

COURT OF APPEALS
DIVISION II

No. 40717-5-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
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KARL J. THUN and VIRGINIA THUN, husband and wife; THOMAS
PAVOLKA; VIRGINIA LESLIE REVOCABLE TRUST; and WILLIAM AND
LOUISE LESLIE FAMILY REVOCABLE TRUST,

Appellants,

v.

CITY OF BONNEY LAKE, a municipal corporation,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The parties agree on one statement. That is, that ripeness of a regulatory takings claim requires a final government decision. The parties disagree on what constitutes a final decision.

Thun's position is that a final decision is one which establishes to a reasonable degree of certainty the limits on development imposed by a challenged regulation. If a land use regulation is adopted limiting development, but offers the possibility of a variance, waiver or other exemption from its facial requirements, a takings challenge is not ripe until the variance is applied for and rejected. If, on the other hand, a variance is not available, the decision is final and the challenge is ripe. In such circumstance, the decision became ripe when the challenged regulation was enacted.

The City's position is very different. The City claims there can be no final decision unless and until an owner applies for a development permit under the challenged regulation. The City claims this requirement is rigid and absolute, even when the limits on development are clear, no variance is available, and the owner would never actually construct the economically unfeasible project if permits issued. According to the City, application for a development permit is required in every case, not to determine the limits the challenged

regulation imposes on development, but to determine if development authorized by the regulation is economically feasible.

The City's argument is remarkable, since the government's role in the permitting process is limited to evaluating whether a proposed development complies with the applicable zoning code. No government permitting process evaluates profitability of a development project and the government does not approve or disapprove a project based on economic feasibility. Contrary to the City's unsupported assertions, the permitting process will not create "a fully developed record on the economic impact of the regulation" or "a record on development costs" or a record regarding the impacts of the "vastly changed economy." (City's Brief at pp. 12, 13, 25.)

The ripeness determination is not intended to be a summary determination of the merits of an asserted takings claim, but is intended only to define with reasonable certainty the extent of the development limitations imposed by the challenged regulation. Property owners are not required to apply for permits for their own sake, nor are they required to seek permits for developments they do not deem economically viable. The United States Supreme Court has made clear the policy underlying the ripeness doctrine is that

a landowner may not establish a taking before a land-use authority has the opportunity, using its own

reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

Palazzolo v. Rhode Island, 533 U.S. 606, 620-21, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (emphasis added.)

Our ripeness jurisprudence imposes obligations on landowners because “[a] court cannot determine whether a regulation goes ‘too far’ unless it knows how far the regulation goes.” Ripeness does not require a landowner to submit applications for their own sake.

Id., at 622 (citations omitted).

Once the permissible uses of the property are known to a reasonable degree of certainty the ripeness doctrine requires nothing further from the landowner.

Id. at 620.

The City is insisting that Thun apply for development permits for their own sake, rather than to yield certainty regarding the nature and intensity of allowable uses. The City has failed to identify any permit process or discretionary authority that could expand the maximum density or range of uses allowed under the RC-5 zoning designation.

The nature and intensity of allowable uses on the Thun property under the RC-5 zone were known the day the Ordinance was adopted. Thun's takings claim is ripe for adjudication.

II. ARGUMENT

A. The City Failed To Identify Any Permit Process That May Waive, Relax Or Lessen The Density And Use Limitations Imposed By The RC-5 Zoning Ordinance.

The City correctly notes that ripeness requires a final determination of “whether a more modest submission or an application for a variance would be accepted.” (City’s Brief at p. 23, quoting *Palazzolo*, 545 U.S. at 620 (emphasis added).) In this case, however, there is no question or dispute that permits would issue allowing development on the Thun property with the less intense uses authorized by the RC-5 Ordinance.

Immediately following enactment of the Ordinance, the maximum possible development of the Thun’s RC-5 property was fully known with certainty. The allowable uses in the RC-5 zone, to include residential development at a density of one unit per five acres, are clearly and unambiguously set forth in BLMC 18.20.050. The permit process will provide no increased certainty or clarity with regard to the authorized uses and densities, since the regulation does not afford any opportunity to increase the intensity or nature of any authorized uses.

Variations in this regard are expressly prohibited. (BLMC 14.110.010) Because of the express and invariable use and density limitations imposed by the RC-5 regulation, the permitting process likewise presents the City no opportunity to alleviate the harsh impacts of those limitations. The City does not and cannot deny this inescapable fact. To the contrary, it admits that “[t]he City Code sets unequivocal density caps.”¹ (City’s Brief at p. 8.)

Usually the question of ripeness arises in the context of a takings claim when there is a dispute regarding whether a certain use or development can be approved under the challenged regulation. In the typical ripeness dispute, the landowner will assert that development will never be approved under the regulation, and the municipality will assert that, through application of discretionary variance criteria in the permitting process, development might be approved. See, e.g., *Presbytery v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990); *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.ed.2d 153 (1992). A claim is not ripe and litigation must be deferred

¹ In attempt to distract from the absolute and invariable limitation the RC-5 zoning designation imposes on residential density, the City asserts: “all the Appellants need to do to increase their density beyond six units is utilize the C-2 portion for high density residential.” (City’s Brief at p. 18.) This argument is absurd. That Thun did not suffer the complete misfortune of having every single acre Thun owned

when the uses allowed under the regulation cannot readily be determined on the face of the regulation.²

In this case, however, there is no dispute regarding the allowable uses for Thun's property. There is no disagreement between the City and Thun that Thun's RC-5 property may receive permit approval for the following developments or uses:

- six high-end, luxury homes constructed on large estate-sized lots, with amenities such as swimming pools and outdoor fireplaces;
- six "affordable" homes constructed on smaller, clustered lots;
- a school;
- a church;
- a child or adult daycare home;
- a bed and breakfast;

downzoned does not lessen the economic impact to the Thun property that was downzoned. Of course, none of Leslie's property is zoned C-2.

² For example, under a wetlands regulation construction within a wetland is generally prohibited in the absence of qualifying for an exception or variance under certain subjective criteria. (See, e.g. BLMC 16.20.145; see also, Chapter 16.22 BLMC.) The parties to a takings action may dispute whether construction within a particular wetland could ever be approved. In such cases, whether development will be allowed can only be determined by submitting to the permitting process – through the permitting process, the local authority will apply the subjective variance criteria to a particular development proposal and exercise its discretion to determine if that proposal meets the criteria so as to authorize development that ordinarily would be prohibited in a wetland. That permitting process will not determine if a proposed project is economically feasible. Rather, it will only determine if the proposed development is allowed. (See Bonney Lake critical area variance criteria at BLMC 16.20.145.) Once the local government makes a final determination as to whether the proposed development is or is not allowed, the jury will then determine if the regulation has so limited allowable development of the property as to constitute a taking without just compensation. *Saddle Mountain Minerals LLC v. Joshi*, 152 Wn.2d 242, 252, 95 P.3d 1236 (2004).

- a dog kennel;
- agricultural applications; or
- a park.

See BLMC 18.20.020; see *also* City's Brief at p. 6. Thun assumes and does not dispute that it could receive permit approval for each and every one of the above uses authorized under the RC-5 Ordinance and that they are available to Thun as development options.³ Even if permits issued, however, Thun will never pursue development of any of the above authorized uses because no development authorized under the RC-5 zoning designation is economically viable. The intensity of the authorized development is too low to support or absorb the significant development costs that will accompany any development of the Thun property.

Thun's takings claim is not premised on a finding or argument that no development of any kind can be authorized or approved for construction on the Thun property. Thun's takings claim is premised

³ It may be that a fully processed land use application could ultimately result in a smaller allowed density, thus increasing the negative economic impact to Thun's property. (See CP 576.) There is no possibility, however, that a processed land use application will yield a greater density. (See CP 575-76.) Postponing the inverse condemnation lawsuit until after a project is fully permitted would not, therefore, present the City with an opportunity to remedy or lessen the regulatory impact to Thun's property, since there is no authorized variance. As a result, requiring completion of a land use application prior to suit could only serve to increase Thun's damages. Thun has nonetheless assumed the risk of permit denial and based their claim on an economic analysis that assumes Thun would be allowed to develop to the maximum potential authorized under the RC-5 zoning designation. This assumption benefits the City.

on the fact that, as applied to Thun's property, none of the allowed uses are economically feasible. Put more precisely, when the *Penn Central* factors balancing test is applied to the RC-5 designation as applied to the Thun property, the economic impact resulting from the regulation, on balance, rises to the level of a taking.⁴ Because of the unique attributes of Thun's property, the cost of any development of the property will be extraordinarily high. Despite the high cost, development of the Thun property was economically feasible under the C-2 zoning designation because those costs could be spread over 500+ units. (CP 493-95, 417.)

The extreme downzone eliminated that opportunity. Development is not economically viable if the density of development is too low to absorb the development costs. (*Id.*) While it might be economically feasible develop other more ordinary or differently situated properties with the limited low density uses allowed under RC-5, the extreme downzone, as applied to Thun's property, so limits beneficial use of the property that it constitutes a taking of the property without compensation.

⁴ Resolution of the merits of Thun's takings claim under this balancing test "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Guimon v. Clarket*, 121 Wn.2d 586, 601, 854 P.2d 1 (1993) quoting *Yee*, 503 U.S. at 523. The question of remaining value of Thun's property is a fact question for the jury. *Saddle Mountain Minerals*, 152, Wn.2d at 252.

Though the City lists a variety of permit review processes that must be completed before construction could commence, it has not and cannot identify any permitting process or variance process that can in any way increase the allowable density or expand the allowable uses under the RC-5 zoning designation. Despite that the City may have some discretion on ancillary issues not germane to this takings claim, not one of the permit and review processes the City identifies, to include the short plat, building permit, SEPA process, site planning, critical areas, clearing, landscaping and design review processes,⁵ can yield approval of greater density than the uses listed above. The processes identified by the City may serve to further limit allowable development of Thun's development,⁶ but they cannot increase the development potential for the property.

Again, the purpose of the ripeness doctrine is to ensure that the allowable uses are defined with reasonable certainty so that the jury may, in turn, determine the economic impact the challenged limitations have on the subject property. *Palazzolo*, 533 U.S. at 620-22; *Saddle Mountain Minerals v. Joshi*, 152 Wn.2d. 242, 252, 95 P.3d

⁵ City's Brief at pp. 9-10.

⁶ See CP 575-76.

95 P.3d 1236 (2004). None of the City's permitting processes will further that purpose.

B. A "Permit-Ready Project" Is Not A Prerequisite To Ripeness. Ripeness Only Requires A Final Decision Regarding The Nature And Intensity Of Allowable Uses.

The City asserts that Thun has "invent[ed] a novel exception to the ripeness doctrine, 'whether any discretionary decision remains to be made.'" (City's Brief at p. 18.) The City also criticizes Thun for emphasizing the U.S. Supreme Court's decision in *Palazzolo*, even though *Palazzolo* is the Supreme Court's most recent decision on ripeness as applied to an inverse condemnation claim. Thun did not invent a novel argument with regard to ripeness and its reliance on the policy and principles articulated in *Palazzolo* are not misplaced. When courts have been presented with facts similar to this case, they have reached the same conclusion advocated by Thun.

One such decision was issued by the Fourth Circuit of the U.S. Court of Appeals just days after Thun filed their opening brief in *Acorn Land, LLC v. Baltimore County*, 2010 WL 3736258 (4th Cir., Slip Opinion, Sept. 21, 2010).⁷ Though this court expressed its ruling

⁷ Federal Rule of Civil Procedure 32.1 and Fourth Circuit Rule 32.1 authorize citation of unpublished federal court of appeal decisions issued after January 1, 2007. A copy of the *Acorn Land* decision is attached as Appendix A.

under the auspices of a futility exception to the final decision requirement, its basic analysis and conclusion mirrors Thun's.

In that case, Acorn Land sought to develop property zoned Density Residential 1 (DR-1), which authorized one dwelling unit per acre. Acorn Land applied for a water/sewer reclassification for its property in order to develop the property consistent with the zoning. Baltimore County denied the application; however, following an appeal by Acorn Land, the Baltimore Circuit Court issued a writ of mandamus compelling the County to amend the water and sewer classification for Acorn Land's property.

Following the Baltimore Circuit Court's decision, the County downzoned Acorn Land's property to Rural Residential (RC-5), cutting the maximum density in half. Like this case, the Baltimore Zoning Code did not permit an increase in residential density through variance procedures. Without submitting a development application under the newly applied RC-5 zoning designation, Acorn Land commenced an inverse condemnation action asserting that the downzone constituted an unconstitutional taking of property without payment of just compensation. The District Court dismissed the federal takings claim, holding that the claim was not ripe.

The Fourth Circuit reversed, holding that the ordinance by which the downzone was applied to the Acorn Land property constituted a final decision and the takings claim was ripe for adjudication. Before reaching its conclusion, the Fourth Circuit noted the principles regarding the “final decision” requirement articulated by the U.S. Supreme Court :

For a developer to obtain a final decision, she must generally submit “a plan for development of [her] property as the ordinances permit,” *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), *rev'd on other grounds*, *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 532, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Then, “where the regulatory regime offers the possibility of a variance from its facial requirements, [the developer] must go beyond submitting a plan for development and actually seek such a variance to ripen his claim.” *Suitum*, 520 U.S. at 736-37. Consequently, “the final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted.” *Palazzolo*, 533 U.S. at 619. These general rules support the principle that “a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.” *Id.* at 620.

That said, there are several notable exceptions to these general rules. First, developers need not engage in futile acts to obtain a final decision. Indeed, the final decision prong is satisfied “once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of

certainty.” *Id.* In the same vein, the final decision prong is satisfied where “a zoning agency ... has dug in its heels and made clear that all ... applications will be denied.” *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 349 (2d Cir.2005). Next, landowners are not required to resort to “repetitive or unfair land-use procedures” to obtain a final decision. *Palazzolo*, 533 U.S. at 621. And finally, the final decision requirement does not require landowners to exhaust administrative remedies.⁸ In other words, landowners need no resort to clearly remedial procedures, such as appealing to an administrative board where the board is empowered only to review, not participate in the lower agency’s decision making. *Williamson*, 473 U.S. at 193.

Id. at pp. 4-5.

The Fourth Circuit applied the above principles to the Acorn Land takings claim and concluded that its claim was ripe for adjudication when the County Council adopted the downzone ordinance.

Based on these well-pled facts, we hold that Acorn satisfied *Williamson’s* final decision prong. To be sure, we acknowledge that *Williamson* would

⁸ The City states at footnote 2, page 1 of its brief: “Logically, it appears correct to say that exhaustion is the process by which a takings claim becomes ripe.” The City’s “logic” is contrary to the law. The U.S. Supreme Court explained the difference between ripeness and exhaustion in *Williamson*:

The question whether administrative remedies must be exhausted is conceptually distinct ... from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 192. Ultimately, the *Williamson* Court held that exhaustion is not required to satisfy the final decision requirement. *Id.* at 193.

generally require Acorn to seek a density variance to ripen its claim and that Acorn has not sought such a variance here. However, the Baltimore County Zoning Regulations do not permit an increase in residential density through variance procedures. Indeed, Baltimore County Zoning Regulations section 307.1 provides that the Zoning Commissioner and the County Board of Appeals, upon appeal, may grant height and area variances, but “[n]o increase in residential density beyond that otherwise allowable by the Zoning Regulations shall be permitted as a result of any such grant of a variance.”

Id. at p. 5. The court held that no further development applications were required for a final decision and Acorn Land’s claim was ripe.

The final decision requirement does not require a takings plaintiff to submit to and complete any permit process if the process will not further clarify the scope of the development restrictions challenged. Certainly the ripeness doctrine does not under such circumstances require a property owner to seek permits for development that the property owner does not deem economically viable and would never construct, even if approved.

Thun’s position is supported by the principles and policies articulated by the U.S. Supreme Court and a court that addressed a remarkably similar fact pattern. Thun’s position is hardly novel or “invented”. In contrast, not one of the cases the City cites found ripeness to be lacking in any instance in which the challenged regulation left the local jurisdiction without discretion to waive, vary or

relax the challenged development restriction. See *Estate of Friedman v. Pierce County*, 112, Wn.2d 68, 768 P.2d 462 (1989) (addressing open space reserve regulation applied through discretionary and flexible standards); *Sintra v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992) (addressing Housing Preservation Ordinance which contained variance procedures); *Presbytery v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990) (addressing wetlands regulation with discretionary variance procedures); *Agins v. City of Tuburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980), *overruled on other grds*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L.Ed.2d 876 (2005) (addressing a facial challenge to ordinance restricting development of five-acre tract of land to one to five residents, depending on project provisions to preserve surrounding environment);⁹ *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006) (addressing denial of requested upzone, where existing zoning code gave county discretion to increase density with clustering and other conditions);¹⁰ *Asarco, Inc. v. Dept. of Ecology*, 145 Wn.2d 750, 43 P.3d 471 (2001) (addressing environmental remediation

⁹ The City's reliance on *Agins* is misplaced. Because a development application had not been submitted in that case, the government had not yet determined how many houses were allowed on the property under the challenged regulation. 447 U.S. at 262-63

¹⁰ The *Peste* decision was addressed and distinguished in great detail in Thun's opening brief. (See Opening Brief at pp. 44-49.)

regulation applied at the discretion of the Department of Ecology); *Bellevue 120th Assocs. V. City of Bellevue*, 65 Wn. App. 594, 829 P.2d 812 (1992) (addressing wetlands regulation with discretionary variance procedures and SEPA mitigation conditions that applicant failed to appeal); *Ventures Northwest v. State*, 81 Wn. App. 914 P.2d 1180 (1996) (addressing wetlands regulation with discretionary variance procedures).

C. The Fact Question Of Economic Feasibility Of Development On Thun's Property Is Not Presented In A Ripeness Determination, But Is To Be Decided By A Jury.

The City dedicates the bulk of its brief to challenging Thun's factual contentions, which contentions are supported by sworn expert testimony. The City disagrees with Thun's assessment of the economic impact that resulted from the extreme downzone. This Court may not, however, disregard on summary judgment Thun's proffered evidence and favor the City's unsubstantiated conclusions. *Fitzpatrick v. Okanagan City*, 169 Wn.2d 548, 610-12, 238 P.3d 1129 (2010).

More importantly, the City does not dispute that evaluation of a takings claim requires a two step process. The ripeness inquiry is a threshold question that does not address the merits of the takings claim itself. The merits, to include the economic impact of the

challenged regulation, are not decided until the second step, which includes a trial to the jury.

Where a landowner has not sought a variance or waiver from the land use restriction, a taking claim is not ripe. Before a property owner can raise a taking claim, the government entity charged with implementing the regulation must reach a final decision regarding the application of the regulations to the property at issue. Then, the court must ascertain the remaining value of the regulated property to determine the amount of economic impact caused by the regulation. The question of remaining value is a question of fact determined by the jury. (Emphasis added.)

Saddle Mountain Minerals, 152, Wn.2d at 252. Resolution of the merits of Thun's takings claim "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Guimon v. Clarket*, 121 Wn.2d 586, 601, 854 P.2d 1 (1993) quoting *Yee*, 503 U.S. at 523. That complex factual question is not before this Court and should not be decided in advance of a trial.

In another attempt to address the merits, the City implies in a footnote¹¹ that the public interest question presented Thun's inverse condemnation claim – whether the downzone furthers an important public interest and could have been accomplished by less intrusive means – was already decided by the Growth Management Hearings

¹¹ Our courts of appeals have declined to consider issues raised only through a footnote. *State v. Johnson*, 69 Wn. App. 189, 194, n.4, 847 P.2d 960 (1993); *State v. N.E.*, 70 Wn. App 602, 606 n.3, 854 P.2d 672 (1993).

Board when it addressed the Growth Management Act challenge to the RC-5 Ordinance, making collateral estoppel applicable to this case. (City's Brief at p. 14.) Of course, whether collateral estoppel applies to bar further litigation of the merits of any portion of Thun's takings claim is not before the Court now. The question before the Court is whether Thun's takings claim is ripe for adjudication. Regardless, the Growth Board decision, which is the product of a highly deferential and limited review of a legislative record, has no preclusive effect in this case.

As the Growth Board acknowledged when it reviewed the RC-5 Ordinance: "The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review." (CP 179.) The GMA mandates the Growth Board's review to be highly deferential to the planning municipality, and the Board may only consider evidence in the record created by the City in the legislative process. RCW 36.70A.290, .3201. The Board must presume that the legislative action (in this case the RC-5 Ordinance) is valid and may only find noncompliance if the legislative action is clearly erroneous in view of the entire record in light of the goals and requirements of the GMA. RCW 36.70A.320. The Washington Supreme Court has directed that this deference "cedes only when it is shown that the

[municipality's] planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corp. v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 223, 248, 110 P.3d 1132 (2005). Moreover, the Growth Boards have consistently acknowledged and held that they do not have jurisdiction over constitutional issues. See *Dudek/Bagley v. Douglas County*, EWGMHB Case No. 07-1-0009, Order on Motions (Sep. 26, 2007), *Roth, et al v. Lewis County*, WWGMHB Case No. 04-2-0014c, Order on Motions (Sep. 10, 2004), *Gutschmidt v. Mercer Island*, CPSGMHB Case No. 92-3-0006, Final Decision and Order (Mar. 16, 1993), at 10. See also, *Pacific Topsoils, Inc. v. Washington State Dept. of Ecology*, 157 Wn. App. 629, 635, 238 P.3d 1201 (2010). Even if there was identity of issues between the Board's administrative appeal and this takings claim, which there is not, the differing degree of the burden in the two proceedings alone precludes application of collateral estoppel or res judicata in this case. *Standler v. Smith*, 83 Wn.2d 405, 408-09, 518 P.2d 721 (1974); *Roper v. Mabry*, 115 Wn. App. 819, 822, 551 P.2d 1381 (1976).

D. The City Advocates A Ripeness Doctrine That Would Serve No Meaningful Purpose, But Would Erect Unreasonable And Oppressive Hurdles To Takings Claimants, Denying Them Fair Access To The Courts.

Thun does not argue, as the City asserts, that the ripeness requirement may be excused solely because a permit process is expensive or will result in delay. If the permitting process will not further the purpose of the ripeness doctrine, however, consideration of the cost and delays associated with the process is certainly appropriate. Indeed, in assessing ripeness, this Court is required to “evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 743, 117 S.Ct. 2886, 137 L.ED.2d 980 (1997).

The *Acorn Land* court astutely noted that the final decision requirement only affords the local jurisdiction “the opportunity ‘to decide and explain the reach of [the] *challenged regulation*.’” 2010 WL 3736258 at p. 5 *quoting Palazzolo*, 533 U.S. at 620 (emphasis added by *Acorn* court). The ripeness requirement must relate and be relevant to the takings claim asserted in the particular case. It does not require a landowner to submit to the local permitting process for any other purpose. Ripeness does not require a landowner to submit applications for their own sake. *Palazzolo*, at 533 U.S. at 622.

Certainly no court has directed that the ripeness doctrine requires a property owner to seek permits for development that the property owner does not deem economically viable and would never build even if permits were issued. Such an exercise would serve no function in a takings claim.

Any other holding would require Thun to expend their own time and resources pursuing, and the City's time and resources considering, a development proposal that Thun would never actually develop. Requiring such a wasteful expenditure of resources would violate the Supreme Court's admonition that a property owner is "not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination." *MacDonald Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n. 7, 106 S. Ct. 2561, 91 L.Ed. 285 (1986).

The City states at page 8 of its brief: "Until they [Thun] pursue permits, there is no way to know exactly what could be built." This statement is false. The permitting processes the City identifies – e.g. the short plat, building permit, SEPA, site plan and design review process – do not afford the City the opportunity to decide and explain the reach of density and use restrictions imposed by the RC-5 zoning designation. They cannot, since variances relaxing the density and use

limitations are expressly prohibited by the Bonney Lake Code. (BLMC 14.110.010.)

With regard to the various low density development options listed under the RC-5 zoning designation, the exercise of discretion is not required to confirm that the lower intensity uses are authorized. Again, Thun does not dispute that permits would issue for all of the authorized low intensity uses. Contrary to the City's unsubstantiated assertion, submission to the City's permitting processes is not required to create "a fully developed record on the economic impact of the regulation" or "a record on development costs" for the authorized low intensity uses. (City's Brief at pp. 13, 25.) There simply is no authority that states a takings plaintiff may only prove his case and create a record regarding economic viability through the local permitting process. Moreover, the permitting process is not conducive to creating a complete record in this regard.

The City's role in the permitting process is limited to evaluating whether a proposed development complies with the applicable zoning code. (See, BLMC 14.10.060, .070, .080.) The permitting process does not provide a mechanism for the City to evaluate profitability of a development project and the City does not approve or disapprove a project based on economic feasibility. (See permit and review criteria

at Chapters 14.30 through 14.110 BLMC; see *a/so* criteria at Titles 15 through 18 BLMC.) The permitting processes may present an opportunity for the City to collect fees and delay litigation,¹² but they do not present a mechanism to alleviate the economic impact of the development restrictions imposed by the challenged RC-5 zoning ordinance, which, again, is the purpose of the ripeness doctrine.

There is no reason to require Thun to submit to an expensive and prolonged permitting process that will delay litigation of their takings claim and only serve to yield permit approvals for economically unfeasible development projects that Thun will never construct. The nature and intensity of uses allowed under the RC-5 designation are fully known. The City's adoption of the Ordinance applying the RC-5 designation to the Thun property was a final decision. Thun's claim is ripe for adjudication.

III. CONCLUSION

The City claims that the purpose of ripeness is to determine administratively if development is economically feasible. The City

¹² We suspect that the City will claim that the ripeness requirement cannot be satisfied with a single development application under the RC-5 zone. The City claims that economic viability for any proposed development may only be determined following completion of the permitting process. If that were accepted as true, then evaluation of feasible development under the RC-5 zone would require Thun to submit a separate application for each authorized use – one application for six high-end luxury homes on estate lots, another for six affordable homes on small clustered lots, another for a dog kennel, yet another for a bed and breakfast, etc. The City could successfully postpone Thun's claim indefinitely.

claims that “the Property’s value, its development potential, the profits a developer might turn, and the costs to develop are all factors that must be established through the administrative process.” (City Brief p. 24) But that is not the role of the permitting process. It is common knowledge that an owner does not go to the City and ask “what can I build on my property.” If he did, the City would simply refer him to the City’s land use regulations. Instead, the owner reads the regulations, creates his own plan for development, and estimates the costs. The City’s role is limited to evaluating whether the proposed development complies with the applicable land use regulations. No government permitting process evaluates profitability of a development project and the government does not approve or disapprove a project based on economic feasibility. That explains why the City cites no authority which supports its position.

Controlling case law teaches that the sole role of ripeness is to determine what development is allowed under a challenged regulation. If the regulation is clear, and no administrative discretion exists to grant variances or waivers, the regulation itself is a final decision and the case is ripe for trial on the merits. See *Acorn Land LLC, supra*. Those are the facts of this case. The Bonney Lake Code is clear as to what is allowed. The same Code expressly prohibits variances to

increase the allowable density and the City has failed to identify a single procedure that provides relief to recover any of the lost density. Thun's takings claim is therefore ripe and should proceed to a trial on the merits (to determine economic impact and other relevant issues). This Court should reverse the trial court and remand the matter for a trial on the merits.

Dated this 17th day of November, 2010.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

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APPENDIX A

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HOnly the Westlaw citation is currently available. This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals,
 Fourth Circuit.
 ACORN LAND, LLC, d/b/a PCS Homes, Plaintiff-Appellant,
 v.
 BALTIMORE COUNTY, MARYLAND, A Body Corporate and Politic; People's Counsel for Baltimore County, Defendants-Appellees.
 No. 09-2150.

Argued May 12, 2010.
 Decided Sept. 21, 2010.

Background: Landowner brought state court declaratory judgment action against county alleging that county's rezoning of landowner's property from single-family residential to rural residential amounted to an unlawful taking. County removed. The United States District Court for the District of Maryland, 648 F.Supp.2d 742, Catherine C. Blake, J., dismissed. Landowner appealed.

Holdings: The Court of Appeals held that:
 (1) county's rezoning decision was final for purposes of judicial review;
 (2) landowner stated a regulatory takings claim against the county; but
 (3) complaint failed to state substantive due process claim since it failed to allege that no state-court process could cure landowner's injury.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Civil Rights 78 ↪1395(3)

78 Civil Rights

78III Federal Remedies in General

78k1392 Pleading

78k1395 Particular Causes of Action

78k1395(3) k. Property and Housing.

Most Cited Cases

Even though landowner whose property was rezoned by county from single-family residential to rural residential failed to specifically refer to § 1983 in complaint against county for unlawful taking, complaint would be construed as § 1983 claim, for purposes of waiving requirement of exhausting state administrative remedies before filing suit, where essential elements of § 1983 claim were pled; landowner pled a deprivation of a right secured by the Constitution, by a person acting under color of state law. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

[2] Declaratory Judgment 118A ↪209

118A Declaratory Judgment

118AII Subjects of Declaratory Relief

118AII(K) Public Officers and Agencies

118Ak209 k. Counties and Municipalities and Their Officers. Most Cited Cases

County's decision to rezone landowner's property from single-family residential to rural residential was "final decision," and thus landowner's declaratory judgment claim alleging that county's rezoning violated federal constitutional provisions regarding substantive due process and unlawful takings was ripe for judicial review; planning board recommended approval of landowner's petition to amend property's water and sewer classification, county blocked petition without explanation, and once court ordered county to forward board's recommendation to environmental committee, county obtained a stay of enforcement and effectively denied water and sewer access by rezoning property. U.S.C.A. Const.Amend. 14.

[3] Eminent Domain 148 ↪2.10(6)

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and

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Other Powers Distinguished

148k2.10 Zoning, Planning, or Land Use;
 Building Codes

148k2.10(4) Zoning and Permits

148k2.10(6) k. Particular Cases. Most

Cited Cases

Landowner whose property was rezoned by county from single-family residential to rural residential stated a regulatory takings claim against the county by alleging that county's zoning decision had an adverse economic effect on landowner in that it prevented its plan for residential development causing 25 million dollars in damages, that landowner had a reasonable investment-backed expectation to residentially develop its property and that county arbitrarily and capriciously blocked its efforts without providing just compensation. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ↪ 4093

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4093 k. Particular Issues and Applications. Most Cited Cases

Zoning and Planning 414 ↪ 1167

414 Zoning and Planning

414III Modification or Amendment; Rezoning

414III(A) In General

414k1158 Particular Uses or Restrictions

414k1167 k. Agricultural Uses, Wood-

lands and Rural Zoning. Most Cited Cases

Landowner whose property was rezoned by county from single-family residential to rural residential failed to state substantive due process claim against county, since it failed to allege that no state-court process in Maryland could cure landowner's injury. U.S.C.A. Const.Amend. 14.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (1:09-cv-00422-CCB). **ARGUED:** J. David Breemer, Pacific Legal Foundation, Sacramento, California, for Appellant. James Joseph Nolan, Jr., Baltimore County Office of Law, Towson, Maryland; Peter Max Zim-

merman, Towson, Maryland, for Appellees. **ON BRIEF:** John E. Beverungen, County Attorney, Baltimore County Office of Law, Towson, Maryland, for Appellee Baltimore County, Maryland.

Before GREGORY, Circuit Judge, C. ARLEN BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation, and SAMUEL G. WILSON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions by unpublished PER CURIAM opinion. Unpublished opinions are not binding precedent in this circuit. **PER CURIAM:**

*1 Following the Baltimore County Council's (Council) decision to rezone Acorn Land, LLC's (Acorn) property, Acorn filed suit against Baltimore County (County) in Maryland state court. Acorn sought, among other relief, a declaratory judgment that the rezoning constituted an unlawful taking under the United States Constitution and violated Acorn's substantive due process rights. The County removed the case to federal court, where the district court dismissed Acorn's claims as unripe. Acorn now appeals the district court's dismissal of those claims, and we reverse in part and affirm in part.

I.

We accept the well-pleaded facts in Acorn's complaint ^{FN1} as true and recite them in the light most favorable to Acorn. *See Kerns v. United States*, 585 F.3d 187, 192 (4th Cir.2009). In April 2004, Acorn purchased a tract of land within Baltimore County's Urban-Rural Demarcation Line (URDL) zoned "Density Residential 1" (DR-1). ^{FN2} The property is directly adjacent to an interstate highway and the University of Maryland, Baltimore County Research Park, and is otherwise surrounded by lots containing single family dwellings. Shortly after purchasing the property, Acorn filed a petition to amend the property's water/sewer classification to facilitate residential development. Specifically, the property's then-existing water/sewer classification was W-6/S-6, "Area of Future Consideration," ^{FN3} and Acorn petitioned to amend the classification to W-3/S-3, "Capital Facilities Area." ^{FN4} Acorn's petition explained that public water and sewer mains, which existed in close proximity to its prop-

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erty, could easily be extended to serve the property.

Several public agencies reviewed Acorn's petition and all recommended its approval to the Baltimore County Planning Board (Planning Board). In September 2004, after considering these recommendations, the Planning Board likewise recommended to the Council that Acorn's petition be granted. In January 2005, the Council reviewed the Planning Board's water/sewer amendment recommendations for several properties, including Acorn's property. Acorn's petition received opposition from citizens as well as state senators and delegates. While the Council adopted the Planning Board's recommendations as to all other properties, the Council, without explanation, took no action on Acorn's petition. As a result, no change was made to the tract's water/sewer classification and Acorn was prevented from proceeding with residential development.

On January 10, 2007, Acorn filed a petition for writ of mandamus in the Circuit Court for Baltimore County to compel the Council to forward the Planning Board's recommendation to amend the property's water/sewer classification to the Maryland Department of the Environment (MDE) for review. On April 7, 2008, the circuit court held that mandamus relief was warranted and ordered the County to forward the Planning Board's recommendation to the MDE. Notably, the court determined that Acorn met Baltimore County's established objective criteria for water/sewer reclassification and that the Council's denial of Acorn's petition was "arbitrary and capricious." The County appealed this decision, and upon the County's motion, the circuit court stayed enforcement of its order pending the appeal.

*2 Meanwhile, in November 2007, after Acorn filed its petition for writ of mandamus, a county councilman filed a petition to rezone Acorn's tract as "Agricultural Protection 2" (RC-2),^{FN5} as part of the County's 2008 Comprehensive Zoning Map Process (CZMP). On April 24, 2008, the Planning Board recommended to the Council that Acorn's tract remain zoned as DR-1. The Council reviewed the Planning Board's recommendation, but nevertheless decided to rezone Acorn's tract as "Rural-Residential" (RC-5).^{FN6} Due to this zoning reclassification, the maximum residential density on Acorn's property was cut in half, and Acorn's water/sewer classification changed from W-6/S-6 to W-7/S-7, "No Planned Community or

Multi-Use Service."^{FN7}

On October 8, 2008, following the Council's decision to rezone Acorn's tract, the County dismissed its appeal of the circuit court's mandamus order as moot. In its notice of dismissal, the County explained that, as a result of its reclassification to the RC-5 zone, Acorn's property was subject to a different water/sewer classification and the County could no longer comply with the circuit court's order to forward the Planning Board's recommendation to the MDE. Thus, the Council's decision to rezone Acorn's property effectively allowed the County to sidestep the circuit court's order.

Based on the above events, Acorn filed a complaint for declaratory judgment in the Circuit Court for Baltimore County on January 23, 2009, asserting, among other claims, that the Council's actions (1) were "arbitrary and capricious" and violated Acorn's substantive due process rights, and (2) effected an unlawful taking without just compensation in violation of both the Maryland Constitution and the United States Constitution. Upon the County's notice of removal, the suit was removed to the District of Maryland in February 2009, and the federal district court granted the People's Counsel for Baltimore County's motion to join and/or intervene. *See Acorn Land, LLC v. Baltimore County*, 648 F.Supp.2d 742, 744 n. 1 (D.Md.2009). The County and the People's Counsel (defendants) filed motions to dismiss.

The district court dismissed Acorn's state constitutional claims because Acorn failed to exhaust applicable state remedies. Then, the district court dismissed Acorn's federal substantive due process and takings claims as unripe due to Acorn's failure to petition the County Board of Appeals to reclassify Acorn's property back to the DR-1 zoning classification. On appeal, Acorn challenges only the district discussed below, we reverse in part and affirm in part.

II.

Acorn's sole argument on appeal is that the district court erroneously dismissed its as-applied federal takings and substantive due process claims for lack of ripeness. Specifically, Acorn asserts that it need not petition the County Board of Appeals for reclassification to ripen its claims. We review the district court's dismissal for lack of ripeness de novo. *Miller v.*

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Brown, 462 F.3d 312, 316 (4th Cir.2006).

A.

*3 First, Acorn's complaint asserts that the Council's zoning decisions constitute a regulatory taking without just compensation in violation of the Fifth Amendment, which applies to states through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979 (1897). To present a ripe regulatory takings claim, the plaintiff must demonstrate that: (1) the government entity charged with implementing the regulations in question has issued a "final decision regarding the application of the regulations to the property at issue," and (2) the plaintiff has sought and been denied just compensation through available and adequate state procedures for seeking just compensation. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 195, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Notably, the Supreme Court has clarified that Williamson's ripeness prongs are "prudential hurdles," Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 734, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997), not jurisdictional requirements. Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., --- U.S. ---, ---, 130 S.Ct. 2592, 2610, 177 L.Ed.2d 184 (2010). Here, the only issue properly before this court is whether Acorn satisfied Williamson's first, "final decision" prong.^{FN8}

As a preliminary matter, we note that Williamson's final decision requirement is intended to inform the courts' determination of whether a regulation, as applied, constitutes a regulatory taking. As discussed in more detail below, a property regulation constitutes a taking if it goes "too far." Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). Simply put, the determination of whether a regulation goes too far "cannot be resolved in definitive terms" until there is a final decision demonstrating "the extent of permitted development" on the land in question." Id. at 618 (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986)).

For a developer to obtain a final decision, she must generally submit "a plan for development of [her] property as the ordinances permit," Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 65

L.Ed.2d 106 (1980), *rev'd on other grounds*, Lingle v. Chevron U.S.A., Inc. 544 U.S. 528, 532, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Then, "where the regulatory regime offers the possibility of a variance from its facial requirements, [the developer] must go beyond submitting a plan for development and actually seek such a variance to ripen his claim." Suitum, 520 U.S. at 736-37. Consequently, "the final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted." Palazzolo, 533 U.S. at 619. These general rules support the principle that "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." Id. at 620.

*4 [1] That said, there are several notable exceptions to these general rules. First, developers need not engage in futile acts to obtain a final decision. Indeed, the final decision prong is satisfied "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty." Id. In the same vein, the final decision prong is satisfied where "a zoning agency ... has dug in its heels and made clear that all ... applications will be denied." Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 349 (2d Cir.2005). Next, landowners are not required to resort to "repetitive or unfair land-use procedures" to obtain a final decision. Palazzolo, 533 U.S. at 621. And finally, the final decision prong does not require landowners to exhaust administrative remedies.^{FN9} In other words, landowners need not resort to clearly remedial procedures, such as appealing to an administrative board where the board is empowered only to review, not participate in, the lower agency's decisionmaking. Williamson, 473 U.S. at 193.

[2] Here, in short, to begin residentially developing its property, Acorn submitted a petition to amend its property's water/sewer classification and the Planning Board recommended its approval. However, after receiving opposition from citizens and state politicians, the Council blocked Acorn's petition, without explanation, through what the Circuit Court of Baltimore County deemed "arbitrary and capricious" conduct. Once the circuit court ordered the Council to forward the Planning Board's recommendation to the

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MDE, the Council appealed that decision, obtained a stay of enforcement, and then conveniently avoided the circuit court's order by rezoning Acorn's property. The rezoning both cut the property's maximum residential density by half and placed the property in the lowest water/sewer classification.

Based on these well-pled facts, we hold that Acorn satisfied *Williamson's* final decision prong. To be sure, we acknowledge that *Williamson* would generally require Acorn to seek a density variance to ripen its claim and that Acorn has not sought such a variance here. However, the Baltimore County Zoning Regulations do not permit an increase in residential density through variance procedures. Indeed, Baltimore County Zoning Regulations section 307 .1 provides that the Zoning Commissioner and the County Board of Appeals, upon appeal, may grant height and area variances, but “[n]o increase in residential density beyond that otherwise allowable by the Zoning Regulations shall be permitted as a result of any such grant of a variance.”

Moreover, we reject the defendants' argument that petitioning the County Board of Appeals for zoning reclassification is equivalent to seeking a density variance under *Williamson* and that Acorn must therefore petition for reclassification to ripen its claim. Under Maryland law, “reclassification” or “rezoning” is “a change in the existing zoning law itself, so far as the subject property is concerned,” *Cadem v. Nanna*, 243 Md. 536, 221 A.2d 703, 707 (Md.1966) (alteration omitted), whereas a variance is “an authorization for [that] ... which is prohibited by a zoning ordinance.” *Mueller v. People's Counsel for Baltimore County*, 177 Md.App. 43, 934 A.2d 974, 989 (Md.Ct.Spec.App.2007) (alterations in original) (quotation omitted). In other words, reclassification applies an entirely different zoning classification to the property in question, whereas the approval/denial of a variance helps define how the property's *existing* zoning classification applies. This distinction is important because, under *Williamson*, a land-use authority must only have the opportunity “to decide and explain the reach of [the] challenged regulation.” *Palazzolo*, 533 U.S. at 620 (emphasis added). Accordingly, we find that requiring Acorn to petition for reclassification is tantamount to requiring Acorn to exhaust state administrative remedies—a requirement expressly prohibited in *Williamson*. *Williamson*, 473 U.S. at 193.

*5 Lastly, we duly recognize that in some cases, pursuant to fair and reasonable zoning procedures, developers may be required to submit multiple plans, applications, and the like to ripen their takings claims. *See, e.g., id.* 473 U.S. at 176-82. Here, however, Acorn was subjected to unfair and unreasonable zoning procedures when the Council blocked Acorn's water/sewer petition, without explanation, after the petition met the County's objective criteria for amending Acorn's property's water/sewer classification. Indeed, the Circuit Court for Baltimore County went so far as to deem such action “arbitrary and capricious.” Then, once the circuit court ordered the Council to forward the Planning Board's recommendation to the MDE, the Council again effectively denied Acorn water/sewer access by rezoning Acorn's property. In light of such sophistry, it is clear that the Council has “dug in its heels” and will not allow Acorn to receive necessary access to public water/sewer systems to residentially develop its property. *Murphy*, 402 F.3d at 349. Thus, under these circumstances, we conclude that it would be both futile and unfair to require Acorn to jump through any additional administrative hoops to obtain a “final decision.” *Palazzolo*, 533 U.S. at 621 (“Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision.”).

For the foregoing reasons, we are satisfied that the “permissible uses of [Acorn's] property are known to a reasonable degree of certainty,” and *Williamson's* first prong is satisfied. *Id.* at 620.

B.

Acorn's complaint also asserts that the Council's zoning decisions were arbitrary and capricious and therefore violated Acorn's substantive due process rights.^{FN10} This claim, like Acorn's regulatory takings claim, is not ripe until the claimant has obtained a final decision from the government entity charged with implementing the regulations in question.^{FN11} *See Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96-97 (2d Cir.1992). Given that Acorn has obtained a final decision from the Council, its substantive due process claim, like its takings claim, is ripe for review.

III.

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On the merits of Acorn's claims, the defendants argue that Acorn's complaint does not state plausible takings or substantive due process claims. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S. ---, ---, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation omitted). This "plausibility" standard is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* We consider the sufficiency of Acorn's claims in turn, beginning with its as-applied takings claim.

A.

*6 "[T]o make out a takings claim, a plaintiff must demonstrate that the government took property without just compensation." *Presley v. City of Charlottesville*, 464 F.3d 480, 485 (4th Cir.2006) (alteration omitted). In the regulatory takings context, a property regulation that goes "too far" will be recognized as a taking. *Palazzolo*, 533 U.S. at 617. Notably, even if a regulation falls short of denying all economically beneficial use of a landowner's property, "a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Id.* (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). This ad hoc, multi-factor inquiry is "informed by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 617-18 (internal quotation omitted).

[3] We find that Acorn has pled facts that plausibly state a regulatory takings claim under the ad hoc, multi-factor test articulated above. First, Acorn's complaint plausibly pleads that the Council's decision to rezone Acorn's property had an adverse economic effect on Acorn. Specifically, Acorn's complaint asserts that the decision, which effectively denied public

water/sewer access, prohibited Acorn from residentially developing its property. Acorn also pled that, due to its property's location and size, Acorn's property is not suited for non-development and/or agricultural uses. Finally, Acorn's complaint states that the Council's decision caused \$25 million in damages.

Next, Acorn has plausibly pled that the Council's actions interfered with Acorn's reasonable investment-backed expectations. Indeed, the circuit court's decision, which has not been overturned and is incorporated into Acorn's complaint, holds that Acorn met the objective criteria for amending its water/sewer classification and that the Council arbitrarily and capriciously blocked Acorn's petition. Based on the circuit court's order, we find that Acorn has plausibly pled that it had a reasonable investment-backed expectation to residentially develop its property with public water/sewer access. Moreover, we find that Acorn plausibly pled that the Council interfered with this reasonable expectation when it rezoned Acorn's property and denied Acorn's property the public water/sewer access necessary for such development.

Moreover, we find that Acorn has plausibly pled that the character of the Council's actions was inequitable and illegitimate. Indeed, as discussed above, Acorn's complaint notes that the circuit court decided the Council arbitrarily and capriciously blocked Acorn's efforts to amend its water/sewer petition. This fact casts a shadow over the Council's later decision to rezone Acorn's property, which effectively sidestepped the circuit court's order. Thus, Acorn's complaint plausibly pleads that the Council's actions constituted an illegitimate and inequitable attempt to prevent Acorn from developing its property. *Cf. Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 165 (4th Cir.2008) (finding no taking, in part, because the "character of the government action here is both legitimate and equitable").

*7 Finally, Acorn pled that the County has not paid Acorn just compensation for the regulatory taking. Accordingly, we hold that Acorn has sufficiently pled a regulatory takings claim that is plausible on its face.

B.

To make out an arbitrary and capricious substantive due process claim, Acorn must demonstrate "(1) that [it] had property or a property interest; (2) that the

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state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency.” *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir.1995) (emphasis in original). Although, as discussed above, we found that Acorn's substantive due process claim is ripe because Acorn obtained a “final decision,” we hold that Acorn's complaint does not plead a plausible arbitrary and capricious substantive due process claim.

[4] Assuming *arguendo* that Acorn's complaint sufficiently pleads the first two prongs of an arbitrary and capricious due process claim, Acorn's complaint fails under the third prong because it did not plausibly plead that no state-court process could cure Acorn's injury. Indeed, the “[Due Process] Clause is violated only where the state courts can do nothing to rectify the injury that the state has already arbitrarily inflicted.” *Love v. Peppersack*, 47 F.3d 120, 123 (4th Cir.1995). Notably, under Maryland law, the state courts possess the authority to strike down zoning decisions that are “arbitrary, capricious, discriminatory or illegal.” *Trustees of McDonogh Educ. Fund & Institute v. Baltimore County*, 221 Md. 550, 158 A.2d 637, 645 (Md.1960). Acorn's complaint does not assert that seeking such relief in state court would not rectify its injury. Thus, as to Acorn's substantive due process claim, Acorn has failed to state a claim that is plausible on its face. See *Sylvia*, 48 F.3d at 829 (“[T]he fact that established state procedures were available to address and correct illegal actions by the [Zoning] Board belies the existence of a substantive due process claim.”). Accordingly, we affirm the district court's decision to dismiss this claim, albeit on different grounds.

IV.

For the foregoing reasons, we affirm in part and reverse in part, and remand for proceedings consistent with this opinion.

*AFFIRMED IN PART, REVERSED IN PART, AND
 REMANDED WITH INSTRUCTIONS*

FN1. Specifically, we “consider the complaint in its entirety, as well as ... documents incorporated into the complaint by reference.” *Matrix Capital Mgmt. Fund, LP v.*

BearingPoint, Inc., 576 F.3d 172, 176 (4th Cir.2009) (quotation omitted).

FN2. Properties zoned DR-1 may accommodate one single family dwelling per acre.

FN3. “Areas of Future Consideration” are areas to be considered in the design of major facilities for growth and development beyond the Land Use Master Plan.

FN4. “Capital Facilities Areas” are areas in which water and sewerage facilities are required and possible.

FN5. Property zoned RC-2 is primarily used to foster and protect agriculture, though limited residential development is permitted.

FN6. Under the RC-5 zoning classification, property may be put to agricultural use or may accommodate one single family dwelling per two acres.

FN7. Areas classified as “No Planned Community or Multi-Use Service” are areas of planned, low-density growth for which metropolitan water and sewerage facilities are neither planned nor intended.

FN8. The defendants contend that Acorn also failed to satisfy *Williamson's* second, “just compensation” prong. However, the defendants did not raise this argument below or in their opening appellate brief. Indeed, it was not until the panel requested the parties to address *Williamson's* second prong that the defendants finally pressed this argument. Therefore, because *Williamson's* just compensation prong is not a jurisdictional requirement, we deem this argument waived. *Beach*, 130 S.Ct. at 2610; see also *United States v. Jones*, 308 F.3d 425, 427 n. 1 (4th Cir.2002) (holding that an argument not raised in the opening appellate brief is waived).

FN9. In *Williamson*, the Court explained that plaintiffs need not exhaust state administrative remedies to satisfy the final decision

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prong where their claim is predicated on 42 U.S.C. § 1983. *Williamson*, 473 U.S. at 192-93. Here, the defendants argue that Acorn must exhaust state administrative remedies because it did not cite § 1983 in its complaint. We disagree. “Federal and state court decisional law is virtually unanimous that a complaint need not specifically refer to § 1983, so long as the essential elements of the claim are [pled].” *Hill v. North Tex. State Hosp.*, No. 7:09-CV-158-0, 2010 WL 330209, at *2 (N.D.Tex. Jan. 26, 2010) (emphasis in original); see, e.g., *Smith-Berch, Inc. v. Baltimore County*, 68 F.Supp.2d 602, 626 (D.Md.1999). To state a cause of action under § 1983, a plaintiff must establish “(1) the deprivation of a right secured by the Constitution or a federal statute; (2) by a person; (3) acting under color of state law.” *Jenkins v. Medford*, 119 F.3d 1156, 1159-60 (4th Cir.1997). Acorn pled these essential elements.

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FN10. The defendants argue that Acorn's complaint does not sufficiently allege a federal substantive due process claim because Acorn does not cite the Fourteenth Amendment. Like the district court, however, we assume that Acorn relied on both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Maryland's state constitutional equivalent. See *Acorn Land*, 648 F.Supp.2d at 747 n. 6. After all, Maryland “precedent states clearly that the Maryland and Federal due process provisions have been read ‘*in pari materia*.’” *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171, 194 n. 22 (Md.2007).

FN11. We note, however, that arbitrary and capricious substantive due process claims are not subject to *Williamson's* second, “just compensation” prong. *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 n. 3 (4th Cir.1998); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96-97 (2d Cir.1992).

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THIS IS TO CERTIFY that on this 17th day of November, 2010, I did serve true and correct copies of the following:

1. REPLY BRIEF OF APPELLANT; and
2. CERTIFICATE OF SERVICE.

via Email and via U.S. Mail, First Class, Postage Prepaid (or other method indicated below) by directing delivery to and addressed to the following:

<u>Attorneys for City of Bonney Lake</u>	<u>Attorneys for City of Bonney Lake</u>
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Dated this 17th day of November, 2010, at Tacoma, Washington.


Cheryl M. Koubik
Legal Assistant to Margaret Y. Archer