A08-143

STATE OF MINNESOTA
IN COURT OF APPEALS

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Franklin Kottschade,

*Appellant,*

v.

City of Rochester,

*Respondent.*

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# AMICUS BRIEF OF BUILDERS ASSOCIATION OF MINNESOTA

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## STATEMENT OF INTEREST OF AMICUS

The Builders Association of Minnesota ("BAM") respectfully submits this brief to urge reversal of the district court's summary judgment in this matter.[1] BAM is a not-for-profit, voluntary trade association established to represent the interests of building contractors, land developers, manufacturers, suppliers, and related business enterprises. BAM was established in 1974 and now serves over 4,500 home building, remodeling and related professionals in affiliation with 15 local associations across the state of Minnesota. It is dedicated to providing the public with a diverse selection of quality and affordable housing. The efforts of BAM focus on development and infrastructure capacity issues, and on the education of association members, policymakers and the public about housing affordability, construction best practices, and land use best practices. BAM's mission is to increase the professionalism of the residential construction and development industries.

On the merits, this case presents an issue that is vitally important to property owners, developers, and the public in general: Whether a city's imposition of substantial fees on developers ("exactions") for infrastructure improvements that go far beyond what is necessary to accommodate the needs of the development are improper and unconstitutional. Minnesota law recognizes that exactions or impact fees must be proportionate: "the amount assessed a developer must reflect the cost of infrastructure improvements necessitated by the development itself." *Country Joe Inc. v. City of*

[1] In accordance with Minn. R. Civ. App. P. 129.03, BAM certifies that its counsel authored this brief in whole and that no person or entity, other than BAM has made a monetary contribution to the preparation or submission of this brief.

*Eagan*, 560 N.W.2d 681, 685 (Minn. 1997). An exaction that is not proportionate to the impact likely to be caused by the development can constitute a violation of the Takings Clause of the Fifth Amendment to the United States Constitution. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). As the Minnesota Supreme Court recently explained: "The purpose of the Takings Clause is to ensure that the government does not require some people alone to bear the burdens which, in all fairness and justice, should be borne by the public as a whole." *Wensmann Realty Inc. v. City of Eagan*, 734 N.W.2d 623, 632 (Minn. 2007) (citations omitted). Exactions imposed upon developers for public infrastructure improvements can constitute takings if the scope of the improvements is not proportionate to the impact of the project. In such cases, "the city is, in essence, asking the property owner to carry a burden that in all fairness should be borne by the entire community." *Id.* at 642. Thus, under the Takings Clause, a city "must make some sort of individualized determination that the required [fee] is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391.

If, for example, a city wished to widen a road to better accommodate regional traffic needs, there is no doubt that the city would be required to "take" the property by instituting condemnation proceedings and compensating the landowner. A city could not achieve that same result by, in essence, "taking" the land by an exaction, *i.e.*, by requiring a landowner to dedicate the land as a condition of obtaining governmental approval for development. Here, the developer presented evidence that exactions imposed by the City

were not at all proportionate to the impact of the proposed development making them unconstitutional.

Having the merits of these issues addressed in this case is very important because municipalities and other land-use agencies frequently impose similar types of exactions or impact fees as a condition of a landowner developing his or her property. Exactions of the nature and extent at issue in this case have a direct and significant impact on the development and housing industries and their ability to produce quality, diverse and affordable housing. In this case, the additional costs caused by the exactions in the City's approval of the project may effectively eliminate any possibility of affordable housing being built on this property.[2] Consequently, the permissible scope of such exactions is an issue of importance not only to property owners, developers and contractors, but to the public in general.

However, the important merits of the case were never reached because the district court concluded that the statute of limitations for the developer's takings claim had expired. The district court held that the limitation period started on the date of the City's *initial* action on the developer's proposal rather than its final action. That ruling is a misapplication of the well-established "final decision" or ripeness doctrine set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985) and creates inconsistency and uncertainty in this area of the law. The district court

[2] Affidavits submitted by the developer indicated that the per-unit cost to comply with the conditions was $89,511 at a time when the average price of a townhome in Rochester was $125,591. (A.A. 122-32.)

further erroneously concluded that the action was non-justiciable and moot because the disputed development approval, under which the developer could not have proceeded due to the onerous exactions, expired after two years under a City ordinance. In effect, the district court applied a *de facto* two-year limitation period rather the statutory six-year period. These rulings are incorrect, and should not be affirmed because they will further confuse the law in this complex area, and keep landowners from protecting their constitutional rights.

## ARGUMENT

### I. The District Court Misapplied the "Ripeness" or "Final Decision" Rule.

#### A. Courts Have Consistently Held That A Takings Claim Is Not Ripe Until The Municipality Has Reached a Final Decision.

Property owners and developers seeking to pursue court challenges to actions by local governments, particularly claims that a constitutional "taking" has occurred, face substantial procedural obstacles. The "final decision" or "ripeness" doctrine is one of several procedural obstacles that a property owner must overcome in order to have his or her claims heard on the merits. It can be a difficult burden.[3] Municipalities and other land-use agencies routinely raise the ripeness doctrine to argue against a court reaching the merits of a takings claim. They argue that a city's decision is not final, and therefore is not ripe for a takings challenge, until the property owner, after having received an adverse decision or action by the city, has returned to the city to seek a variance, has

[3] *See* Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 91 (1988) (presenting data that from the years 1983-1988 only 5.6% of land use cases were found to be ripe).

presented a modified plan, or has taken some other action to try to alleviate the economic consequences of the city's action.

The leading case concerning ripeness doctrine in takings claims[4] is *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985). In *Williamson*, a land-use agency rejected a property owner's proposal to expand a subdivision. The property owner then filed suit alleging a regulatory taking. Before filing the federal suit, the property owner did not pursue a variance, an appeal to the county council, an amendment to the general plan, or a state inverse condemnation suit, all of which were available. When the case reached the United States Supreme Court, the Court decided that the existence of a taking could not be determined because there had been no "final decision" from the planning commission and because the property owner had not sought "state compensation." *Id.* at 185. Analyzing the "finality" requirement, the Supreme Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186 (emphasis added).

Three main reasons exist for the "final decision" rule according to the Supreme Court in *Williamson*. The first is the long-standing principle that cases should be decided

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[4] The ripeness doctrine of the Taking Clause is different than the ripeness doctrine having to do with Article III justiciability. The ripeness doctrine of the Taking Clause "is a special ripeness doctrine applicable only to constitutional property rights claims." Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992).

on non-constitutional grounds whenever possible. *Id.* at 187 ("If [the property owners] were to seek administrative relief under these [administrative] procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions."). The second rationale is that a final decision is necessary before the issue of whether a taking has occurred can be determined. Whether a regulatory taking has occurred involves a determination of the extent to which economically viable use of property has been denied, and that determination cannot be made until the land-use agency declares exactly how the owner may permissibly use his or her property. *Id.* at 187. The third rationale is that in order for a property owner to be deprived of economically viable use of his or her property, the regulation must actually be applied to the property. *Id.* at 190. If a property owner never pursues a variance, appeal, or amendment, a court cannot know exactly how the regulation (or a modification of it) would have affected the potential uses of the property. *Id.* at 191.

The Supreme Court expanded the ripeness doctrine in *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340 (1986) by adding what some subsequent decisions have called a "meaningful application" and "reapplication" requirement. The property owner in *MacDonald* sought county approval of plans to develop agricultural land into single-family and multi-family parcels. The county land-use agency rejected the plans, and the county's ordinance provided no direct way to appeal the county's decision. Nevertheless, the Court stated that as a "prerequisite" to a taking claim, there must be a "final and authoritative determination of the *type and intensity* of development legally

permitted on the subject property." *MacDonald*, 477 U.S. at 348 (emphasis added). The Court noted that "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with one hand they may give back with the other." *Id.* at 350. *See also, Palazzolo v. Rhode Island,* 533 U.S. 606, 620 (2001) (The "final decision requirement 'responds to *the high degree of discretion* characteristically possessed by land-use boards in softening the strictures of the general regulations they administer'") (*quoting Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738 (1997)) (emphasis added).

Courts have applied the "final decision" or "ripeness" requirements in different manners depending on the unique facts of each case. A landowner or developer is typically required to "follow[] reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Palazzolo*, 533 U.S. 620-21. *See e.g. Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1530-39, 1541 (11th Cir. 1991) *cert. den.* 502 U.S. 810 (1991) ("the plaintiffs must obtain a final decision regarding the application of the zoning ordinances to their property, including denial of variance applications"); *Eide v. Sarasota County*, 908 F.2d 716, 721 (11th Cir. 1990) *cert. den.* 498 U.S. 1120 (1991) ("The final decision requirement includes a requirement that the property owner seek variances from the applicable regulations"); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987) *cert. den.* 484 U.S. 1043 (1988) ("plaintiff must seek variances which would permit uses not allowed under the regulations"); *Paragon Properties Co. v. City of Novi*,

550 N.W.2d 772, 776-77 (Mich. 1996) *cert. den.* 520 U.S. 1117 (1997). Some cases require a landowner to seek not only a variance but also a "meaningful application" and a "reapplication" before a final decision can be said to exist. *See Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 503-4 (9th Cir. 1990) *cert. den.* 502 U.S. 943 (1991); *Southview Assoc. v. Bongartz*, 980 F.2d 84, 99 (2nd Cir. 1997) *cert. den.* 507 U.S. 987 (1993).

Despite different applications of the "final decision" rule to different factual situations, the central principle remains the same: The existence of a taking cannot be determined until the full extent of the regulation's economic impact is known. Recognizing, as the Supreme Court put it in *McDonald*, that land-use agencies are "singularly flexible institutions" that may "take with one hand" and "give back with the other," the fact that a developer or property owner *may* seek to alleviate the economic affects of the land use regulation by seeking a variance, submitting a modified proposal, resubmitting a proposal, or taking other action, means that a decision is not "final" for taking purposes until such actions are pursued. After all, one of the primary rationale for the "final decision" rule is that if a constitutional issue can be avoided by having the landowner seek discretionary relief from the regulation, the landowner should do so.

### B. The City's July 15, 2000 Conditions Did Not Constitute A Final Decision.

#### 1. The Conditions Themselves Were Incomplete And Required Further Detail And Application.

The facts of the present case demonstrate that the City's conditional approval of the developer's proposal on July 15, 2000 was not a final decision for the purposes of the

ripeness doctrine. On its face, the conditioned approval on July 15, 2000 was not final. The "conditions" imposed were general in nature and did not define the precise limitations that actually would be *applied* to the developer's project. *See Williamson*, 473 U.S. at 187-190 (a decision is not final until the land-use agency declares exactly how the owner may use his or her property and the regulation must be actually applied to the property). Instead, the City's July 15, 2000 conditions *expressly* indicated that the actual application of the conditions to the property would be determined in a later "Development Agreement" that would be negotiated in the future by the City and developer. For example, Condition D adopted by the City on July 15, 2000 states that:

> The applicant shall enter into a Development Agreement with the City that outlines the obligation of the applicant relating to, but not limited to . . . traffic improvements, pedestrian facilities, right-of-way dedications, . . . contributions for public infrastructure improvements and contributions for future reconstruction of 40th Street S.E. . . . The City may create a Transportation Improvement District in the area that may result in a capacity component being added to the substandard street reconstruction charge.

(A.A. 81.) What the future Development Agreement would require is not set out in the conditions, and the fact that subsequent events would need to take place (the creation and negotiation of a future Development Agreement) demonstrates that the City's action on July 15, 2000 was *not* a final decision.

### 2. The City Has Acknowledged That The Conditions Were Not Final Because The City Actually Considered And Determined The Variance Request.

Moreover, the conditions were not final because they were subject to modification, and the City actually considered and determined the developer's subsequent variance

request. Like other land-use agencies, the City, being a "singularly flexible institution," *MacDonald, supra* at 350, has the jurisdiction and the discretion to take further action to ameliorate the economic impacts of the conditions that it imposed upon the developer's proposal. By statute, the City, through its Zoning Board of Appeals ("ZBA"), had jurisdiction to hear requests for variances from the literal provisions of the City's ordinances.[5] Minn. Stat. § 462.357, subd. 6. While the City now argues that the ZBA was not strictly required to consider the developer's request for a variance, the record is clear that the ZBA ***did***, in fact, exercise discretion to consider the variance.

The City Council likewise exercised discretion to consider the variance. It took up the variance issue at hearings on November 20 and December 6, 2000. (A.A. 132.) The City Council expressly determined that the variance appeal from the ZBA was properly before the Council. (A.A. 144) ("the variance appeal is properly before the Common Council"). Like the ZBA, the Council chose to consider the merits of the developer's variance proposal. (A.A. 145-151.) Even though it ultimately denied the variance, the City Council acknowledged, by reaching the merits, that it did have the discretion to grant a variance or waiver of the conditions imposed upon the developer.

It is improper for the City to now argue that, after having actually considered the developer's variance request on the merits, and after having made consideration of the variance request part of the City's decision-making process, that a "final" decision

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[5] The developer's variance request included relief both from the conditions imposed by the City *and* relief from the ordinance provisions under which the City imposed the conditions. (A.A. 132.)

occurred *before* the City's decision-making process was completed, *i.e.*, before the City resolved the variance request.

The trial court's determination that seeking a variance was futile is factually incorrect and legally irrelevant. The facts are undisputed that the developer sought a variance and the City considered and decided the variance request on the merits. It is undisputed that the City did not conclude its decision-making process until it rejected the variance request in January of 2001, within the six-year limitations period. For this same reason, the district court's conclusion that the variance request was "futile" and therefore did not change the "finality" of the City's imposition of conditions in July of 2000 misses the point. The City's decision-making process was *not* final in July of 2000 because the City thereafter actually considered and decided the developer's variance request.

### 3. Even During Its Consideration Of The Variance Request, The City Indicated On The Record That Further Modifications Could Occur.

In addition to the variance request actually sought by the developer, the record indicates that throughout the process leading up the City Council's final decision on January 3, 2001, the planning staff and the City Council did not believe that the City's decision on July 15, 2000 was final. To the contrary, they believed that *other* options were available for the City to provide some relief from the economic consequences of the conditions. The "Findings of Fact, Conclusions of Law and Order" issued by the City on January 3, 2001 includes findings that the Senior Planner for the City believed there were "variances to *other* standards that could be considered to achieve a density" on the

property similar to what the developer was seeking. The record contains evidence that City Council members recognized that they could:

> meet with the Applicant and city staff in an attempt to discuss and work out a possible compromise on applicable performance standards. It was pointed out that either the City or developer can initiate an amendment to a general development plan.

(A.A. 142.) In other words, the City was expressing a willingness to take further action to at least evaluate other ways in which the economic impact of its regulations could be lessened. (A.A. 141 at ¶ 29.)

In sum, the City's decision on July 15, 2000 was not a "final decision" that was immediately subject to challenge as a taking. Had the developer commenced a takings action at that time, the City would have sought, or the court on its own initiative would have ordered, that the action be dismissed for lack of ripeness. Accordingly, because the developer's taking claim was not ripe at that point in time, the statute of limitations for commencing a taking claim could not have accrued at that time.

## II. The District Court Improperly Created a *De Facto* Two-Year Limitation Period.

The legislature has sole authority to determine what limitations period should be applicable to takings claims, and has determined that a six-year limitation period applies. Minn. Stat. § 541.05, subd. 1(4). The district court and the parties in this case all agree that this action is governed by the six-year limitation period.

The City, whose power is limited to the authority delegated to it by the legislature, has no authority to modify the statute of limitations created by the legislature. However, under a misapplication of standing and mootness principles, the district court erroneously

concluded that the City could create a *de facto* two-year statute of limitations that overrides the legislatively-created six-year limitations period merely by the City limiting the effective period of its development approval to two years. According to the district court, the developer was required to commence a state court takings claim within two years of the City's final action,[6] and the failure to do so made the developer's later-filed action untimely because the action was then moot and the developer had no "standing."

The district court's approach, if affirmed, would allow any land-use agency to create whatever *de facto* statute of limitations it desires – one year, six-months, or even less – simply by making its development approval effective for a limited time. Land-use agencies cannot override legislative enactments in this way. The Court should reaffirm that the full six-year period mandated by the legislature governs all takings claims, regardless of any time limits that a city or land-use agency places on its approval.

Moreover, the district court's analysis of the standing and mootness issues is plainly wrong. Under the district court's analysis, a justiciable controversy suddenly disappeared when the development approval (and conditions) granted by the city expired. That ignores the fact that an actual injury occurred, at a minimum, while the approval (including its unreasonable conditions) was in effect. The landowner was deprived of the economic benefit of his property beginning at that moment and continuing forward in time. The fact that the City's conditional approval expired after two years did not make that actual injury, which had already taken place, disappear, as the City apparently is

[6] The developer did commence a federal court taking claim within two years of the City's final decision.

arguing. The landowner has standing to assert a claim against the City for his damages and the issue is not moot.

## III. A Consistent Judicial Application Of The "Final Decision" Requirement Is Essential.

What is most striking, and most disturbing, about the City's positions in this case is that it is advocating *against* the well-established "final decision" rule simply because it is expedient, under the circumstances of this case, to do so.[7] That rule is intended to *protect* cities and other land-use agencies from liability posed by takings claims by prohibiting claims until the effect of the land use regulation is fully defined through *its application* to the property, and until the agency has had the opportunity to modify the restrictions to ameliorate or eliminate any adverse economic impacts that could lead to liability. There can be no doubt that if the developer in this case had, in fact, commenced a takings claim against the City immediately after the City issued it Findings of Fact, Conclusions of Law and Order July 15, 2000 (A.A. 76) the City would have sought to dismiss the case under *Williamson* because the its decision was not "final." The City undoubtedly would have argued that the action the City took on July 15, 2000 was not final because the "conditions" that it imposed were general in nature and did not define the precise limitations that actually would be *applied* to the developer's project. It would

[7] By arguing that the City's "final decision" occurred when the City made its *initial* determination rather than its final decision, the City is trying to turn the law on its head and argue the reverse of a city's normal position. That is true also with respect to the City's argument on the "futility" exception to the final decision rule. The futility exception is intended to protect property owners from having to jump through unnecessary hoops, and cities typically argue against its application. Here, the City is again arguing just the opposite, and is attempting to use the futility exception against the landowner.

have argued that the development agreement had not even been proposed at that time, and that the developer could have engaged in further negotiations with the City, as the City itself acknowledged, to explore "potential alternatives available to the Applicant which may allow him to accomplish his development goals" including considering other "performance standards which could be varied . . .." (A.A. 147.)

Although the "final decision" rule can often cut against the interests of landowners, it is a binding rule of law and should be applied even-handedly. Its application should not be suspended, as it was here, simply because it would benefit the land-use agency to do so in a particular case. Landowners, land-use agencies and the public must be able to rely on the *consistent* application of established rules of law. Too much is at stake. A property owner or developer who follows the district court's holding in this case and does *not* seek a variance before commencing a takings claim may find himself or herself out of luck later. If the court in the takings claim rules that the decision challenged was not "final" under *Williamson* because no variance was sought before suit was commenced, the ability at that point to seek a variance may no longer exist under the city's ordinances. A claim could never "ripen" at all. For this reason, applying to the well established "final decision" rule in a fair and even-handed manner is crucial.

## CONCLUSION

Any person developing property for residential or other use will almost always have to deal with some form of exactions or impact fees imposed by governmental entities. The United States and Minnesota Supreme Courts have recognized that such exactions and fees may rise to the level of a taking that violates the United States and

Minnesota Constitutions. State and federal law recognize a requirement that a "final decision" be rendered before a landowner may seek a determination of whether a taking has occurred and that suit be brought within six years of that final decision. The trial court's decision turns that law on its head. Affirming its decision will result in landowners not knowing when their claims accrue or the time period within which a claim must be brought. Reversing the trial court's decision will uphold long-standing law and avoid this uncertainty, and will permit the important merits of this case to be reached.

Respectfully submitted,

Dated: May 7, 2008

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