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NO. A08-143

State of Minnesota
In Court of Appeals

Franklin Kottschade,

Appellant,

v.

City of Rochester,

Respondent.

REPLY BRIEF OF APPELLANT FRANKLIN P. KOTTSCHADE

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Appellant Franklin P. Kottschade hereby replies to the City of Rochester's Brief dated May 30, 2008.

SUMMARY OF ARGUMENT

1. *Williamson County* finality applies to claims that permit conditions and exactions violate the federal Takings Clause under the *Nollan-Dolan* doctrine. To adjudicate whether an essential nexus and rough proportionality exist between an imposed condition and a development plan's impacts, a court requires a government's definitive position regarding what development it will and will not allow on the property. In this respect, *Nollan-Dolan* exaction claims do not differ from *Penn Central* regulatory taking claims. Moreover, the City of Rochester has not cited a single case that exempts *Nollan-Dolan* claims from *Williamson County* finality, because no case so holds.

2. The statute of limitations issue in this appeal is whether the six-year period began with the City Council's initial imposition of conditions on July 5, 2000, or its affirmance of the Rochester Zoning Board of Appeals' denial of Kottschade's variance application on January 3, 2001. This, in turn, depends on whether *Williamson County* and its progeny – federal law – required Kottschade to apply to the ZBA for relief from the General Development Plan ("GDP") conditions in order to fully define the City's regulatory position and thus to ripen his *Nollan-Dolan* taking claim. Kottschade was required to do so if *either* (a) Minnesota law *required or allowed* him to apply to the ZBA for a waiver of the GDP conditions; or (b) the issue of whether ZBA had jurisdiction over his waiver application was required by administrative law principles to be submitted to the agency itself first for resolution. Kottschade's application fell into *both* of these categories, and as a result, he was obligated by *Williamson County* to apply to the ZBA to ripen his federal taking claim. Minnesota statutes grant zoning boards of appeal the authority to provide relief from conditions imposed under the authority of a municipality's land use ordinance, and require property owners to exhaust such remedies before proceeding to court. Whether Kottschade's application for a waiver of the GDP

conditions was an application for relief from a "literal provision" of the ordinance was a threshold issue for the ZBA to determine, one that it had to be allowed to determine first. *Thus, the ZBA's conclusion that it lacked jurisdiction to waive the conditions was not dispositive of whether Kottschade's application was required to satisfy* *Williamson County finality.* To establish the City's overall dispositive position, Kottschade had to test whether the ZBA would provide relief; he did not have the legal option of assuming how the ZBA would so rule.

3. The fact that the ZBA concluded that it could not waive the GDP conditions did not mean that Kottschade's application was a futile or "unauthorized" step, because, as discussed above, the ZBA's decision was not a foregone conclusion, as its own wrestling with the jurisdictional issue demonstrates. In addition, the City continues to misapprehend the difference between federal law/*Williamson County* finality and state law of exhaustion of administrative remedies. Exhaustion refers to utilizing procedures for review of the legality of an action. Finality, in the federal takings context, refers to whether the government, through its various agencies – those with the power to impose conditions and those with the power to relieve or modify them – has stated a definitive position as to what it will or will not allow. Under *Williamson County,* futility is only an issue when a takings plaintiff asserts that a particular step is not necessary to establish the government's definitive position *vis-a-vis* his land. Futility is not a government's *post hoc* special defense that a landowner's application, made to establish finality, was unnecessary.

4. Kottschade's claim in this case is not based on a "plan approval that expired," but on the imposition of conditions so onerous and undocumented as to lack the required nexus and proportionality, which left Kottschade with nothing to preserve or renew.

5. The City's argument that Kottschade received an approval of his development plan which then expired after two years continues to misstate Kottschade's

legal claim. Indeed, Kottschade did not receive an approval he could effectuate; what the City granted was so burdened with excessive, onerous, and unconstitutional conditions as to amount to nothing but a sham approval. The City's imposition of conditions was a constitutional tort, and Kottschade had no viable development rights or authorization to preserve.

6. Kottschade did address the trial court's ruling regarding lack of a justiciable controversy. The lower court ruled that there was no controversy because GDP #151 had expired. This ruling was based solely on the two-year permit expiration, so by challenging the trial court's predicate ruling, Kottschade necessarily challenged the justiciability holding.

LEGAL ARGUMENT

It will be helpful at the outset to identify the matters on which the parties agree:

With one exception noted below, Kottschade and the City concur on the facts, relevant documents, and procedural history. The parties agree that Minnesota law provides a just compensation remedy; the applicable statute of limitation is six years as set forth in MINN. STAT. § 541.05, (AA 153[1]); and statutes of limitation in general serve an important public policy objective. Kottschade does not argue that his federal court litigation in 2001-2003 tolled the six year statute of limitations. He also does not argue that his September 2000 variance application tolled the statute; the appellant's argument is that the six-year period did not begin until the Rochester City Council affirmed the ZBA's denial of his application for relief from the GDP conditions. While maintaining his arguments that the district court improperly denied factual inferences to which he was entitled when defending against a summary judgment motion, and wrongly provided the

[1] "AA" refers to documents in the Appendix of Kottschade's Brief in this appeal filed April 30, 2008.

City with favorable factual inferences, Kottschade does not contend that he (or the City) may benefit from inferences on issues of law.

Kottschade's factual disagreement is with the City's claim that from 2003 to 2006 he "did nothing." (City's Br. at 10-11). This disagreement need not be resolved; this court may simply take judicial notice of Kottschade's administrative proceedings and litigation in the Minnesota courts during this period and his defense of the development potential and value of his property against incursions by the State and the City. (Kottschade's Br. at 2, 12).

I. *WILLIAMSON COUNTY* FINALITY APPLIES TO FIFTH AMENDMENT TAKING CLAIMS THAT SEEK JUST COMPENSATION FOR ILLEGAL EXACTIONS UNDER THE *NOLLAN-DOLAN* DOCTRINE.

The City argues that *Williamson County* finality does not apply to exaction claims brought under the *Nollan-Dolan* line of cases. It asserts that *Nollan-Dolan* claims are "distinct" from regulatory takings claims brought under *Penn Central Transport. Co. v. New York City*, 438 U.S. 104 (1978), because *Penn Central* claims focus on economic impact and interference with investment-backed expectations, while *Nollan-Dolan* claims do not. (City's Br. at 20). *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The City actually argues that in exactions/ conditions cases, a court does not need to know the government's definitive position as to what uses it will and will not allow on the subject property: "There is no need for a land owner to test the breadth of government regulation on use of property where the allegation is that government exceeded its authority to impose the condition in the first place." (City's Br. at 14). The City's position is incorrect for several reasons.

First and foremost, the City's Brief does not contain a single citation to a case holding that *Williamson County*'s requirement that the government must have arrived at a definitive position with respect to development is inapplicable to *Nollan-Dolan* exaction claims. No court, including the U.S. Supreme Court, has ever so held. Indeed, the City

argues for a proposition that federal, state, county, and municipal governments and agencies would oppose in takings litigation: The City argues, in effect, that a takings claim is exempt from *Williamson County*'s finality requirement if it arises from an exaction or permit approval condition rather than a permit denial. No case says that, and city attorneys everywhere would blanche at this suggestion. Indeed, if this Court accepts the City's argument, it would be the first time a court ruled that *Williamson County* finality is irrelevant in unconstitutional conditions cases, allowing property owners in Minnesota to immediately seek judicial review of claims that permit conditions constitute a taking.

As to case law, in *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994), the Court applied *Williamson County* finality to a challenge to approval conditions, *see id.* at 1273. In addition, in the earlier federal court litigation in this case, *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003), the Eighth Circuit, while not deciding finality because it was addressing the forum issue, expressly noted that unlike the plaintiff in *Williamson County*, "Mr. Kottschade has already sought variances." 319 F.3d at 1041. One other recent case applies *Williamson County* finality to a *Nollan-Dolan* claim, without discussion or comment. *Tapps Brewing Inc. v. City of Sumner*, 482 F. Supp. 2d 1218 (W.D. Wash. 2007).

Establishing the government's definitive position is as necessary to a *Nollan-Dolan* exaction claim as it is to a *Penn Central* claim.[2] First, *Penn Central* claims and *Nollan-*

[2] Kottschade, many property owners, and most likely the *amicus curiae* in this case believe that *Williamson County*'s finality requirement has developed in the lower federal courts in ways that the U.S. Supreme Court did not intend or anticipate when it created the doctrine in 1985. Mr. Kottschade, as a citizen, has supported legislation proposed in Congress that would at least modify the most extreme judicial interpretations and applications of *Williamson County*, rulings that deny or thwart constitutionally-protected property rights. The City insinuates, with no legal, factual, or even political basis, that

Dolan claims are similar in that both arise from denials of property rights: regulatory claims from express denials and exaction claims from approvals with conditions so onerous as to prevent a property owner from proceeding with development. Thus, the City's "approval vs. denial" analysis is inaccurate. (*See* City's Br. at 13)

Under *Penn Central*, regulatory takings can be either facial or as-applied; *Nollan-Dolan* claims, on the other hand, are often as-applied challenges.[3] The issue becomes whether the government, in imposing conditions by permit approval or legislatively, has provided the "individualized determination" of an "essential nexus" and "rough proportionality" that *Nollan* and *Dolan* require. Thus, the nature of a *Nollan-Dolan* claim is that the government has failed to provide its definitive position regarding use of the subject land by failing to provide the logic, rationale, and balance of the condition it seeks to impose. The elements of a *Nollan-Dolan* claim rest on a fact-specific inquiry regarding the nexus and proportionality between the exaction and the proposed development.

Moreover, a *Nollan-Dolan* claim is not, as the City asserts, a claim that a government's action is unauthorized in the first place, what is sometimes called *ultra vires* action. (City's Br. at 14). Exaction claims under *Nollan-Dolan* do not assert that government does not have the generic power to impose conditions. If a property owner makes a claim that the government does not have the authority at all to impose any conditions or conditions of a particular type, that argument will be made under state law. As Kottschade explained in his Brief at 1, exactions are not illegal *per se*; a government violates the federal Fifth Amendment Taking Clause when – if authorized by state law –

_____ (continued)

Mr. Kottschade's 2006 Congressional testimony was something less than a citizen's honorable and straightforward exercise of his right to petition the government to change the law. (*See* City's Br. at 11).

[3] Conditions can be imposed through both development approvals with attached conditions and legislative enactments. *See Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., dissenting).

it applies an ordinance, but then imposes onerous conditions without providing the individualized explanation that *Nollan-Dolan* requires.

Nollan-Dolan and *Penn Central* analyses are usually fact-intensive; to provide a meaningful analysis under either rubric, the reviewing court must know the extent to which the challenged conditions burden the subject property. *See Nollan*, 483 U.S. at 837.[4]

In summary, the City's argument that *Williamson County* finality is inapplicable to *Nollan-Dolan* claims is not based on a single case citation and is contrary to the essence of such claims.

The City's argument is also undermined by *Dolan* itself. *See* 512 U.S. at 379. There, the City Planning Commission granted the petitioner's permit application with conditions attached, which were required per the Community Development Code. Mrs. Dolan then applied for a variance from the application of the Code standards, which was denied by the Commission. *Id.* at 380. Next, Mrs. Dolan appealed to the Land Use Board of Appeals. This appeal was similarly rejected. *Id.* at 382. Although the U.S. Supreme Court did not specifically address the issue of ripeness in *Dolan*, the Court is well-known for taking note of procedural prerequisites to taking claims, even *sua sponte*. In *Dolan*, the Court did not question or comment on Mrs. Dolan's variance application. It is instructive, therefore, that Kottschade followed the same procedural path as Mrs. Dolan.

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[4] The City cites *Mobley Construction Co. v. United States*, 68 Fed. Cl. 434 (Fed. Cl. 2005), for the proposition that the statute of limitations on challenging a permit condition begins to run when the condition takes effect, not when the property owner is able to measure its damages with precision. Kottschade does not disagree, but *Mobley* has nothing to do with this case. In *Mobley*, federal regulations clearly defined when agency action constituted the government's final position. The issue here is which agency action was the final one.

Without explaining whether it is discussing *Nollan-Dolan* or statutes of limitations, the City cites several cases that involve limitations and approval conditions, but misstates the holdings, fails to identify the case's relevance, or both. The City cites *Rocky Mountain Christian Church v. Board of County Comm'rs*, 481 F. Supp. 2d 1213 (D. Colo. 2007), incorrectly, and in contradiction to its position regarding *Nollan-Dolan* and *Williamson County* finality. (*See* City's Br. at 18). The City declares that that case held, as a universal principle, that "[w]hen a condition is imposed on a development approval, the statute of limitations begins to run on a claim that the condition is unconstitutional." *Id.* The Colorado court, however, did not hold that limitations on challenging conditions always begin when a condition is first imposed. *See Rocky Mountain*, 481 F. Supp. 2d at 1225-26. The issue in *Rocky Mountain* was whether a 2004 denial of a special use application or a 1997 approval of a special use permit with a condition constituted the date of accrual of the plaintiff's inverse condemnation claim. The church argued that the 2004 denial invalidated the earlier condition by undermining any nexus and proportionality between the condition and the proposed use. The court held that the church's claim against the condition ripened when it was imposed, rather than when the later permit was denied. The court reasoned that, "if the easement requirement violated the rough proportionality test, then that violation and the resultant harm were apparent when the easement was imposed as a condition of the board's approval of the 1997 application." *Id.* Thus, the court did not espouse a universal principle, but denied a fact-specific claim arising from the relationship of the 2004 and 1997 actions. Also, *Rocky Mountain* does not suggest that *Nollan-Dolan* claims are exempt from *Williamson County* finality, even though an exaction claim was at issue.

The City also misdescribes *Christopher Lake*, because the City fails to note (Brief at 23) that the Court's conclusion that *Williamson County* finality had been achieved was based on the applicant's variance application. The court there confirmed that the *Williamson County* finality requirement applies to constitutional challenges of

development approvals with conditions. *See id.* at 1273. As a condition, the county required the developer to make provisions for the disposal of stormwater as required by local regulations. *Id.* at 1271. The developer sought relief from the regulations, which was denied. *Id.* Then, after the developer installed the drainage system, the developer *sought a variance* of the conditions. *Id.* at 1273. The court determined that the developer's variance application had ripened its taking claim. *See id.* at 1274.

Furthermore, the City erroneously cites *McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997), in support of its assertion that "[a]n approval with conditions constitutes a final decision." (*See* City's Br. at 23). The Eighth Circuit categorized the taking in *McKenzie* as authorizing a physical occupation, which "is by definition a final decision for the purpose of satisfying *Williamson County*'s first requirement." *Id.* at 317. *McKenzie* is of no relevance here, however, because no statute of limitation was at issue, nor the availability of a variance.

The City's reliance on *Daniels v. Area Plan Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002), is similarly misplaced. (*See* City's Br. at 23). The City states that the court in *Daniels* "held that 'an approval of a plat vacation and imposition of a condition on a plat vacation constitutes a final decision' to satisfy the *Williamson County* requirement." *Id.* The City fails to include that the Seventh Circuit was interpreting Indiana law, Ind. Code § 36-7-3-11(h), to determine whether the plaintiff had further administrative responsibilities under the Indiana plat vacation statute. *See Daniels*, 306 F.3d at 454. The court quoted the state statute as providing that "'the approval, disapproval, or imposition of a condition on the approval of the vacation of all or part of a plat is a final decision of the plan commission' and may be appealed to a court for review." *Id.* As such, the court found that the plaintiff in *Daniels* had achieved *Williamson County* finality. *Id.* Indiana law regarding plat approvals, however, has

nothing to do with whether Minnesota law allows or compels applications to waive conditions imposed on general development permits.[5]

II. KOTTSCHADE HAD TO APPLY TO THE ZBA FOR RELIEF FROM THE GDP CONDITIONS, AND AS A RESULT, THE LIMITATIONS PERIOD DID NOT BEGIN UNTIL THE CITY COUNCIL AFFIRMED THE ZBA DENIAL.

Kottschade maintains but will not repeat here his argument that the City Council's July 2000 imposition of conditions on GDP #151 was factually and legally incomplete and therefore not a definitive statement of the City's position with respect to what it would and would not allow on the subject parcel. (Kottschade's Br. at 5-9, 28).[6]

The issue here with regard to whether the statute of limitations began in July 2000 or January 2001 is whether, after the City Council initially imposed the conditions, Kottschade had either the opportunity or the obligation to apply to the ZBA for relief. If he did, he was obligated under *Williamson County* finality – federal law – to do so, and

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[5] In fn.8 on p. 26, the City argues that invalidation of a condition is the only available remedy in a *Nollan-Dolan* claim. The required remedy for a taking under the Fifth Amendment, however, is just compensation. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 329 (1987), the U.S. Supreme Court held that where the government's activities have already worked a taking of all use of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Invalidation of government action converts a permanent taking to a temporary taking, with compensation being the required remedy for the period of illegal regulation.

[6] In its Brief at 24, the City misstates Kottschade's argument regarding the draft Development Agreement. It is undisputed that that Agreement was incomplete as of July 2000. As a result, as a factual mater, the City at that time had not stated its definitive position as to what development it would allow on the property, because an important part of the conditions had not even been written. The City provided additional details in September. The effect of this chronology is that Kottschade's first opportunity to challenge the full impact of the GDP conditions was at the ZBA hearing in October 2000, and thus the City's definitive position was not and could not have been formulated until the ZBA acted (in November) and the City Council affirmed that action in January 2001. The City Council's January 2001 action established finality because at that time the Development Agreement had been sufficiently delineated.

his taking claim did not accrue until the ZBA denied that variance application and the Council affirmed. In other words, while the City Council's July 2000 action was "final" with respect to its exercise of authority to impose conditions on GDP #151, whether that action satisfied *Williamson County* finality – whether it constituted the City's definitive position on the 16.4 acres – depends on whether a ZBA application was required *or* allowed. If either is true, then the July 2000 action was not the City of Rochester's last word.[7]

Kottschade had the opportunity and obligation to apply to the ZBA for several reasons. First, the state statute that governs the jurisdiction of zoning boards of appeal in Minnesota, MINN. STAT. § 462.357, subd. 6(2)/AA 104, provides expressly that zoning boards of appeal can provide relief "from the literal provisions" of a city land use ordinance, and both a state statute, § 462.361/AA 106, and a Rochester city ordinance, § 60.734, expressly required Kottschade to exhaust available administrative remedies before proceeding to court.[8]

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[7] The City's Brief at 17 includes an excerpt from Kottschade's 2003 appeal brief in the U.S. Court of Appeals for the Eighth Circuit, where the issue was whether Kottschade was entitled to pursue his federal taking claim in federal court. The City implies, though does not state, that the quote is a judicial admission that the City Council's imposition of the conditions was a final action. This suggestion is inaccurate in several ways: (1) the excerpt says that "the City's" action – not the Council's – action was final; (2) as of May 2001 when Kottschade commenced his action in federal district court, the City's action – Council condition plus ZBA's denial plus Council affirmance – was final under *Williamson County*; (3) finality was not at issue in the federal district court adjudication, which focused only on the forum issue; (4) the City's claim that the Council's July 2000 action satisfied *Williamson County* finality was made for the first time in this case; (5) in any event, a party cannot concede jurisdiction. The quote from 2003 adds nothing to this case.

[8] Kottschade will not reiterate here the arguments in its Brief as to the availability of the ZBA application being governed by state law, not municipal ordinance, and being a matter of law for this Court to decide on a plenary basis, without deference to decisions or determinations made by the City planning staff.

Given the wording of the state statute on ZBA jurisdiction, the next issue is whether an application for a waiver of, or relief from, the conditions imposed on a general development permit falls within relief from "the literal provisions of the ordinance." Here, the City's own Brief and other materials provide the best evidence that it did: On p. 8 of its Brief, the City states: "Following the multiple public hearings about Kottschade Plan and conditions, the City Council's order of July 5, 2000 was the final action '*on the conditions under procedures prescribed by the ordinance*.'" (Emphasis added). On p. 41 of its Brief, quoting Attorney Karen Marty, advising the ZBA, the City states: "Although the *conditions are all based on an ordinance*, none of them are ordinances." (Emphasis added.) Finally, as quoted in Kottschade's Brief on p. 30, in arguing its summary judgment motion in the District Court in this matter, with respect to the *Nollan-Dolan* doctrine, the City 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). Arguing that its exactions were substantively proper, the City's position was that it was simply applying its own ordinance as written. Thus, the City has conceded that conditions are part and parcel of the ordinance.

Throughout its summary judgment motion and in its Brief in this appeal, the City has not cited any Minnesota case holding that a municipal zoning board of appeals does not have the authority to provide relief from a condition imposed on a development permit. On the other hand, case law demonstrates that ZBA's are authorized to provide relief from the actions of municipal agencies dealing with land use. For example, *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85, 90 (Minn. Ct. App. 2000) holds that county boards of adjustment have the power to vary zoning ordinances.[9] *In re Appeal of*

[9] The county variance statute is worded differently from the municipality variance statutes, which allows variances only on a showing of "undue hardship" and does not

Kennedy, 374 N.W.2d 271, 275 (Minn. 1985), holds that a board of adjustment has the authority to grant a variance of a city ordinance. When Kottschade filed his application with the Rochester ZBA for relief from conditions imposed under authority of Rochester's Land use Ordinance, he was in the right City office.

It is important at this point to remember that Kottschade's obligation to apply to the ZBA was governed by federal law, *Williamson County* and its progeny, which hold that if an agency can *possibly* provide relief that will ameliorate a taking, then it is incumbent upon a takings plaintiff to establish the government's definitive position with respect to development of the land. The City's Brief is notable for its near-total avoidance of the holdings of the federal court case (Kottschade's Br. at 24-26) that explain this standard.

Because the standard is "possible" relief, Kottschade was obligated to apply for a variance if state law directed or allowed him to, or if the ZBA's authority was uncertain. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736-37 (1997) ("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") (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297 (1981)). Federal law, then, brings into play the second basis on which Kottschade had to seek relief from the ZBA: It is a well-established principle of administrative law that so long as an application is of the type committed to a particular agency, that agency must be given the first opportunity to rule on the matter, even if it is jurisdictional. (*See* Kottschade's Br. at 31-32 and cases cited therein). It is possible to posit applications that would be "unauthorized" or inappropriate, such as going to a zoning board of appeals for a driver's license or applying to a wetlands agency

_____ (continued)
refer to practical difficulties, but the authority is the same. *See* MINN. STAT. § 394.27, subd. 7 (1998). *See* MINN. STAT. § 462.357, subd. 6(2) (1998).

for rezoning. Such applications would be akin to *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1987), after remand, 857 F.2d 567 (1988), cited by the City, which discusses a variance as being "not legally available." (*See* City's Br. at 32). In that case, state statutes expressly said that the property owner's only avenue of relief was a General Plan amendment, not a variance. *See* 834 F.2d 1488, 1496 (9th Cir. 1987). Here, however, the ZBA's jurisdiction was based on an *interpretation* of the City's own zoning ordinance, from which Kottschade was seeking relief. Indeed, the record shows, (AA 129-1 & 2), that the ZBA had to discuss its jurisdiction in order to disavow it. It engaged in a nuanced debate about whether a waiver of a condition is relief from the literal ordinance. The ZBA did not say that Kottschade had filed with the wrong agency, that his application was procedurally defective, or untimely, or void *ab initio*; the ZBA adjudicated its jurisdiction on the merits. (Even then, the ZBA took the discretionary step of addressing the merits of the variance, in the alternative.)

Thus, in this matter, Kottschade *had to give the ZBA the first opportunity to determine its own jurisdiction*. He was not permitted to make an assumption about that jurisdiction. He was obligated by *Williamson County* to pursue the ZBA application. Even if the ZBA was correct in declining jurisdiction, its decision was not dispositive of the *Williamson County* finality issue. Kottschade's application was not futile or unauthorized; it was simply denied, because the ZBA disagreed with him about its authority.

Had Kottschade not applied to the ZBA, the City would undoubtedly have raised *Williamson County* finality as a defense.[10]

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[10] The City argues in its Brief that if this Court were to recognize the variance procedure as necessary under *Williamson County* finality, the statue of limitations would be extended indefinitely in Minnesota. This is plainly incorrect. Applications for variances and other forms of administrative relief all have timing requirements, and Kottschade does not assert that administrative avenues necessary to establish a city's

The City has tried in its Brief to recharacterize the futility exception to the finality rule as a government's special defense. Kottschade has not yet been able to find, nor has the City, a case where the futility exception to administrative finality has been used *by the government* against a landowner to dismiss a takings claim by asserting an earlier start to a limitation period. Futility is a judicially-created exception, for the benefit of the landowner, to the requirement to obtain a final decision under *Williamson County*. The landowner must establish the exception. *See e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001) ("federal ripeness rules do not require the submission of further and futile applications with other agencies."); *Murphy v. New Milford Zoning Commission*, 402 F.3d 342, 349 (2d Cir. 2005); *Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996); *Lost Trail, LLC v. Town of Weston*, 485 F. Supp. 2d 59, 65 (D. Conn. 2007); *Dakota, Minnesota & Eastern Railroad Corp. v. Rounds*, 422 F. Supp. 2d 1073, 1076-77 (D.S.D. 2006). Thus, in addition to Kottschade's variance application not being a futile step, the trial court erred in allowing the City to assert futility as a defense and failing to adjudicate the issue from Kottschade's perspective and his obligation under federal law.

In summary: *Williamson County* finality requires a property owner to make such applications as are necessary to create an administrative record from which a court, adjudicating a takings claim, may understand the government's final position. Thus, every agency with the power to shape that position must be given the opportunity to participate. Here, state law compelled and allowed Kottschade to seek a variance, but at a minimum, under administrative agency law, he was required to apply to the Rochester ZBA to allow it to determine its own jurisdiction. Because of these circumstances, *Williamson County* required Kottschade's variance application. The fact that the ZBA declined jurisdiction does not mean that Kottschade's application was futile, and in any

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definitive position can be pursued at the applicant's leisure or convenience. They must be pursued under the time limits established by state statutes and municipal ordinances.

event, futility is a property owner's claim to try and avoid ripeness hurdles and allow immediate judicial review of a taking claim. No court has ever sanctioned use of the futility doctrine as the City would have here, as a sword to strike down constitutional claims of property owners who have pursued available remedies prior to seeking court adjudication. The limitation period could not begin until the ZBA weighed in and the City Council affirmed its action.

III. KOTTSCHADE HAD NOTHING TO PRESERVE OR RENEW BECAUSE THE CITY'S ACTION LEFT HIM WITH A USELESS APPROVAL.

The City's Brief, at 42-44, does not respond to or take issue with Kottschade's Brief, at 33-34, regarding the two-year permit expiration issue. The City only repeats from the District Court's opinion and restates its view that the lower court outcome was correct. Kottschade can do no more than repeat that the City did not grant an approval that could be preserved; after January 2001, all Kottschade had was a lawsuit; and asking him to "preserve the permit" every two years is analogous to requiring a tort victim to re-injure himself periodically in order to obtain the full benefit of a statutory limitations period.

IV. KOTTSCHADE CHALLENGED THE TRIAL COURT'S RULING REGARDING LACK OF A JUSTICIABLE CONTROVERSY.

The City claims that Kottschade's appeal brief does not challenge the District Court's ruling, (AA 15-18), that the case must be dismissed for lack of a justiciable controversy. (City's Br. at 43-44). To the contrary, this holding was based exclusively on the lower court's conclusion that GDP #151 had expired under the City's two-year expiration ordinance. In his Brief, Kottschade plainly challenges the expiration holding. (Kottschade's Br. at 33-34). The lower court decision, at (AA 15, 17, and 18), refers to no other basis for dismissal than the two-year expiration ordinance. Having appealed the only predicate on which the trial court based its conclusion of no justiciable controversy, Kottschade challenged both the predicate and the conclusion. The fact that the trial court

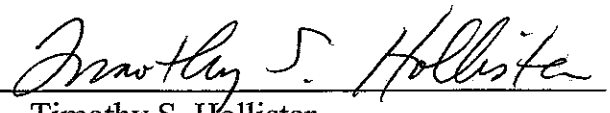
decision is stated in subheadings covering the same point does not mean that Kottschade, attacking the point, appealed one subheading but not the other.

V. CONCLUSION.

The City states that eight years have passed since "the Plan approval," suggesting that the City granted Kottschade valuable rights of which he did not avail himself, and that so much time has passed that even if the City violated Kottschade's constitutional rights, we should all just start over. (*See* City's Br. at 43).

Vindication of constitutional rights often takes years, for various reasons. Here, the *Williamson County* state-court-first requirement; the State and the City's unrelenting view that Kottschade has an unlimited obligation to pay for public transportation improvements; and a District Court decision that takes a myopic and therefore unanticipated view of the statute of limitations period, have caused Kottschade's challenge to the City's violation of the Fifth Amendment to take a long time. The passage of eight years, however, is not a reason to let bygones by bygones; it is a call for this Court to put this case back on track by reversing the lower court dismissal, restore this case to the trial docket, and afford Frank Kottschade his right to an adjudication on the merits of his constitutional claim.

PLAINTIFF/APPELLANT
FRANKLIN P. KOTTSCHADE

By 

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that this reply brief complies with the requirements of Rule 132.01 of the MN Rules of Civil Appellate procedure. Specifically, the brief contains 5,786 words in compliance with the word count limitation contained in Rule 132.01 subd. 3 and conforms with all typeface requirements of Rule 132.01 subd. 1. The reply brief was prepared using Microsoft Word.

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