order approving the Plan with nine conditions. The Appeals Board lacked authority to reverse the City Council’s order. Kottschade’s “variance” application to the Appeals Board was futile—it was not allowed by law. The six-year statute of limitations for Kottschade’s claim alleging “unconstitutional conditions” under *Nollan* and *Dolan* began to run on July 5, 2000, when the City Council placed conditions on the Plan.

**3. Both the Appeals Board and the City Council concluded that Kottschade's "variance" application was not allowed by law.**

The Appeals Board and the City Council recognized and concluded that Kottschade's "variance" application was not allowed by law. During the October 4, 2000 hearing on Kottschade's "variance" application, the Appeals Board recognized that it could not "overturn" the City Council's decision to approve the Plan with nine conditions. (RA42-43.) The Appeals Board observed that it is "not a higher administrative body than the City Council." (RA44; RA50.) Kottschade was not exhausting his administrative remedies because, in the City, "[t]here is no higher administrative body than the City Council." (RA44.) The Appeals Board stated that—after the City Council's approval of the Plan with nine conditions on July 5, 2000—Kottschade's "only recourse is judicial" (RA44), and that Kottschade "should go to the District Court level." (RA48.)

In its resolution denying the request, the Appeals Board found that Kottschade's "variance" application was not authorized by either the Rochester Code of Ordinances or Minn. Stat. § 462.357, subd. 6, and that the "Zoning Board of Appeals is not a higher administrative body than the City Council." (RA50.) As an alternative ground for denying the request, the Appeals Board found that the application lacked sufficient evidence to justify a variance. (RA50-51.) Contrary to what Kottschade and the amicus contend, when the Appeals Board addressed the alternative reason for the denial it did not somehow nullify the finding that the variance application was not authorized by law. Courts may address alternative bases for decisions without negating the initial basis. *See,*

*e.g.*, *Evans v. Chavis*, 546 U.S. 189, 194 (2006) (explaining that a court “will sometimes address the merits of a claim that it believes was presented in an untimely way,” in circumstances “where the merits present no difficult issue” or “where the court wants to give a reviewing court alternative grounds for decision”); *Northern States Power Co. v. Commissioner of Revenue*, 504 N.W.2d 34, 37 (Minn. 1993) (explaining “an alternative basis for our decision”); *Smiley v. State of South Dakota*, 551 F.2d 774, 775 (8th Cir. 1977) (“The district court concluded, as an alternative ground for its ultimate decision that even if it possessed subject matter jurisdiction, it would be compelled to dismiss the suit”).

Although Kottschade and the amicus criticize the City for processing his “variance” application, the fact that the City processed the application does not change the legal conclusion that the statute of limitations began to run on July 5, 2000. The City could not have simply refused to process his application. State law required the City to act on Kottschade’s “variance” application, even if the application lacked any legal basis. *See* Minn. Stat. § 15.99, subd. 2 (automatic-approval statute). If the City had ignored such an application, it could result in automatic approval. *Id.* And throughout the process, City officials recognized and raised the legal defect in Kottschade’s application.

Kottschade raises a concern that the City relied on “non-lawyer planning staff” when concluding that the Appeals Board lacked legal authority to vary the conditions that the City Council had imposed. But the City’s interpretation of an ordinance—regardless of whether a lawyer provided it—is “entitled to some weight.” *Chanhassen Estates Residents Ass’n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984). And

Kottschade's reading of the record is incorrect because City officials received legal advice. At the public hearing, special legal counsel to the Appeals Board, Karen Marty, summed up the reasons why Kottschade's "variance" application lacked any legal basis:

What has been granted to Mr. Kottschade is not an ordinance. It's a general development permit with conditions. Although the conditions are all based on an ordinance, none of them are ordinances. And you do not have the authority to overturn the City Council on their issuance of such a permit. You have the authority to issue a variance to a particular ordinance. But that's not what's in front of you here.

(RA45-46.) Kottschade's criticism of "non-lawyer planning staff" is both unfounded and irrelevant.

The City Council affirmed the Appeals Board's denial of the variance request, finding that the Appeals Board "lacked authority to vary the conditions of approval imposed upon a general development plan." (RA66.) Kottschade and the amicus quote the first paragraph of the City Council's conclusions, ignoring the next paragraph. That second paragraph states that "the Rochester Code of Ordinances does not provide for a variance from conditions of approval imposed upon a general development plan." (RA66.) While the City Council's conclusions also address an alternative ground for denying the variance, those alternative findings do not negate the conclusion that the variance application was not authorized by law. Again, courts routinely address alternative bases for decisions without nullifying the initial basis. *See Evans*, 546 U.S. at 194 (discussing the merits did not prove that the court thought the petition was timely). There is no reason why a board of appeals or city council cannot address alternative reasons for their decisions without negating the threshold reason.

Kottschade was not exhausting administrative remedies under Minn. Stat. § 462.361 with his “variance” application to the Appeals Board.<sup>11</sup> Rather, he attempted to invent a remedy that was not allowed by law. The Appeals Board is not a higher administrative body than the City Council. It lacked the legal authority to overturn the City Council’s decision to approve the Plan with conditions. As a matter of law, the statute of limitations began to run on July 5, 2000, when the City approved the Plan with conditions.

### **III. NO JUSTICIABLE CONTROVERSY EXISTS AND KOTTSCHADE LACKS STANDING.**

The district court properly found that Kottschade failed to preserve his rights to develop his land under the approved Plan. (AA15-20.) Section 61.216 of the Rochester Code of Ordinances provides that, after the City Council approves a general development plan, it shall expire if no construction activity or subsequent development approval occurs for any two-year period. It is undisputed that Kottschade did not begin construction activity and did not receive subsequent development approval for the Plan for over two years. He also failed to ask the City Council to extend the time period. As a result, the Plan approval expired.<sup>12</sup> Section 61.216 serves an important public policy by

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<sup>11</sup> In support of his supposition that he was exhausting administrative remedies, Kottschade cites Minn. Stat. § 461.354, which does not exist. The City presumes that Kottschade meant § 462.361. That statute requires use of procedures available under municipal ordinance before seeking judicial review. But again, the Rochester Code of Ordinances does not provide for any administrative appeal or variance from the City Council’s order placing conditions of approval on a general development plan.

<sup>12</sup> A two-year limit does not violate any inherent federal right to assert a taking claim. *See Rocky Mountain*, 481 F.Supp.2d at 1226 (holding that Colorado’s two-year statute of limitations applied to bar federal taking claim).

requiring developers to inform the City and its planning staff that a “live” development plan continues to exist, enabling the City to consider other land-use planning questions in the context of the “live” development plan. This ordinance requirement also allows the City to consider changed circumstances if development approvals expire.<sup>13</sup> Nearly eight years have passed since the Plan approval.

The district court also correctly observed that Kottschade could have taken steps to prevent the Plan approval from expiring. (AA17.) He did not have to commence construction activity to preserve his rights in the Plan. Section 61.216 also provides that “action by the Council” can extend the time period for a general-development-plan approval. So a developer may ask the City Council to extend the time period on an approval. But Kottschade never did that. In fact, Kottschade said nothing to the City about the Plan for many years. After the Plan approval expired—and after the statute of limitation ran out—Kottschade filed the present lawsuit on December 22, 2006. Kottschade is responsible for the long delay that results in the absence of a justiciable controversy, the lack of standing, and the mootness of his claim. He cannot evade his responsibility for allowing so much time to pass without acting.

Since Kottschade’s brief did not challenge the district court’s holding that no justiciable controversy exists, he waived arguing that point. *Melina v. Chaplin*, 327

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<sup>13</sup> As a matter of public record, 40th Street SW has been reconstructed. Kottschade’s other lawsuit against the City challenges the special assessment imposed for the reconstruction of 40th Street SW. *SJC Properties, et al. v. City of Rochester*, Olmsted County District Court, Consolidated Court File Nos. 55-C6-05-1988, 55-C6-05-1991, 55-C8-05-1992, 55-C1-05-1994, 55-C3-05-1995, 55-C5-05-1996, 55-C7-05-1997. The reconstruction of 40th Street SW during the nearly eight years since the Plan approval is just one example of changed circumstances.

N.W.2d 19, 20 (Minn. 1982). This Court may affirm the district court's decision to dismiss on that basis alone. No genuine or present controversy exists for this Court to consider because, under Section 61.216 of the Rochester Code of Ordinances, the City's approval of the Plan with conditions expired. (AA15-18.)

For reasons similar to the absence of a justiciable controversy, the district court appropriately concluded that Kottschade lacks standing (and his issue with the conditions is moot). (AA19-20.) By operation of section 61.216 of the City's ordinance, the City's approval of the Plan—along with the nine conditions imposed on the approval—expired. Because the Plan approval with conditions expired, Kottschade lacks standing to claim that it constitutes a taking. Standing exists if the City's action adversely "*operates*" on Kottschade's property rights. *See Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 18 (Minn. App. 2003) (explaining that "aggrieved person" has standing under Minn. Stat. § 462.361, subd. 1, when a city's action adversely "operates on his rights of property or bears directly upon his personal interest"). The Plan approval with conditions no longer "operates" on Kottschade's property. It expired. No "injury-in-fact" exists. So Kottschade lacks standing.

#### **IV. NO FACT ISSUES PRECLUDED THE DISTRICT COURT'S DECISION TO GRANT SUMMARY JUDGMENT AS A MATTER OF LAW.**

Kottschade's efforts to contrive fact issues should be rejected. This Court must "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). But with respect to legal questions, this Court is "free to exercise its independent judgment."

*Smith v. Employers' Overload Co.*, 314 N.W.2d 220, 221 (Minn. 1981). Legal questions should not be viewed in the light most favorable to Kottschade.

Contrary to Kottschade's supposition, he is not entitled to a "factual inference" that the Appeals Board possessed jurisdiction to grant his "variance" application. In its resolution denying the variance, the Appeals Board specifically stated that it "is not a higher administrative body than the City Council." (RA50.) The Appeals Board also expressly found that Kottschade's "variance" application was not authorized by either the Rochester Code of Ordinances or Minn. Stat. § 462.357, subd. 6. (*Id.*) The interpretation of the ordinance and the statute is a legal question. *See State Farm Mut. Auto. Ins. Co. v. Thunder*, 605 N.W.2d 750, 753 (Minn. App. 2000) ("Statutory interpretation is a legal question that this court reviews de novo."). Kottschade is wrong when he requests a "factual inference" regarding that legal question. The actual text of the ordinance and the statute contains no legal authority for Kottschade's "variance" application requesting the Appeals Board to waive the conditions that the City Council had placed on the Plan. The reading of that text is a legal matter.

Furthermore, Kottschade is not entitled to a "factual inference" that the statute of limitations did not begin to run on July 5, 2000 when the City Council approved the Plan with conditions. The City's proceedings on the Plan are a matter of public record. Applying the statute of limitations to the undisputed factual record presents a legal question. *See Sarafolean v. Kauffman*, 547 N.W.2d 417, 419 (Minn. App. 1996) ("Statute of limitations construction is a legal question reviewed de novo."). As a matter of law, Kottschade's *Nollan-and-Dolan* claim alleging "unconstitutional conditions"

arose when the City Council approved the Plan subject to conditions on July 5, 2000. As Kottschade has stated, the City Council's order approving the Plan with conditions was "final" (App. Br. at 28), and the "only remaining issue involves the legality of the conditions." (RA88.)

Finally, Kottschade attempts to manufacture a fact issue by suggesting for the first time on appeal that his "first opportunity to evaluate the extent of the conditions and explain their impact on his property" occurred after the City Council's order of July 5, 2000. But the record shows that—four months before the matter finally reached the City Council—the City's Planning and Zoning Commission held three public hearings concerning Kottschade's Plan and the conditions that the City proposed to place on the Plan. Kottschade's representatives spoke at each of the three hearings before the Planning and Zoning Commission. And, at the hearing before the City Council, Kottschade's legal representative objected to all the conditions and asked the City Council to approve the Plan without imposing any conditions. Kottschade thus had multiple opportunities to evaluate the conditions and explain their impact. While the record must be viewed in a light favorable to Kottschade, the hand holding the light should not cast shadows over parts of the record that contradict Kottschade's story.

### **CONCLUSION**

Respondent City of Rochester requests this Court to affirm the district court's decision to dismiss Appellant Kottschade's complaint.

Respectfully submitted,

Dated: May 30, 2008

**GREENE ESPEL, P.L.L.P.**



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**CERTIFICATE OF COMPLIANCE**

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 12072 words.

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