

WHAT DO GRAPES AND FEDERAL LAWSUITS HAVE IN COMMON? BOTH MUST BE RIPE

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More and more land use litigation is being brought in federal court as landowners, discouraged by their inability to get state courts to grant relief from what they perceive to be biased land use boards, attempt to focus the debate on violations of civil and constitutional rights, rather than state law.¹ This growing trend raises the concern that an increasing body of land use law is now coming from judges who are unfamiliar with it, and sometimes render rulings that contradict state law.

I. THE DANGER OF FEDERAL COURTS BECOMING ARBITERS OF NEW YORK LAND USE LAW

The Second Circuit starts with the premise that federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations by the circuit's many local legislative and administrative agencies. Federal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors that enter into local zoning decisions. Even were we blessed with the requisite knowledge and sensitivity, due regard for the constitutional role of the federal courts in our dual judicial system would permit us to

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¹ Since this article is being written in the summer and fall of 2010, former New York Southern District Judge Stephen C. Robinson's decision in *Fortress Bible Church v. Feiner*, No. 03 Civ. 4235(SCR), 2010 WL 3199876 (S.D.N.Y. Aug. 12, 2010), may be the most recent example of a New York federal court handling the merits of a land use matter.

exercise jurisdiction in zoning matters only when local zoning decisions infringe national interests protected by statute or the constitution. However, when a landowner's constitutional rights are infringed by local zoning actions, our duty to protect the constitutional interest is clear.²

Since the New York Court of Appeals has instructed the state's judiciary to "giv[e] due deference to the broad discretion of the Board [of Appeals],"³ the lower state courts have become less inclined to upset decisions by local land use boards.⁴ This jurisprudential directive has drawn disenchanted developers to the federal courts. Because, as Judge Pratt noted in the passage quoted above, "[f]ederal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors that enter into local zoning decisions,"⁵ the result of this movement can be disastrous.

*O'Mara v. Town of Wappinger*⁶ is an example. The issue was whether notes restricting development that appeared on a subdivision plat provided constructive notice of the restriction to bona fide purchasers for value.⁷ The District Court decided that a subdivision plat, though filed with the County Clerk, was not "recorded" within the meaning of New York's Recording Act (N.Y. Real Property Law section 291). Hence, the plat did not constitute notice to subsequent owners who took title free of the restrictions on that plat.⁸

This holding was at odds with what New York land use practitioners knew the law to be and could have led to unimaginable confusion, both in the land use and the title insurance worlds. Fortunately, through the certification procedure,⁹ the Second Circuit Court of Appeals certified the question to New York's Court

² *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986).

³ *In re Pecoraro v. Bd. of App.*, 2 N.Y.3d 608, 614, 814 N.E.2d 404, 407, 781 N.Y.S.2d 234, 237 (2004).

⁴ *See, e.g., In re Henderson v. Zoning Bd.*, 72 A.D.3d 684, 897 N.Y.S.2d 518 (App. Div. 2d Dep't 2010) (deferring to, and therefore upholding, a Board of Appeals' interpretation of a zoning ordinance).

⁵ *Sullivan*, 805 F.2d at 82.

⁶ *O'Mara v. Town of Wappinger*, 400 F. Supp. 2d 634 (S.D.N.Y. 2005), *rev'd* 518 F.3d 151 (2d Cir. 2008).

⁷ *Id.* at 641, 643.

⁸ *Id.* at 643, 647.

⁹ *See* 2ND CIR. R. 27.2(a) (Certification of Questions of State Law); N.Y. COMP. CODES R. & REGS. tit 22, § 500.27 (2008) (Discretionary Proceedings to Review Certified Questions from Federal Courts and Other Courts of Last Resort).

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of Appeals,¹⁰ which assured its federal cousin that notes on filed plats are as much a part of a property's chain of title as matters contained in recorded deeds, easements, covenants, and the like.¹¹ Armed with that answer, the Second Circuit undid the mischief the lower court's holding may have had.¹²

It is not only federal judges who find themselves in new fields. It has been quite some time since many municipal attorneys have reviewed the doctrines that require a federal jurist to refrain even when jurisdiction otherwise appears to exist. One such doctrine is ripeness.

II. RIPENESS IN LAND USE CASES

Ripeness is “a constitutional prerequisite to exercise of jurisdiction by federal courts.”¹³ For a case to be “ripe,” there must be a “real, substantial controversy between parties” which involves a dispute that is “definite and concrete, not hypothetical or abstract.”¹⁴ The doctrine calls upon federal courts to decide at the outset “whether [they] would benefit from deferring initial review until the claims [they] are called on to consider have arisen in a more concrete and final form.”¹⁵ The obvious purpose behind the ripeness doctrine is to prevent adjudication of issues that do not exist, can be addressed by another body, or may never arise.¹⁶ Ripeness keeps the federal judiciary from getting caught up in academic exercises.¹⁷

In land use matters, the doctrine has evolved from *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,¹⁸ a regulatory takings case.¹⁹ The landowner argued

¹⁰ *O'Mara v. Town of Wappinger*, 485 F.3d 693, 699 (2d Cir. 2007).

¹¹ *O'Mara*, 9 N.Y.3d 303, 879 N.E.2d 148, 849 N.Y.S.2d 9 (2007).

¹² *O'Mara*, 518 F.3d 151 (2d Cir. 2008).

¹³ *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 51 (2d Cir. 1980) (en banc) (per curiam) (citations omitted). *See also* *Country View Estates @ Ridge LLC v. Town of Brookhaven*, 452 F. Supp. 2d 142, 144 (E.D.N.Y. 2006) (“Ripeness goes to the existence of a case or controversy under the Constitution and thus presents a jurisdictional issue.”) (citations omitted).

¹⁴ *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

¹⁵ *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005).

¹⁶ *Id.*

¹⁷ *In re Bean*, 252 F.3d 113, 117–18 (2d Cir. 2001), *cert. denied* 528 U.S. 869 (1999) (citing *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 478 (2d Cir. 1999)); *Motor Vehicle Mfrs. Ass'n of the U.S v. N.Y. State Dep't of Env'tl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996)).

¹⁸ *Williamson Cnty. Reg'l Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

¹⁹ Today, such a case would also be referred to as an “inverse condemnation.” *United*

that by denying its application to subdivide, the government had taken its property without giving just compensation in violation of the Fifth Amendment.²⁰ The United States Supreme Court held that the case was not ripe for federal court review because the landowner had failed to meet both prongs of a two-pronged test for ripeness.²¹

A. *Prong-One Ripeness*

Though its proposed subdivision had been denied, the landowner had not attempted to obtain variances from the Planning Commission's decision.²² If granted, those variances may have restored economic vitality to the land.²³ Accordingly, "the Commission's denial . . . [did] not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision."²⁴ Thus, the first prong of the ripeness test requires "the government entity charged with implementing the regulations [to have] reached a final decision regarding the application of the regulations to the property at issue."²⁵ This branch of the test has come to be known as the final decision requirement,²⁶ or prong-one ripeness.²⁷

B. *Prong-Two Ripeness*

An additional reason why *Williamson* was not ripe was that the landowner had not sought "compensation through the procedures the State has provided for doing so."²⁸ After all, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes

States v. Clarke, 445 U.S. 253, 257 (1980) ("The phrase 'inverse condemnation' appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."). Or, it may be called a case involving a regulation that has gone "too far." Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); Southview Assocs. v. Bongartz, 980 F.2d 84, 96 (2d Cir. 1992).

²⁰ By virtue of the Fourteenth Amendment, this constitutional concept applies to the states. Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

²¹ *Williamson*, 473 U.S. at 200.

²² *Id.* at 188–89.

²³ *Id.* at 201 (Brennan, J., concurring).

²⁴ *Williamson*, 473 U.S. at 194.

²⁵ *Id.* at 186.

²⁶ Country View Estates @ Ridge v. Town of Brookhaven, 452 F. Supp. 2d 142, 148–49 (E.D.N.Y. 2006).

²⁷ Murphy v. New Milford Zoning Comm., 402 F.3d 342, 348 (2d Cir. 2005).

²⁸ *Williamson*, 473 U.S. at 194.

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taking without just compensation.”²⁹ Ergo, “a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through procedures provided by the State.”³⁰ Thus, the second prong of the ripeness test requires a party to seek compensation for an alleged taking through state law procedures before coming to the federal judiciary.³¹ The second component of the test has been called the state compensation requirement,³² or prong-two ripeness.³³

Of course, lawsuits claiming regulatory takings are only one type of land use litigation. Landowners often argue that land use boards have violated their substantive or procedural due process rights, or that these boards have denied them equal protection of the laws.³⁴ With one exception, the Second Circuit applies both prongs of the *Williamson* ripeness test to such claims.³⁵ The exception is when the substantive due process claim is based upon allegations of arbitrary and capricious governmental conduct.³⁶ There only the final decision requirement (or prong-one ripeness) needs to be satisfied.³⁷

C. What Is a “Final Decision”?

“A final decision exists when a development plan has been submitted, considered and rejected by the governmental entity with the power to implement zoning regulations.”³⁸ Reminiscent of the one-bite rule in dog bite cases, the courts have maintained that finality requires “at least one meaningful application for development . . . be made in order to invoke the futility exception and consider a claim ripe for adjudication.”³⁹

In regulatory taking cases, however, more than one application is usually necessary. The argument in such cases is that the

²⁹ *Id.*

³⁰ *Id.* at 195.

³¹ *Id.*

³² S&R Dev. Estates v. Bass, 588 F. Supp. 2d 452, 464 (S.D.N.Y. 2008).

³³ Murphy v. New Milford Zoning Comm., 402 F.3d 342, 349 (2d Cir. 2005).

³⁴ See, e.g., Southview Assocs. v. Bongartz, 980 F.2d 84, 96 (2d Cir. 1992); Unity Ventures v. Cnty. of Lake, 841 F.2d 770, 771 (7th Cir. 1998); Herrington v. Cnty. of Sonoma, 883 F.2d 739, 740 (7th Cir. 1988).

³⁵ *Southview*, 980 F.2d at 96.

³⁶ *Id.* at 96–97.

³⁷ *Id.*

³⁸ S&R Dev. Estates v. Bass, 588 F. Supp. 2d 452, 462 (S.D.N.Y. 2008).

³⁹ Kittay v. Guiliani, 112 F. Supp. 2d 342, 350 (S.D.N.Y. 2000), *aff'd* 252 F.3d 645 (2d Cir. 2001).

government, through the application of its laws, has stripped the land of its value. Cases such as *MacDonald, Sommer & Frates v. County of Yolo*,⁴⁰ as interpreted by *Southview Associates, Ltd. v. Bongartz*,⁴¹ hold that more than one application may be required before a takings case is ripe because the federal courts should not act until it is obvious that the regulatory agency will not approve any uses from which the landowner can derive a financial benefit.⁴²

D. *The Futility Exception*

As with so many legal doctrines, prong-one ripeness has its own exception.

A property owner . . . will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile. That is, a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied.⁴³

The exception was developed to “protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved.”⁴⁴

Unfortunately, “[t]he Second Circuit has not yet determined ‘what the precise contours of the futility exception are.’”⁴⁵ Other circuits have, however. To establish futility, the plaintiff must demonstrate that “the prospect of refusal must be certain (or nearly so).”⁴⁶ The lower federal courts of New York appear to agree,⁴⁷ and two points are beyond doubt. First, “[f]utility does not exist merely because of hostility to the developer’s plans.”⁴⁸ Second, delays in processing an application, even inordinately long ones, do not, by themselves, establish futility.⁴⁹

⁴⁰ *MacDonald, Sommer & Frates v. Cnty. of Yolo*, 477 U.S. 340 (1986).

⁴¹ *Southview*, 980 F.2d at 98.

⁴² *MacDonald*, 477 U.S. 340, 351–53 nn.8–9 (1986).

⁴³ *Murphy v. New Milford Zoning Comm.*, 402 F.3d 342, 349 (2d Cir. 2005).

⁴⁴ *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 504 (9th Cir. 1990).

⁴⁵ *Homefront Org., Inc. v. Motz*, 570 F. Supp. 2d 398, 407 (E.D.N.Y. 2008).

⁴⁶ *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991).

⁴⁷ *S&R Dev. Estates v. Bass*, 588 F. Supp. 2d 452, 463 (S.D.N.Y. 2008) (“[I]t has not [been] shown that the prospect of refusal from the ZBA would be certain.”).

⁴⁸ *Id.* See also *Goldfine v. Kelly*, 80 F. Supp. 2d 153, 160–61 (S.D.N.Y. 2000).

⁴⁹ See *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190–91(1985) (eight years); *Dougherty v. Town of Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 89 (2d Cir. 2002) (five and a half years); *Goldfine*, 80 F. Supp. 2d at 161

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At least one federal district court in New York has found futility. In *Catcove Corp. v. Heaney*,⁵⁰ an application for amendments to a zoning ordinance had been “pending—in one form or another—for close to nine years.”⁵¹ While that alone might not have been grounds for invoking the futility exception, the court found the case to be ripe because the plaintiffs sufficiently pled that the defendants had “set an ‘Ever Changing Finishing Line,’ whereby they constantly imposed new obstacles whenever Plaintiffs satisfied the Defendants’ previous purported requirements for approval.”⁵²

These decisions teach us that when the landowner in a federal action argues that only the final decision requirement or prong-one ripeness need be shown, “[t]he property owner . . . has a high burden of proving that a final decision has been reached by the agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds.”⁵³

III. A WOULD-BE WINE STORE

Recently (but not most recently),⁵⁴ the failure to establish ripeness led to a complaint’s dismissal on a Federal Rule of Civil Procedure 12(b)(1) and (6) motion.⁵⁵ The short version of *Rivendell Winery, LLC v. Town of New Paltz*⁵⁶ is that the plaintiffs were nonsuited for not applying to the Town’s Board of Appeals for a variance,⁵⁷ thereby failing to bring finality to their situation before bringing themselves before the Northern District of New York.

(three years); *Country View Estates @ Ridge LLC v. Town of Brookhaven*, 452 F. Supp. 2d 142, 155 (E.D.N.Y. 2006) (two years).

⁵⁰ *Catcove Corp. v. Heaney*, 685 F. Supp. 2d 328 (E.D.N.Y. 2010)

⁵¹ *Id.* at 333.

⁵² *Id.*

⁵³ *Hoehne v. Cnty. of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). *See also Acierno v. Mitchell*, 6 F.3d 970, 975 (3d Cir. 1993).

⁵⁴ As if to prove the premise of this piece, the decision featured in this article is not even the most recent example of land use litigation in a New York federal court. On October 28, 2010, the Northern District of New York dismissed a due process claim because it was not ripe. *Hennelly v. Town of Middletown*, No. 3:10-CV-966, 2010 WL 4366917 (N.D.N.Y. Oct. 28, 2010).

⁵⁵ FED. R. CIV. P. 12(b) (“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; . . . (6) failure to state a claim upon which relief can be granted.”).

⁵⁶ *Rivendell Winery, LLC v. Town of New Paltz*, 725 F. Supp. 2d 311 (N.D.N.Y. 2009).

⁵⁷ This board is almost always referred to as the “Zoning Board”; however, in the statutes its actual name is the “Board of Appeals.” *See* N.Y. TOWN LAW §§ 267(2), (3), (6), (7) (McKinney 2003); N.Y. VILLAGE LAW §§ 7-712(2), (3), (6), (7) (McKinney 1996); N.Y. GEN. CITY LAW §§ 81(1), (2), (5), (6) (McKinney 2003). To add to the confusion, each of these sections is entitled “Zoning Board of Appeals.” Go figure!

Understanding the background, however, leads one to appreciate why the plaintiffs felt aggrieved, and why they may yet succeed assuming, of course, they can establish the facts Judge Hurd assumed to be true,⁵⁸ and can avoid being caught in the *San Remo Hotel* trap discussed below in the Epilogue. The decision also illustrates the lack of appreciation for land use jurisprudence that the opening paragraphs of this article characterize as a concern.

The plaintiffs were a winery and its principal owner, Susan L. Wine.⁵⁹ The winery had operated for a number of years in Ulster County when damage from severe storms forced it to find new quarters.⁶⁰ Ms. Wine purchased two contiguous parcels in the Town of New Paltz on which to relocate her winery.⁶¹ One parcel included a newly constructed, but unoccupied, building.⁶² In addition to growing grapes and producing wine, Ms. Wine intended to use the building as a store to sell the wine produced onsite.⁶³

The local zoning for these parcels permitted “agriculture.”⁶⁴ Determining what constitutes “agriculture” for zoning purposes in New Paltz requires more than just reading the local ordinance, however.⁶⁵ The Town Code has a two-step test. First, the use must comport with certain definitions contained in New York’s Agriculture and Markets Law.⁶⁶ Meeting that requirement is not enough. The land also must qualify for an agricultural exemption under both county and state law.⁶⁷ New Paltz’s assessor makes that latter determination.⁶⁸

In March 2007, the plaintiffs applied to the New Paltz Planning Board for site plan approval of the proposed winery.⁶⁹ Prior to making the application, Ms. Wine sought out and received advice from the chair of the Planning Board that the proposed use was agricultural in nature and therefore permissible.⁷⁰

⁵⁸ *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007) (“In reviewing a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted, we accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party.”).

⁵⁹ *Rivendell Winery*, 725 F. Supp. 2d at 314. It is too her name!

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 315.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 314.

⁷⁰ *Id.*

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On May 1, 2007, the town's building inspector, who was one of the defendants, wrote to the chair of the Planning Board.⁷¹ He opined that although a winery is an agricultural use, the retail sale of wine from the building on the property would not be.⁷² The Town Code only authorized the "[r]etail sale of agricultural produce grown on the same lot from a road stand."⁷³ To sell wine from a store required a variance, concluded the inspector.⁷⁴

Subsequently, an Ulster County assistant district attorney allegedly tried to pressure the building inspector to reverse his interpretation that the proposed winery was an agricultural use.⁷⁵ He allegedly did so because his personal and economic interests would be damaged if the winery were to open.⁷⁶ Though named as a defendant, the assistant district attorney was later dropped from the case by stipulation of the parties.⁷⁷

While proceeding with the site plan application, the plaintiffs applied to have the two parcels included in Ulster County Agricultural District No. 2.⁷⁸ Such a designation is important for it can immunize property from unreasonable regulation or interference by local officials.⁷⁹ The Ulster County Agriculture and Farmland Protection Board ("Farmland Protection Board") recommended that the Ulster County Board of Legislators include the plaintiffs' properties within the Agricultural District.⁸⁰ Prior to the legislators' vote, one of them (also a defendant) called Ms. Wine to suggest that the inclusion application be withdrawn due to community opposition.⁸¹ Ms. Wine complied only to learn later that the county legislator allegedly had a personal and economic stake in keeping the plaintiffs' properties out of the Agricultural District.⁸²

Two months passed when the building inspector finally recognized that under the Town Code, the assessor must also weigh in on whether a parcel could be used for an agricultural purpose

⁷¹ *Id.* at 315.

⁷² *Id.*

⁷³ *Id.* (quoting Complaint ¶ 80, *Rivendell Winery*, 725 F. Supp. 2d at 314 (No. 1:09-CV-547)).

⁷⁴ *Rivendell Winery*, 725 F. Supp. 2d at 315.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 313 n.1.

⁷⁸ *Id.* at 314.

⁷⁹ *Id.* (citing N.Y. AGRIC. & MKTS. LAW § 305-a (McKinney 1992)).

⁸⁰ *Id.* at 315.

⁸¹ *Id.*

⁸² *Id.*

within the meaning of the zoning ordinance.⁸³ In a letter dated July 26, 2007, the building inspector reported that the assessor had advised him that the portion of the land proposed for the sale of wine could not be considered an agricultural use under New York Agriculture and Markets Law section 301-4.⁸⁴ According to the assessor, as relayed by the building inspector, that statute does not exempt from taxation “land or portions thereof used for processing or retail merchandising of . . . crops.”⁸⁵ Hence, the proposed retail outlet would not satisfy the second branch of the New Paltz “agriculture” test—qualification for an agricultural exemption under both county and state law.⁸⁶ From that premise, the building inspector reasoned that a retail store would not be part of an agricultural use, but would be a business use—a use not allowed in the zoning district.⁸⁷

A. *The Board of Appeals Gets Involved*

The plaintiffs appealed the building inspector’s interpretation of the zoning ordinance to the Board of Appeals pursuant to New York Town Law section 267-b-1.⁸⁸ It is important to keep in mind that the appeal was limited to the inspector’s interpretation of the ordinance. It did not ask, in the alternative, for a variance to operate a retail facility. This distinction is key to understanding Judge Hurd’s ruling.

In support of their appeal, the plaintiffs submitted a letter from the New York State Commissioner of Agriculture and Markets where he expressed his opinion that so long as the wine being sold consisted predominately of grapes grown on the plaintiffs’ properties, the entire enterprise from planting, to harvesting, to fermentation, to bottling, to marketing would be a “farm operation” within the meaning of the New York Agriculture and Markets Law.⁸⁹ The on-premises retail sale would not alter the basic agricultural use.⁹⁰

Following the commissioner’s letter, the “State” (Judge Hurd is

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (The words in the building inspector’s letter are taken from the statute.)

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* For comparable provisions for villages and most cities, see N.Y. VILLAGE LAW § 7-712-b-1 (McKinney 1996) and N.Y. GEN. CITY LAW § 81-b-2 (McKinney 2003).

⁸⁹ *Rivendell Winery*, 725 F. Supp. 2d at 315.

⁹⁰ *Id.* at 316.

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not more specific) advised the Board of Appeals that the entire winery, as proposed, would be a farm operation.⁹¹ To aid its review, the Board of Appeals requested that the Ulster County Planning Board provide its point of view.⁹² The County Board offered that the “farm winery is an agricultural use within the Town’s zoning statute.”⁹³ On the other hand, the assessor advised the Board of Appeals that only nine of the plaintiffs’ fourteen acres would qualify for the agricultural exemption.⁹⁴

The Board of Appeals denied the plaintiffs’ appeal to overturn the building inspector’s interpretation.⁹⁵ Intriguingly, on the night of the vote, the Board of Appeals had before it “a previously prepared decision approving plaintiffs’ appeal that was drafted by . . . the Zoning Board’s attorney.”⁹⁶

An Article 78 proceeding ensued in which the plaintiffs argued that the Board of Appeals had acted in an arbitrary and capricious manner, had abused its discretion, and had erroneously interpreted the Town Code’s definition of “agriculture.”⁹⁷ The Supreme Court dismissed the petition, finding that the Board of Appeals’ decision was entitled to deference as it “was ‘neither irrational, unreasonable, nor inconsistent with the ordinance.’”⁹⁸ In dictum, the lower court suggested that if it had interpreted the zoning ordinance in the first instance, it would have interpreted the section the same way as the Board of Appeals.⁹⁹ The Third Department affirmed.¹⁰⁰

Feeling singled out, the plaintiffs wrote to the Town’s code enforcement officer (also a defendant) about what they believed to be uses that were similar to their own proposed use.¹⁰¹ They questioned why the Town allowed these uses to continue.¹⁰² The code enforcement officer replied that the building inspector’s determination about the plaintiffs’ proposal was based upon and

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (Even the federal courts call them “Zoning Boards.”).

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting *Rivendell Winery, LLC v. Donovan*, No. 08-275 (Sup. Ct. Ulster Cnty. July 21, 2008), available at <http://www.rivendellwine.com/Lawsuit%20Files/11.25.08.Decision%20and%20Order%20Art%2078%20with%20Notice%20of%20Entry.pdf>.)

⁹⁹ *Rivendell Winery*, No. 08-275.

¹⁰⁰ *Rivendell Winery, LLC v. Donovan*, 74 A.D.3d 1594, 1596, 903 N.Y.S.2d 597, 599 (App. Div. 3d Dep’t 2010).

¹⁰¹ *Rivendell Winery*, 725 F. Supp. 2d at 317.

¹⁰² *Id.*

limited to the facts contained in the plaintiffs' application.¹⁰³ Furthermore, he was "not aware of any facts that demonstrate the applicability of that determination to the other circumstances described in [plaintiffs'] letter."¹⁰⁴

The plaintiffs renewed their application to have the properties made part of the Ulster County Agricultural District No. 2.¹⁰⁵ As before, the Farmland Protection Board recommended inclusion.¹⁰⁶ Despite the recommendation, the Ulster County Board of Legislators turned down the request.¹⁰⁷ The county legislator who had convinced Ms. Wine to withdraw the first application abstained after declaring "that [the legislator's] property values would be adversely affected by the plaintiffs' proposed winery."¹⁰⁸ Another legislator, outraged by the vote, was quoted as stating "that the denial . . . was politically motivated and 'an injustice to our democratic process.'"¹⁰⁹

With nowhere else to turn, the plaintiffs turned to the federal system. Their complaint alleged violations, among others, of: (1) their right to petition the government for a redress of grievances as guaranteed by both the United States and the New York Constitutions; (2) their procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution; (3) their due process rights under the New York Constitution; (4) their rights to equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and under the New York Constitution; and (5) their civil rights.¹¹⁰

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting Complaint, *Rivendell Winery, LLC v. Town of New Paltz*, 725 F. Supp. 2d 311, 314 (N.D.N.Y. 2010) (No. 1:09-CV-547)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 313. The plaintiffs also claimed violations of the Open Meetings Law, N.Y. PUB. OFF. LAW § 100—but that's a subject for another day. See Defendants' Memorandum of Law in Support of Motion to Dismiss at 2–3, *Rivendell Winery*, 725 F. Supp. 2d 311 (No. 1:09-CV-547), available at [http://www.rivendellwine.com/Lawsuit Files/Zimet and County MOL.pdf](http://www.rivendellwine.com/Lawsuit%20Files/Zimet%20and%20County%20MOL.pdf).

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IV. WHY THE WINERY'S CASE WAS NOT RIPE

The defendants, invoking the ripeness doctrine, moved to dismiss the complaint.¹¹¹ Judge Hurd started his analysis by noting that the plaintiffs had to demonstrate “finality,” or demonstrate why “finality” was unnecessary.¹¹² “Generally, a final decision of how property may be used has not been made unless the property owner requests a variance from the local zoning laws.”¹¹³

The logic behind this position is unassailable. It accounts for the possibility that a variance may be granted, thereby eliminating the need to analyze constitutional or federal statutory issues. It assures that if the federal judiciary is called upon to act, it will have a complete record before it. Furthermore, waiting until the local authority's decision is final means that the federal court will know exactly how the municipality applied its laws to a particular property. In short, the ripeness doctrine acknowledges that land use decisions are matters of local concern which, whenever possible, should be handled at the local level.¹¹⁴

The plaintiffs countered by arguing “futility.”¹¹⁵ According to the plaintiffs, the facts alleged in the complaint, if proven, showed that the Board of Appeals “was unequivocally determined to bar their winery operations regardless of whether their proposed use of the land qualified as ‘agricultural.’”¹¹⁶ This was evidenced by the Board's decision to ignore the opinions of the New York State Commissioner of Agriculture and Markets, the Ulster County Planning Board, and “a number of ‘scholars, elected officials, and persons in the industry.’”¹¹⁷ There was no point in going through the exercise of applying for a variance.

¹¹¹ *Rivendell Winery*, 725 F. Supp. 2d at 317.

¹¹² *Id.* at 318.

¹¹³ *Id.* (citing *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005)). See also *Marathon Outdoor, LLC v. Vesconti*, 107 F. Supp. 2d 355, 362 (S.D.N.Y. 2000) (preliminary injunction denied on ripeness grounds because the plaintiff had not sought a variance); *Riverdale Realty Co. v. Town of Orangetown*, 816 F. Supp. 937, 942 (S.D.N.Y. 1993) (“[A]pplication for a variance is generally the procedural predicate for the final decision upon which the ripeness inquiry rests.”).

¹¹⁴ See *Murphy v. New Milford Zoning Comm.*, 402 F.3d 342, 348–49 (2d Cir. 2005) (noting that the requirement that a property must first get a final position from zoning authorities demonstrates that land use should be a local concern).

¹¹⁵ *Rivendell Winery*, 725 F. Supp. 2d at 318.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (quoting Plaintiffs' Memorandum of Law in Opposition to Town Defendants' Motion to Dismiss, *Rivendell Winery, LLC v. Town of New Paltz*, 725 F. Supp. 2d 311 (N.D.N.Y. 2010) (No. 1:09-CV-547)).

While calling the likelihood of getting a variance “doubtful,”¹¹⁸ Judge Hurd disagreed that a denial was inevitable.¹¹⁹ “To the contrary, several facts suggest plaintiffs may have been granted a variance . . . , including the Town assessor’s determination that nine of plaintiffs’ acres qualified for the agricultural use exemption and [the building inspector’s] suggestion that plaintiffs eventually apply for a variance for the proposed winery operation.”¹²⁰ Judge Hurd also identified what he considered the “[m]ost important[.]” factor, viz., that “different standards govern the consideration of plaintiffs’ site-plan application and the application for a variance.”¹²¹

Since “futility” was not established, Judge Hurd dismissed the complaint without prejudice.¹²² He characterized the plaintiffs’ frustration as “understandable given the defendants’ alleged conduct,” and noted that the defendants’ behavior “may very well, upon consideration of a new complaint, establish a violation of . . . federal and/or state constitutional rights.”¹²³ For now, however, ripeness prevented him from considering the plaintiffs’ claims.¹²⁴

A. *The Lack of Understanding of New York’s Land Use Legislation*

The District Court’s views demonstrate the type of unfamiliarity with New York land use law that can occur. Although Judge Hurd is correct that different standards apply to a variance application than to a request for site plan approval, that observation has little bearing upon the land use issues facing the *Rivendell Winery* plaintiffs.

A site plan and a variance are distinct devices. Their purpose and their place in the pantheon of control over development are radically different. A site plan application is made to a Planning Board; a variance application to a Board of Appeals.¹²⁵ Site plans

¹¹⁸ *Rivendell Winery*, 725 F. Supp. 2d at 319.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 319–20. Judge Hurd’s opinion does not elaborate upon the First Amendment count in the complaint. If that claim alleged governmental retaliation, that cause of action may have been ripe. See *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 89–91 (2d Cir. 2002) (finding that, with First Amendment claims, the ripeness doctrine is relaxed because of “the irretrievable loss”) (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532.3 (1984)).

¹²⁵ For site plans, see N.Y. TOWN LAW § 274-a (McKinney 2004); N.Y. VILLAGE LAW § 7-725-a (McKinney 1996); N.Y. GEN. CITY LAW § 27-a (McKinney 2003). For variances, see N.Y.

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deal with uses permitted by a zoning ordinance. Variances seek permission to do that which a zoning ordinance forbids.

Through the site plan procedure, “the proposed location of the buildings, parking areas, and other installations on the plot, and their relation to existing conditions, such as roads, neighboring land uses, natural features, public facilities, ingress and egress roads, interior roads, and similar features”¹²⁶ are reviewed and revised to come up with a development that fits both the site and the neighborhood.

A variance application affords a landowner the opportunity to demonstrate why a particular provision of the zoning law should not be applied strictly to his/her property, and allows a municipal body to alter the ordinance just enough to accommodate a reasonable variation from the statute.¹²⁷ Since no municipality can tailor its zoning ordinance to suit each individual parcel, variances safeguard a municipality from either having its zoning ordinance declared confiscatory when an ordinance deprives a landowner from making a reasonable return on his/her investment,¹²⁸ or from a finding that an inverse condemnation has occurred, thereby entitling the landowner to monetary damages.¹²⁹

Since site plans deal with permitted uses, Planning Boards examine ways to mollify the impact of a proposal by designating the location of the buildings and the off-street parking areas on the site; designing traffic patterns in and out of the site; requiring landscaping and other forms of screening; approving the architecture and signage; and assuring that lighting is not so intense or directed so as to disrupt the neighbors.¹³⁰

Variance applications, on the other hand, are adjudications. There are statutory standards that an applicant must prove.¹³¹ The standards vary depending upon whether a use or an area variance

TOWN LAW §§ 267, 267-a, 267-b (McKinney 2003); N.Y. VILLAGE LAW §§ 7-712, 7-712-a, 7-712-b (McKinney 1996); N.Y. GEN. CITY LAW §§ 81, 81-a, 81-b (McKinney 2003).

¹²⁶ *Riegert Apartments Corp. v. Planning Bd.*, 57 N.Y.2d 206, 211, 441 N.E.2d 1076, 1079, 455 N.Y.S.2d 558, 561 (1982) (quoting 4 EDWARD H. ZIEGLER, RATHKOPF’S THE LAW OF ZONING AND PLANNING § 30.04[1] (4th ed. 2004)).

¹²⁷ See N.Y. TOWN LAW §§ 267(1)(a), (b) (McKinney 2004); N.Y. VILLAGE LAW §§ 7-712(1)(a), (b) (McKinney 1996); N.Y. GEN. CITY LAW §§ 81-b(1)(a), (b) (McKinney 2003).

¹²⁸ *BLF Assocs. v. Town of Hempstead*, 59 A.D.3d 51, 55, 870 N.Y.S.2d 422, 426 (App. Div. 2d Dep’t 2008), *lv. denied*, 12 N.Y.3d 714, 911 N.E.2d 860 (2009).

¹²⁹ *Ward v. Bennett*, 214 A.D.2d 741, 743–44, 625 N.Y.S.2d 609, 612–13 (App. Div. 2d Dep’t 1995).

¹³⁰ N.Y. TOWN LAW § 274-a(2)(a) (McKinney 2004); N.Y. VILLAGE LAW § 7-725-a(2)(a) (McKinney 1996); N.Y. GEN. CITY LAW § 27-a(2)(a) (McKinney 2003).

¹³¹ N.Y. TOWN LAW § 267-b (McKinney 2004); N.Y. VILLAGE LAW § 7-712-b (McKinney 1996); N.Y. GEN. CITY LAW § 81-b (McKinney 2003).

is being sought.¹³² In either case, the Board of Appeals must judge the proffered proof and be satisfied that the elements have been demonstrated before it can issue the requested relief or an alternate variance.¹³³

The *Rivendell Winery* plaintiffs require a use variance since the retail sale of wine is prohibited in the zoning district where their property is located. Not only are the standards for a use variance different from the standards for site plan approval, they are much more stringent.¹³⁴ Indeed, having purchased property not zoned for the retail use contemplated—an interpretation of the zoning ordinance affirmed by an intermediate state appellate court¹³⁵—an argument can be made that the plaintiffs' hardship was self-created.¹³⁶ If that argument prevails (which it might not),¹³⁷ the Board of Appeals actually would be precluded from granting a use variance since a sine qua non for any use variance is that it not be self-created.¹³⁸

The District Court's thought that "the Town Assessor's

¹³² N.Y. TOWN LAW §§ 267-b(2), (3); N.Y. VILLAGE LAW §§ 7-712-b(2), (3); N.Y. GEN. CITY LAW §§ 81-b(3), (4).

¹³³ N.Y. TOWN LAW §§ 267-b(2)(c), (3)(c); N.Y. VILLAGE LAW §§ 7-712-b(2)(c), (3)(c); N.Y. GEN. CITY LAW §§ 81-b(3)(c), (4)(c).

¹³⁴ N.Y. TOWN LAW §§ 267-b(2)(a), (b) (the standard for site plan approval only requires the arrangement, layout, and design of the proposed land use compared to use variances, which require a showing of unnecessary hardship); N.Y. VILLAGE LAW §§ 7-712-b(2)(a), (b); N.Y. GEN. CITY LAW §§ 81-b(3)(a), (b). The standards for a use variance are even more exacting than the rules for obtaining area variances. N.Y. TOWN LAW §§ 267-b(3)(a), (b) (McKinney 2004); N.Y. VILLAGE LAW §§ 7-712-b(3)(a), (b); N.Y. GEN. CITY LAW §§ 81-b(4)(a), (b) (Approval of a use variance requires satisfying four statutory tests in order to prove unnecessary hardship, while an area variance is granted after weighing the benefit to the applicant against its potential impact upon the health, safety, and welfare of the neighborhood.).

¹³⁵ *Rivendell Winery, LLC v. Donovan*, 74 A.D.3d 1594, 1595, 903 N.Y.S.2d 597, 599 (App. Div. 3d Dep't 2010).

¹³⁶ *Tharp v. Zoning Bd. of Appeals of Saratoga Springs*, 138 A.D.2d 906, 907, 526 N.Y.S.2d 646, 647 (App. Div. 3d Dep't 1988) ("Hardship is self-created where the applicant for a variance acquired the property subject to the restrictions from which he seeks relief.") (citing *Romanelli v. Bonvouloir*, 102 A.D.2d 872, 477 N.Y.S.2d 36 (App. Div. 2d Dep't 1984)).

¹³⁷ Because of the convoluted definition of "agriculture" in the New Paltz zoning ordinance, the *Rivendell Winery* plaintiffs may be able to navigate into the safe harbor of *Allen v. Zoning Bd. of Appeals of Kingston*, 8 A.D.3d 810, 812, 778 N.Y.S.2d 230, 232 (App. Div. 3d Dep't 2004). There, "it [was] unclear whether Allen knew a use variance was required when she acquired the property." *Id.* Moreover, she had announced her intended use when she bid to purchase the property from the very city that then sought to deny her a variance for that use on "self-created hardship" grounds. *Id.* Here, Ms. Wine inquired of the chair of the Planning Board as to the legality of her proposed use before she submitted a site plan application. *Rivendell Winery, LLC v. Town of New Paltz*, 725 F. Supp. 2d 311, 314 (N.D.N.Y. 2010). That inquiry appears to have occurred post-purchase, however. Hence, the *Rivendell Winery* facts are not quite the same as the *Allen* facts.

¹³⁸ N.Y. TOWN LAW § 267-b(2)(b)(4). For the comparable citations for villages and most cities, see N.Y. VILLAGE LAW § 7-712-b(2)(b)(4); N.Y. GEN. CITY LAW § 81-b(3)(b)(iv).

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determination that nine of plaintiffs' acres qualified for the agricultural use exemption," combined with the building inspector's "suggestion that plaintiffs eventually apply for a variance for the proposed winery operation,"¹³⁹ would help plaintiffs obtain a variance, rings hollow. Neither suggestion addresses an element of the statutory test.

The assessor's opinion regarding tax exemption is not an endorsement of a retail use. It is simply an application of the New York Agriculture and Markets Law.¹⁴⁰

The building inspector's suggestion that the plaintiffs seek a variance is just that—a suggestion. In advising them of their legal rights, the building inspector did nothing more than give the plaintiffs a land use version of a "Miranda warning."

Though *Rivendell Winery* did not establish any case law regarding New York land use law per se, it does illustrate a general misunderstanding of the nuances of that area of law. More importantly, it is part of the growing movement to seek relief from land use boards in the federal judiciary, and portends the day when zoning jurisprudence may pour as readily from federal court decanters as from state court barrels.

V. EPILOGUE: *SAN REMO HOTEL, L.P. v. CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA*—YOU CAN CHECK-OUT BUT YOU MAY NOT BE ABLE TO LEAVE¹⁴¹

While this is an article about ripeness, and not takings jurisprudence, it would be imprudent to end without pointing out the perils presented by *San Remo Hotel, L.P. v. City & County of San Francisco, California* ("*San Remo Hotel*").¹⁴²

Judge Hurd invited the *Rivendell Winery* plaintiffs to return to his court "in the event plaintiffs unsuccessfully apply for a variance and replead their current claims in federal court" by directing that "the [new] lawsuit . . . be assigned to [him to] proceed on an expedited basis in the interest of judicial economy."¹⁴³ Assume that the *Rivendell Winery* plaintiffs do return, and that their case

¹³⁹ *Rivendell Winery*, 725 F. Supp. 2d at 319.

¹⁴⁰ *Id.* at 314. N.Y. AGRIC. & MKTS. LAW § 301(4) (McKinney 2004) ("Land use in agricultural production shall not include land or portions thereof used for processing or retail merchandising of such crops.").

¹⁴¹ A harmless pun, playing off the location of the San Remo Hotel, the Eagles' smash hit: "Hotel California" and the legal La Brea Tar Pit that is *San Remo Hotel*.

¹⁴² *San Remo Hotel, L.P. v. City & Cnty. of S.F., Cal.*, 545 U.S. 323 (2005).

¹⁴³ *Rivendell Winery*, 725 F. Supp. 2d at 320.

involves a takings claim—perhaps an unlikely scenario since not having a wine store is probably not the tipping point between a viable vineyard and bankruptcy, but not out of the question since the New Paltz assessor determined that five of the plaintiffs’ fourteen acres could not be used for “agriculture” as of right.

Their new case would be classic *Williamson*, requiring the plaintiffs to satisfy both prongs of the ripeness test. Their entry into the federal system would be barred “until [they] unsuccessfully attempted to obtain just compensation through the procedures provided by the State [of New York],”¹⁴⁴ in other words, prong-two ripeness.

New York has procedures for obtaining just compensation.¹⁴⁵ So let us suppose that the *Rivendell Winery* plaintiffs utilize those procedures. If their trip through the state courts turns out to be unsuccessful, they may be ambushed by *San Remo Hotel* on their return to Judge Hurd’s courtroom to press their federal takings claims.

San Remo Hotel involved a San Francisco city ordinance that required a hotel operator to obtain the city’s permission to convert units used as residences by local citizens into units rented to tourists.¹⁴⁶ The hotel obtained permission, but among the conditions imposed was the payment of a \$567,000 fee.¹⁴⁷ The litigation between the hotel and the city, which ensued from the imposition of the fee, has an involved procedural history. For our purposes, it is sufficient to note that the Ninth Circuit Court of Appeals upheld the District Court’s determination that the hotel’s “as-applied” takings claim was unripe because it had not pursued an inverse condemnation claim in state court.¹⁴⁸ The Ninth Circuit gave the hotel an option, however. It could include its federal takings claims with its state law takings claims in the action to be brought in the California courts.¹⁴⁹ Or, it could ask the state courts to review only the state law claims, but “[i]f [it] wishes to retain [its]

¹⁴⁴ *Williamson Cnty. Reg’l Planning Comm’n. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985).

¹⁴⁵ New York’s Constitution forbids the taking of private property “for public use without just compensation.” N.Y. CONST. art. I, § 7(a). Moreover, “New York does provide a means for obtaining compensation for regulatory takings that Plaintiff must first pursue under *Williamson County*.” *Allocco Recycling Ltd. v. Doherty*, 378 F. Supp. 2d 348, 361 (S.D.N.Y. 2005) (citing *Manocherian v Lenox Hill Hosp.*, 84 N.Y.2d 385, 392–93, 643 N.E.2d 479, 482, 618 N.Y.S.2d 857, 860 (1994)).

¹⁴⁶ *San Remo Hotel*, 545 U.S. at 329 (2005).

¹⁴⁷ *Id.*

¹⁴⁸ *San Remo Hotel*, 145 F.3d 1095, 1102 (9th Cir. 1998).

¹⁴⁹ *Id.* at 1106 n.7.

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right to return to federal court for adjudication of [its] federal claim, [it] must make an appropriate reservation in state court.”¹⁵⁰

The hotel took heed. In the state court action, it specifically “reserved [its] federal causes of action and . . . sought no relief for any violation of the Federal Constitution.”¹⁵¹ Nonetheless, the California Supreme Court “analyze[d the] takings claim under the relevant decisions of both [the California Supreme Court] and the United States Supreme Court.”¹⁵² That analysis did not favor the hotel.¹⁵³

Having succumbed in Sacramento, the hotel returned to federal court, confident that it could pursue its federal takings claims there.¹⁵⁴ Despite having made the reservation which the Ninth Circuit appeared to have allowed them to make, the District Court dismissed the hotel’s complaint, both on statute of limitations and preclusion grounds.¹⁵⁵ Surprisingly—given the safe harbor it had offered—the Ninth Circuit affirmed dismissal on claim preclusion grounds, holding that “the California Supreme Court’s adjudication of the state takings claims was an ‘equivalent determination’ of the federal takings claims, and . . . plaintiffs are therefore barred from relitigating the takings issues by the doctrine of issue preclusion.”¹⁵⁶

The United States Supreme Court granted certiorari to resolve one narrow issue: should an exception be carved out of the federal full faith and credit statute¹⁵⁷ and the doctrine of *res judicata* “in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation.”¹⁵⁸

The hotel’s argument was obvious:

[B]ecause no claim that a state agency has violated the federal Takings Clause can be heard in federal court until the property owner has “been denied just compensation” through an available state compensation procedure, “federal courts [should be] required to disregard the decision of the state court” in order to ensure that federal takings claims

¹⁵⁰ *Id.* (noting that reservations must be made pursuant to *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 421 (1964)).

¹⁵¹ *San Remo Hotel*, 545 U.S. at 332; *San Remo Hotel*, 41 P.3d 87, 91 n.1 (Cal. 2002).

¹⁵² *San Remo Hotel*, 545 U.S. at 332–33 (quoting *San Remo Hotel*, 41 P.3d at 101).

¹⁵³ *Id.* at 334; *San Remo Hotel*, 41 P.3d at 111.

¹⁵⁴ *San Remo Hotel*, 364 F.3d 1088, 1090.

¹⁵⁵ *Id.* at 1093–94.

¹⁵⁶ *Id.* at 1090.

¹⁵⁷ 28 U.S.C. § 1738 (2010).

¹⁵⁸ *San Remo Hotel*, 545 U.S. at 337.

can be “considered on the merits in . . . federal court.” Therefore, the argument goes, whenever plaintiffs reserve their claims under *England v. Louisiana Bd. of Medical Examiners*, federal courts should review the reserved federal claims *de novo*, regardless of what issues the state court may have decided or how it may have decided them.¹⁵⁹

The hotel had support from the Second Circuit, which once observed: “It would be both ironic and unfair if the very procedure that the Supreme Court required [a takings claimant] to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded [that claimant] from ever bringing a Fifth Amendment takings claim [in federal court].”¹⁶⁰

The argument fell on deaf ears. The Supreme Court dispatched the *England* reservation argument because “typical” *England* cases involve a state court’s construction of a state statute.¹⁶¹ There a litigant can reserve his/her federal claims while the state courts interpret the statute under state law.¹⁶² That process does not implicate or require the resolution of federal claims. Depending upon how the state courts construe the statute, the litigant’s federal claims may be extinguished.¹⁶³ If not, the litigant who reserved his/her federal claims can return to the federal system for relief. *San Remo Hotel* was not such a case, according to Justice Stevens.¹⁶⁴ “By broadening their state action . . . [the hotel] effectively asked the state court to resolve the same federal issues they asked it to reserve. *England* does not support the exercise of any such right.”¹⁶⁵

The Supreme Court answered the hotel’s complaint that it had been a reluctant state court litigant, having been forced there by *Williamson*, by debunking the notion “that plaintiffs have a right to vindicate their federal claims in a federal forum.”¹⁶⁶ Justice Stevens noted that “most of the cases in our takings jurisprudence . . . came to us on writs of certiorari from state courts of last resort.”¹⁶⁷

¹⁵⁹ *Id.* at 338 (citations omitted).

¹⁶⁰ *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130 (2d Cir. 2003), *overruled by San Remo Hotel*, 545 U.S. 323 (2005).

¹⁶¹ *San Remo Hotel*, 545 U.S. at 339.

¹⁶² *Id.* at 339–40.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 340.

¹⁶⁵ *Id.* at 341.

¹⁶⁶ *Id.* at 342.

¹⁶⁷ *Id.* at 347.

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Accordingly, Justice Stevens wrote, “we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. The Court of Appeals was correct to decline [the hotel’s] invitation to ignore the requirements of 28 U.S.C. § 1738.”¹⁶⁸

Thus, as a matter of full faith and credit, and under preclusion principles, the hotel could not bring its federal takings claim into federal court, even though it had attempted to reserve those claims in accordance with the alternative afforded by the Ninth Circuit.¹⁶⁹

Although agreeing with the majority on full faith and credit grounds, Chief Justice Rehnquist and three of his colleagues questioned *Williamson*.¹⁷⁰ “For example, [he wrote,] our holding today ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court.”¹⁷¹ Although he voted with the *Williamson* majority, Chief Justice Rehnquist’s “reflection and experience” now made him wonder whether *Williamson*’s prong-two requirement for ripeness is “suspect.”¹⁷² He strongly suggested that “[i]n an appropriate case . . . the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.”¹⁷³

Until then, *San Remo Hotel* will sour the wine in takings cases.¹⁷⁴

¹⁶⁸ *Id.* at 347–48.

¹⁶⁹ *Id.* at 331.

¹⁷⁰ *Id.* at 348 (Rehnquist, J., concurring).

¹⁷¹ *Id.* at 351.

¹⁷² *Id.* at 352.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., *R & J Holding Co. v. Redevelopment Auth. of Montgomery*, No. 06-1671, 2009 WL 4362567, at *6–7 (E.D. Pa. 2009) (illustrating the *San Remo Hotel* effect); see also Michale H. Donnelly, *Property Rights and the Constitution*, MUN. LAW. (N.Y. State Bar Ass’n, Albany, N.Y.), Summer 2010, at 5, 8, 13–14, n.51 (arguing that *San Remo Hotel* “dooms, practically speaking, all subsequent federal claims”).