Inverse Condemnation: Asserting the Ripeness Defense in Federal Courts

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A Practice Note providing considerations to government counsel on asserting the ripeness defense in Fifth Amendment takings, or inverse condemnation, claims. This Note discusses the *Williamson County* exhaustion and finality requirements, the futility exception, and procedural aspects of asserting the defense in a motion to dismiss and a motion for summary judgment.

The Takings Clause of the Fifth Amendment requires the government to pay just compensation when it takes private property for public use. The ripeness defense is one of the strongest, and most litigated, defenses to regulatory takings claims, which are also referred to as inverse condemnation claims.

This Practice Note covers the substantive and procedural requirements for government counsel asserting the ripeness defense to inverse condemnation claims. For information on applying the defense to related constitutional claims, see Practice Note, Inverse Condemnation: Subsumption and Ripeness of Related Constitutional Claims (w-007-4020).

WILLIAMSON COUNTY RIPENESS REQUIREMENTS

Plaintiffs seeking compensation under a ripeness defense for inverse condemnation claims must satisfy:

- **An exhaustion requirement.** Before filing the Fifth Amendment takings claim in federal court, the plaintiff must seek the state remedy for obtaining compensation for the property and be denied relief. For a claim against a state or local government, this generally means that the plaintiff was required to first file a state law takings claim in state court (see Exhaustion of State Remedies Requirement).
- **A finality requirement.** The government has reached a final decision regarding how the local regulations apply to the plaintiff's property and how the plaintiff may use and develop the property (see Finality Requirement).

(*Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).)

The *Williamson County* ripeness requirements are threshold issues in a takings case and are most often resolved on a motion to dismiss or a motion for summary judgment (see Motion to Dismiss Stage and Summary Judgment Stage). A federal court cannot hear the unripe takings claim even though the claim otherwise raises a federal question under the Fifth Amendment or is based on the plaintiff's assertion of diversity jurisdiction (see, for example, *Ackermann Enters., Inc. v. City of Bellevue*, 2016 WL 5171864, at *8-9 (E.D. Ky. Sept. 19, 2016)).

However, the *Williamson County* requirements do not need to be met for claims that the government took property for strictly private use, as private-use takings are unconstitutional regardless of whether just compensation is paid (see *Rumber v. District of Columbia*, 487 F.3d 941, 944 (D.C. Cir. 2007)).

EXHAUSTION OF STATE REMEDIES REQUIREMENT

A takings claim is unripe in federal courts unless the plaintiff has first sought compensation through the process provided by the government. The Constitution does not require pre-taking compensation, but there must be a reasonable and adequate provision for obtaining compensation after the taking.

The governmental action is not complete until the state fails to provide adequate compensation for the taking. This means that:

- All claims for just compensation for the taking of property against state and local government entities must first be filed as state law claims in state courts (see Application to State and Local Government Defendants).
- Most takings claims against federal agencies must follow the process provided in the Tucker Act and be filed in the Federal Claims court (see Application to Federal Defendants).

(*Williamson County*, 473 U.S. at 195.)

APPLICATION TO STATE AND LOCAL GOVERNMENT DEFENDANTS

Almost all federal and state law takings claims against states and local governments are tried in state courts, and not federal courts, because of the *Williamson County* exhaustion requirement. Takings claims against state governments and state officials in their official capacities are also generally barred by Eleventh Amendment sovereign immunity in federal courts (see *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952-56 (9th Cir. 2008)). For more information of state sovereign immunity in federal courts, see Practice Note, Sovereign Immunity of States Under the Eleventh Amendment (W-002-5542).

The specific state remedy that a plaintiff must first seek for the federal takings claim to ripen depends on state law. A plaintiff typically must seek compensation under the state constitution or relevant claims statute (see, for example, *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 234-37 (Tex. 2011)).

Government counsel should also consider whether the state law takings claims have additional exhaustion requirements. In California, for example, a state-law regulatory takings claim is not ripe in state court until the plaintiff files either:

- A declaratory judgment action for facial takings claims.
- A writ for administrative mandamus to review the final decision under Cal. Civ. Proc. Code Section 1094.5.

(*Hensler v. City of Glendale*, 876 P.2d 1043, 1051 (Cal. 1994).)

Sufficiency of State Law Remedies

Plaintiffs may overcome the exhaustion requirement by demonstrating that the state has not provided a sufficient procedure for seeking compensation for a particular governmental action. For example, a plaintiff might argue that the exhaustion requirement is met if a regulation, on its face, makes compensation unavailable or if compensation can be presumed unavailable by the nature of the regulation (*Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1176 (10th Cir. 2011) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998))).

However, proving that the available state remedies are insufficient is a difficult task. Federal courts often summarily dismiss takings claims when the plaintiff has failed to first seek the state law remedy. Most plaintiffs will also find it difficult to survive a government defendant's motion for summary judgment based on the exhaustion requirement (see *Neumont v. Monroe County*, 242 F. Supp. 2d 1265, 1274-75 (S.D. Fla. 2002)).

Government counsel may seek Rule 11 sanctions against a plaintiff making disingenuous assertions regarding the sufficiency of the state remedies (see, for example, *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2d Cir. 2002) (holding that 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) (quoting *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993))).

Federal Takings Claims in State Courts

In state courts, the companion federal takings claim is either:

- Asserted as a separate count by alleging that the government's denial of compensation would violate the Fifth Amendment of the Federal Constitution (*San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 346 (2005) (holding that state courts are not precluded from simultaneously hearing a plaintiff's state and federal law takings claims)). However, this does not work in reverse. A plaintiff cannot ripen the federal claim in federal court by simply amending the complaint to add on a state law takings claim (*Decker v. Citrus County*, 2015 WL 12844302 (M.D. Fla. May 19, 2015)).
- Not filed, but potentially preserved by including an *England* reservation with the state law complaint in the hopes of filing the federal claim at a later date in federal court (*England v. La. Bd. of Med. Exam'rs*, 375 U.S. 411 (1964); see Preclusive Effect of Exhaustion Requirement).

Preclusive Effect of Exhaustion Requirement

The exhaustion requirement is controversial and often referred to by frustrated plaintiffs' counsel as the "*Williamson County* trap" (see, for example, *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (dissenting opinion) (denying certiorari)). The plaintiff's ability to file a takings claim in federal court, after an unsuccessful trial in state court, is largely a legal fiction.

A plaintiff who properly files their takings claim in state court and loses is generally precluded by collateral estoppel, or issue preclusion, from later re-litigating the same issues in federal court (*San Remo Hotel, L.P.*, 545 U.S. at 336-38; see *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1149-50 (9th Cir. 2010)).

Plaintiffs may attempt to preserve the federal takings claim by filing an *England* reservation in the state court and only pursuing the state law claim (see, for example, *Los Altos El Granada Inv's v. City of Capitola,* 583 F.3d 674 (9th Cir. 2009)). An *England* reservation, named for the Supreme Court's decision in *England v. Louisiana Board of Medical Examiners*, permits a plaintiff in certain state court actions to reserve federal claims for subsequent review in a federal forum (375 U.S. 411 (1964)).

The federal takings claim itself is not technically barred by res judicata if an *England* reservation was raised in the state court action (see, for example, *R & J Holding Co. v. Redevelopment Auth.*, 670 F.3d 420 (3d Cir. 2011)). However, the practical ability to later litigate the federal claim is difficult as the issues will likely be similar, if not identical in both state and federal claims, such as whether:

- The plaintiff held an actionable property interest.
- The regulation or government action took the property under the *Penn Central* factors.

(See *San Remo Hotel, L.P.*, 545 U.S. at 338-41; *Ackermann Enters.*, 2016 WL 5171864, at *9.)

Government counsel should keep in mind that a plaintiff's *England* reservation does not make an unripe federal takings claim ripe in federal courts (see *Carroll v. Township of Mount Laurel*, 500 F. App'x 118 (3d Cir. 2012)).

APPLICATION TO FEDERAL DEFENDANTS

Williamson County's exhaustion requirement has a more limited application to federal defendants because of other constitutional and statutory limitations on federal court jurisdiction. It only requires that takings claims be filed in the US Court of Federal Claims under the

Tucker Act (*Williamson County*, 473 U.S. at 195; *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990)).

After the property owner tries that process and is denied compensation, further litigation must allege that the process for receiving compensation, for example the Tucker Act itself, is not a reasonable, certain, and adequate provision for obtaining compensation or that the adequate procedures were not followed (see *City of Monterey v. Del Monte Dunes*, 526 U.S 687, 710 (1999)).

Some federal statutes, such as the Agricultural Marketing Agreement Act, provide a comprehensive remedial scheme that withdraw Tucker Act jurisdiction over the takings claim. To determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must examine:

- The purpose of the statute.
- The entire text of the statute.
- The structure of review the statute creates.

(*Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2061-63 (2013); *E. Enters.*, 524 U.S. at 520; *United States v. Fausto*, 484 U.S. 439, 444 (1988).)

FINALITY REQUIREMENT

Takings claims are not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue (*Williamson County*, 473 U.S. at 186; *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)). The final decision requirement is of greater concern for as-applied regulatory takings claims, because courts assume this requirement is met for physical invasion takings claims and most facial takings claims (see Finality Requirement Is Not Applicable to Categorical Claims).

To satisfy the final decision requirement, courts generally require plaintiffs to demonstrate that:

- They submitted at least one meaningful application seeking an approval from the government agency that has authority to grant variances or exceptions to allow reasonable development on the property (see Meaningful Application).
- The government's action was a definitive position as to how the plaintiff can use and develop the property (see Government Action Is Final Under Local Law).
- The submission of additional applications for zoning relief would be meaningless and futile (see Alternative Plans and Variances).

MEANINGFUL APPLICATION

A landowner may not prove a taking until a land-use authority has the opportunity to exercise its full discretion and decide the reach of the challenged regulation, using its own reasonable procedures (*Palazzolo*, 533 U.S. at 620). A takings claim is not ripe unless the claimant has made at least one meaningful application for approval of the development (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352-53 & n.8 (1986)). The plaintiff must first give the government an opportunity to actually say "no" to the proposed development through the local process before having a viable claim.

In some instances the plaintiff will have made no application at all before filing suit, especially if the plaintiff disagrees with the government's interpretation of its own regulation and the need for local approval. Courts have held, for example:

- The plaintiffs' takings claim was not ripe because they did not make at least one meaningful application and instead repeatedly refused to apply for a conditional use permit that would allow the desired use (*Bee's Auto, Inc. v. City of Clermont*, 927 F. Supp. 2d 1318, 1331 (M.D. Fla. 2013)).
- The plaintiff did not submit a meaningful application for purposes of a temporary takings claim. The delay in plaintiff's development came from its own refusal to apply for approvals, and there was no meaningful application submitted during the period of the alleged temporary taking. (*Ostego County v. Bradford Scott Corp.*, 2011 WL 2936806 (Mich. Ct. App. July 21, 2011).)
- The plaintiffs' failure to apply to rezone its property to permit a manufactured housing community effectively denied the township any opportunity to consider whether that alternative use of the land would be acceptable (*Hendee v. Putnam Township*, 786 N.W.2d 521, 531 (Mich. 2010)).

GOVERNMENT ACTION IS FINAL UNDER LOCAL LAW

The nature of the government's action must be sufficiently final to actually determine the permitted uses and extent of development allowed on the property. The plaintiff must take reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering the development plans for the property, including the opportunity to grant any variances, waivers, and administrative appeals allowed by law (*Palazzolo*, 533 U.S. at 620-21; see also *Williamson County*, 473 U.S. at 190 (holding that denial of a preliminary plat was not a definitive final determination about whether the landowner would be denied all reasonable beneficial use of its property where the landowner failed to follow procedures for seeking a variance)).

This inquiry heavily focuses on:

- The local procedures of the entity.
- The authority of various government actors.

Plaintiffs who have not followed available routes of relief cannot claim to have obtained a final decision, particularly if they chose not to bring their proposal before a decision-making body with broad authority to either:

- Grant different forms of relief.
- Make policy decisions which might abate the alleged taking.

(See *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990).)

Distinguishing Interim from Final Decisions

Claims based on the interim decisions of staff members, particularly claims arising from code enforcement notices and stop work orders, are seldom ripe. These interim actions are typically not final in nature and subject to appeals to the governing body. Courts have held, for example:

- A county had not made a final decision by sending the plaintiff a code enforcement notice of violation. The notice made it obvious that the decision of the code enforcement investigator to send the notice, much like the decision of a police officer to make an arrest,

was not a final decision. If a local code investigator's issuance of a citation was all that was necessary for a claim to ripen, the federal courts would become master zoning boards in disputes which are best handled at the local level. (*Tari v. Collier County*, 56 F.3d 1533, 1536 (11th Cir 1995).)

- A takings claim was unripe because the plaintiff failed to appeal a stop work order to the zoning board that halted all construction (*Wiacek Farms, LLC v. City of Shelton*, 2005 WL 2850154, at *5 (D. Conn. Oct. 28, 2005)).
- The plaintiff's claim, which was based on a stop work order issued after driveway permit was erroneously approved, was not ripe. Owners could not show that they had obtained a final decision by the village on the location of the driveway. (*Gottlieb v. Village of Irvington*, 69 F. Supp. 2d 553 (S.D.N.Y. 1999).)
- An opinion letter from the city attorney was not a final decision for purposes of ripeness as:
  - the ordinance did not grant any final or binding authority to the city attorney; and
  - the property owner otherwise failed to make application through the administrative process.

  (*Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1036 (9th Cir. 2005).)
- A building permit withheld until the plaintiff sought another approval was not a final action (*Norwood v. Salvatore*, 2015 WL 631960, at *5 (N.D.N.Y. 2015)).

ALTERNATIVE PLANS AND VARIANCES

Even if the government makes a final decision denying a specific development request, the claim is not ripe unless the plaintiff also applies for a less intensive form of development (see *MacDonald*, 477 U.S. at 342-43, 351-53 (concluding that the property owner had not met the finality requirement. Even though the government denied the landowner's sole subdivision proposal, the record held open the possibility that some development would be permitted)). If the government denies an exceedingly grandiose development plan, that decision does not logically imply that less ambitious plans will also be denied (*MacDonald*, 477 U.S. at 353 n.9).

The requirement that plaintiff submit alternative development proposals for the property reflects the high degree of discretion land-use boards have in softening the strictures of the general regulations they administer (*Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. at 738; *Williamson County*, 473 U.S. at 190-91). Land-use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to the full extent he might desire or be charged with an unconstitutional taking of the property (*MacDonald*, 477 U.S. at 347). By requiring developers to make a good faith effort to satisfy the permitting agency's concerns after an initial denial, the ripeness doctrine reflects the reality that land development often involves a process of negotiation between the permitting agency and the developer (see *Good v. United States*, 39 Fed. Cl. 81, 102-03 (1997); *Alachua Land Inv'rs, LLC v. City of Gainesville*, 107 So. 3d 1154 (Fla. 1st DCA 2013)).

Factors for Determining Sufficiency of Alternative Plans

No bright-line test exists for determining how far the landowner must go in challenging the limits of allowable development under the regulations before the claim ripens (see *Williamson County*, 473 U.S. at 199 (acknowledging that defining whether a regulation goes too far is a difficult problem)). However, courts are generally less skeptical of this argument if government counsel can succinctly articulate:

- The specific administrative procedures available to plaintiff that, if sought, could ripen the claim. A court may otherwise view the government's position as requiring the plaintiff to submit to an unfair, vague, and never-ending process of submitting applications with no better likelihood of approval (see Futility Exception).
- The reasonable concerns of neighboring property owners, expert witnesses, government staff, and the governing body to the specific development request.
- Other available development options for the property under the existing regulations. Describing the permitted uses currently available to the plaintiff, even if they are not identical to the desired use or intensity, puts the takings claim in the proper regulatory context.
- The willingness and discretion of the final decision makers to consider additional proposals and how the plaintiff's additional proposals realistically could be approved. It is particularly helpful to have positive comments from members of the governing body that they are open to other forms of development or uses of the property (see *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 524-25 (Fla. 4th DCA 1994); *Palazzolo*, 533 U.S. at 620-21).
- The relationship between the finality requirement and the elements of the takings claim itself. Counsel should point out the practical difficulty of litigating an unripe takings claim based on speculation regarding the extent of permitted development.

FUTILITY EXCEPTION

The final decision requirement is relieved if the plaintiff shows, by more than mere allegations, that additional development applications or variances from the existing code requirements would be an exercise of futility (see *Eide v. Sarasota County*, 908 F.2d 716, 726 (11th Cir. 1990)). This futility exception often applies when the government:

- Concedes that the proposed development would be impermissible regardless of whether the plaintiff submitted an application for approval (see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1011-13 & n.3 (1992)).
- Delayed the development process so much that:
  - reaching a final decision is a practical impossibility; or
  - the property lost its beneficial use.

(See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990).)

Limitations of Futility Exception

Plaintiffs typically raise the futility exception in cases where they did not submit a meaningful application or failed to seek available variances and administrative appeals. When opposing the futility exception in these circumstances, government counsel should consider that:

- A plaintiff typically cannot raise the futility exception unless they have already submitted at least one meaningful application (see

DLX, Inc. v. Kentucky, 381 F.3d 511, 525 (6th Cir. 2004)). The futility exception serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved (*Southern Pac. Transp. Co.*, 922 F.2d at 504).

- A plaintiff's delay and failure to seek extensions of time to provide the government an opportunity to make a reasonable accommodation precludes it from invoking futility exception (*County View Estates @ Ridge LLC v. Town of Brookhaven*, 452 F. Supp. 2d 142, 154-55 (E.D.N.Y. 2006)).
- The governing body's alleged hostility and bias is not imputed to the zoning board simply because the town appoints the members. This is especially true when the zoning board itself makes no mention of whether it would consider a variance or special permit to allow plaintiff's plans for the property. (*S&R Development Estates, LLC, v. Bass*, 588 F.Supp.2d 452, 463-44 (S.D.N.Y. 2008).)
- Plaintiffs often confuse futility with invalidity. An assertion that the plaintiff does not have to apply for a permit because of the law's invalidity is not the same as arguing that applying for the permit would be futile and could not result in an approval. Due process issues regarding validity tell the court nothing about the actual burden the regulation imposes on property rights. Invalid regulations may not substantially interfere with property rights at all. (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Rith Energy Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) ("[I]n a takings case we assume that the underlying government action was lawful, and we decide only whether the government action in question constituted a taking for which compensation must be paid. [Plaintiff's] complaints about the wrongfulness of the permit denial are therefore not properly presented in the context of its takings claim.").)

FINALITY REQUIREMENT IS NOT APPLICABLE TO CATEGORICAL CLAIMS

The finality inquiry is generally relieved or assumed met for physical invasion and facial claims. These categorical (or per se) takings occur when either:

- The government physically appropriates property.
- The mere enactment of a regulation precludes all development of the property and deprives the property owner of all reasonable economic use of the property.

For a physical invasion of property, such as a road built improperly across private property, a taking occurs as soon as the invasion occurred and the governmental entity cannot do or say anything after that to make the taking any more final (*Athanasiou v. Town of Westhampton*, 30 F. Supp. 3d 84, 90 n.4 (D. Mass. 2014)).

A final decision is also unnecessary for a true facial takings claim, because a facial claim is necessarily premised on an assertion that any application of the regulation violates the Fifth Amendment (see *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006)). Facial challenges to a regulation are generally ripe the moment the regulation is passed. Plaintiffs face an uphill battle, however, since it is difficult to demonstrate that the enactment of a piece of legislation deprived the owner of all economically viable uses of their property (*Suitum*, 520 U.S. at 736 n.10).

Future Events

If the physical appropriation of property or enactment of legislation has not yet occurred, the claim is likely not ripe. A claim is not ripe for adjudication if it rests on contingent future events that may not occur as anticipated or may not occur at all. (*Texas v. United States*, 523 U.S. 296, 300 (1998); see also *Residents Against Flooding v. Reinvestment Zone No. 17*, 2017 WL 1901660, at *35 (S.D. Tex. May 9, 2017).)

As-Applied Claims Disguised as Facial Claims

A plaintiff may attempt to circumvent the final decision requirement by characterizing an as-applied takings claim as a facial claim. This tactic is often employed on-the-fly at a hearing. (See, for example, *Thunderbird Hotels, LLC v. City of Portland*, 670 F. Supp. 2d 1164, 1178-79 (2009) (holding that the plaintiff's challenge is best described as an as-applied rather than a facial challenge).)

Government counsel should counter this mischaracterization by explaining to the court how the regulation itself does not prevent development. Government counsel should also provide the specific local procedures that the plaintiff could have pursued to permit the desired use. In most takings cases, if the plaintiff failed to seek an approval from the government, the extent of permitted development under the challenged ordinance is unknown and speculative. (*Southern Pac. Transp. Co.*, 922 F.2d at 503-04.)

MOTION TO DISMISS STAGE

WILLIAMSON COUNTY RIPENESS REQUIREMENTS ARE PRUDENTIAL

Federal district courts generally do not have subject matter jurisdiction over unripe claims. The accepted practice has been to assert the *Williamson County* ripeness requirements in motions to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1) (see Lack of Subject Matter Jurisdiction Under FRCP 12(b)(1)).

However, unlike typical ripeness defenses, the Supreme Court has stated that the *Williamson County* requirements only determine "prudential ripeness" and are not, strictly speaking, jurisdictional (*Horne*, 133 S. Ct. at 2062). This means the federal courts could technically retain subject matter jurisdiction over a plaintiff's takings claim that are otherwise unripe under *Williamson County* (see, for example, *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010) (waiving the *Williamson County* requirements on prudential grounds); see also Removal).

Some district courts have recently described this disconnect between the accepted practice and the Supreme Court's holdings and, as a precaution, held that the takings claims are prudentially unripe in the alternative under both FRCP 12(b)(1) and 12(b)(6) (see *Hayes Oyster Co. v. Or. Dep't of Envtl. Quality*, 2017 WL 1381659, at *3 n.1 (D. Or. Apr. 17, 2017); *Goldstein v. U.S. Dep't of State*, 153 F. Supp. 3d 319, 331 n.9 (D.D.C. 2016)).

Until the issue is resolved, practitioners should consider filing the motions to dismiss in the alternative under both FRCP 12(b)(1) and 12(b)(6) (see, for example, *St. Clair v. City of Chico*, 880 F.2d 199, 201-02 (9th Cir. 1989) (holding that the issue of ripeness has nothing to do with the merits of a claim challenging land use regulations, and therefore the district court properly dismissed the complaint under FRCP 12(b)(1))).

The distinction between prudential and jurisdictional ripeness does not arise often. District courts often summarily dismiss unripe takings based on the facial allegations in the pleadings due to plaintiff's failure to meet the exhaustion requirement.

LACK OF SUBJECT MATTER JURISDICTION UNDER FRCP 12(B)(1)

The government defendant often asserts that the court should dismiss the takings claim under either requirement of *Williamson County* at the pleadings stage in a motion to dismiss under FRCP 12(b)(1) for lack of subject matter jurisdiction (see, for example, *Witt v. Village of Mamaroneck*, 992 F. Supp. 2d 350 (S.D.N.Y. 2014)). The motion must be filed before filing a responsive pleading to the complaint. For more information on filing a motion to dismiss under FRCP 12(b)(1), see Practice Note, Motion to Dismiss: Overview: Lack of Subject Matter Jurisdiction (8-523-9648).

The primary benefits to the government defendant of making a factual challenge to the court's subject matter jurisdiction in a FRCP 12(b)(1) motion include:

- The ability to attach additional supporting evidence outside of the complaint to the motion. Attaching affidavits, local code provisions, or other documents to the motion can rebut generic statements in the complaint that the plaintiff has met all pre-suit requirements by demonstrating that:
  - the plaintiff has not first sought and been denied compensation in state courts; or
  - the government provided information on the specific permitting or administrative appeal processes that could resolve the plaintiff's issue, but the plaintiff did not avail itself of those remedies and chose to file suit prematurely.

For more information, see Practice Note, Motion to Dismiss: Drafting and Filing a Motion to Dismiss (1-524-1621), Opposition, and Reply: Supporting Evidence (1-524-1621).

- The burden of proof being on the plaintiff, as the party seeking federal jurisdiction, to present further evidence in support of its position (see, for example, *Houston v. Marod Supermarkets, Inc*, 733 F.3d 1323, 1335 (11th Cir. 2013); *Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 713 (D. RI. 1994)).
- A district court being free to weigh the facts without being constrained to view them in the light most favorable to the plaintiff (see *Sentry Ins. a Mut. Co. v. Provide Commerce, Inc.,* 2016 WL 1241553, *2 (S.D. Cal. Mar. 30, 2016)).
- The possibility in some courts of limited discovery and hearings on the jurisdictional question. No statute or rule specifies a format for evidentiary hearings on jurisdiction, so the court can use any rational mode of inquiry (*Crawford v. U.S.*, 796 F.2d 924, 929 (7th Cir. 1986)).

FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6)

A court may find that a motion to dismiss based on lack of ripeness under *Williamson County* is more properly considered under FRCP 12(b)(6) for failure to state a claim due to the prudential, and not jurisdictional, nature of the inquiry. An FRCP 12(b)(6) motion is more limited than one filed under FRCP(12)(b)(1) because a court determining the sufficiency of the takings claim must accept all non-conclusory allegations as true and is limited to the pleadings. The motion must be filed before filing a responsive pleading to the complaint. For more information on filing a motion to dismiss see Practice Note, Motion to Dismiss: Overview: Failure to State a Claim on Which Relief Can Be Granted (8-523-9648).

Defense counsel's inability to supplement the record on a FRCP 12(b)(6) motion makes prevailing at the pleadings stage more challenging, especially on the finality requirement (see Asserting the Finality Requirement). Persuading the court that the government's action did not have the requisite finality to ripen a takings claim typically requires reference to local policies, correspondence, and public hearing minutes or transcripts.

PRACTICAL CONSIDERATIONS FOR ASSERTING RIPENESS REQUIREMENTS

Asserting the Exhaustion Requirement

Federal district courts typically summarily grant motions to dismiss on the exhaustion requirement (see Exhaustion of State Remedies Requirement). Most courts will also apply this requirement to ancillary due process or equal protection claims. When asserting that the court should dismiss the takings claim as unripe under the exhaustion requirement, consider that:

- It can sometimes be difficult to prove a negative. However, if the plaintiff vaguely alleges that all pre-suit requirements have been met, defense counsel can typically prevail by pointing out that the complaint does not allege that the plaintiff filed a state law inverse condemnation action in state courts and was denied compensation.
- This requirement should be a yes or no question for the court. It is important to clearly explain to the court what specific state law remedy the plaintiff is required to seek in state courts before the federal claim ripens.
- Plaintiff's counsel may voluntarily dismiss the takings claim in federal court when confronted with a motion to dismiss based on the exhaustion requirement rather than allow the court an opportunity to dismiss the action. As many land use disputes take place over many years and multiple lawsuits in state and federal courts, defense counsel should keep in mind that voluntarily dismissing the same claim twice acts as an adjudication on the merits of the claim in favor of the government defendant (the "two-dismissal rule") (FRCP 41(1)(b)).

Asserting the Finality Requirement

A court's inquiry into whether the government has issued a final decision that determines the extent of permitted development on a property can involve questions of law and fact. When arguing the finality requirement on a motion to dismiss, consider:

- Requesting that the court take judicial notice of the relevant regulations. A federal court may, in its discretion, take judicial notice of municipal ordinances and consider their contents in resolving a motion to dismiss as they are public records and not typically in dispute (see, for example, *Demick v. City of Joliet*, 108 F. Supp. 2d 1022, 1025 (N.D. Ill. 2000)). However, some state courts are precluded from taking judicial notice of local ordinances (see, for example, Mass. R. Evid. § 202 ("A court is not permitted to take judicial notice of municipal ordinances ...")).

- Explaining the practical effect of the code provisions. Government counsel should avoid lengthy recitations of local codes or overloading the court with citations to the regulations, but should clearly explain to the court why a specific government action is not final by pointing out available administrative appeals and variance applications.
- Relating the finality requirement to the elements of the takings claim. Explain to the court the practical rationale underlying this requirement: without a final decision from the governing body on how the regulations actually apply to the subject property, it is impossible to determine whether the takings occurred or how much compensation is due. For example, if no final decision has been made, the court's inquiry devolves into mere speculation. The court cannot concretely determine any of the ad hoc factual inquiries required to resolve the claim, such as:
  - the nature and extent of development allowed;
  - the regulation's economic effect on the landowner;
  - the regulation's effect on investment backed expectations; and
  - the character of the government action.

  (*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-25 (1978); see also *Williamson County*, 473 U.S. at 190-91).
- Providing context by explaining the available development options on the property and not just focusing solely on the plaintiff's specific development plan. For example, the uses of the property a new owner could take advantage of under the existing regulations if the property were sold to a new owner.

Removal

Federal courts increasingly disapprove of government defendants removing takings and related constitutional claims to a federal court only to assert that the federal court does not have jurisdiction because the claims are unripe under the *Williamson County* exhaustion requirement (see, for example, *Race v. Bd. of Cty. Comm'rs*, 2016 WL 1182791, at *3 (D. Colo. Mar. 28, 2016); *River N. Props., LLC v. City & County of Denver*, 2014 WL 1247813 (D. Colo. Mar. 26, 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013)). Attempting this strategy will likely result in the federal court ruling that the government has waived the exhaustion defense.

Subject matter jurisdiction cannot normally be conferred to a federal court by the agreement or waiver of the parties. However, many courts now hold that due to the prudential nature of the *Williamson County* inquiry, a federal court has subject matter jurisdiction over an otherwise unripe takings claim if the government defendant removed the claim from state to federal court.

For more information on removal, see Practice Note, Removal: Overview (3-532-4248).

SUMMARY JUDGMENT STAGE

If government counsel is unsuccessful on its motion to dismiss, counsel should raise lack of ripeness as an affirmative defense in the answer. For more information on responsive pleadings and asserting affirmative defenses, see Practice Note, Responsive Pleadings: Answering the Complaint (2-521-6409).

The ripeness defense, and the finality requirement in particular, is most commonly reasserted in a motion for summary judgment under FRCP 56 (see, for example, *Brubaker v. East Hempfield Township*, 234 F. App'x 32 (3d Cir. 2007)). However, as some courts view the *Williamson County* ripeness requirements as jurisdictional, a court may consider the arguments in the summary judgment motion as a suggestion of lack of subject matter jurisdiction under FRCP 12(h)(3).

For more information on filing a motion for summary judgment, see Practice Note, Summary Judgment: Overview (8-520-5163).

The argument in the motion for summary judgment will be largely identical to the prior arguments made in the motion to dismiss. The summary judgment stage also permits the use of discovery to support the ripeness argument. Government counsel should target early discovery requests and depositions specifically to the question of the takings claim's ripeness, such as requesting that the plaintiff admit that it:

- Has not yet filed the inverse condemnation claim in state court and been denied just compensation.
- Never sought available permits, administrative appeals, or variances that could allow the desired use of the property.
- Has not sought less intensive forms of development and uses on the property.
- Agrees with the authenticity of correspondence with staff members, public meeting minutes or transcripts, and the evidentiary record before the governing body, including all:
  - permit applications;
  - staff reports;
  - expert opinions and related reports; and
  - evidence from lay witnesses.

For more information on conducting discovery, see:

- Requests for Admission in Federal Court Toolkit (8-571-2585).
- Deposition Toolkit (3-532-3606).
- Document Discovery Toolkit (7-529-3645).
- Interrogatories in Federal Court Toolkit (9-555-3345).