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Obstacles and Pitfalls for Landowners: Applying the Ripeness Doctrine to Section 1983 Land Use Litigation (Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990)).

Bruce I. Wiener

OBSTACLES AND PITFALLS FOR LANDOWNERS: APPLYING THE RIPENESS DOCTRINE TO SECTION 1983 LAND USE LITIGATION
(*Eide v. Sarasota County*, 908 F.2d. 716 (11th Cir. 1990))

BRUCE I. WIENER*

The Supreme Court in *Felder v. Casey*[1] referred to 42 U.S.C. § 1983[2] as "a uniquely federal remedy against incursion . . . upon rights secured by the Constitution and laws of the Nation,"[3] thus deserving "a sweep as broad as its language."[4] Despite section 1983 and the Court's expression of civil rights actions belonging in court,[5] landowners often find such support to be meaningless rhetoric. The conflict, private rights versus the protection of social good, is historically founded in the era of Thomas Jefferson[6] and James Madison.[7] Com-

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* B.A. 1990, Vanderbilt University; J.D. expected, May, 1993, Florida State University College of Law.

1. 487 U.S. 131 (1988).

2. 42 U.S.C. § 1983 (1982). Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

3. *Felder*, 487 U.S. at 139 (quoting Mitchum v. Foster, 407 U.S. 225, 239 (1972)).

4. *Id.* (quoting United States v. Price, 383 U.S. 787, 801 (1966)); *see also* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting from *Ex parte* Virginia, 100 U.S. 339, 346 (1880)) (Congress enacted 42 U.S.C. § 1983 "to interpose federal courts between the States and the people, as guardians for the people's federal rights, to protect the people from unconstitutional action under color of state law, 'whether the action be executive, legislative or judicial.'").

5. *Id.* at 148.

6. Thomas Jefferson espoused the republican thought of property which favored the sacrifice of individual rights to the greater public good. Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 699 (1985). Basically, the republican view considered property to be held by the individual for the benefit of society as a whole. Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 758 (1985).

7. James Madison followed the federalist view which equated property rights with that of individual rights. Jerry Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529, 533-35 (1989). The distinction between Madison and Jefferson is found in Madison's view of man as an individual rather than necessarily part of the community as was thought by Jefferson. *Id.*

prehensive plans adopted by states to preserve the environment and control urbanization generate this conflict today.[8]

The United States Eleventh Circuit Court of Appeals in *Eide v. Sarasota County*[9] held the plaintiff landowner's substantive due process and equal protection claims not ripe for decision.[10] The court's analysis provides an illustration of the difficulty faced by aggrieved landowners when bringing a section 1983 cause of action—specifically the overwhelming requirements of the ripeness doctrine. The main concern in this note is the rigorous application of the finality requirement of the doctrine to substantive due process actions brought under section 1983. The problem lies in the reasoning used by courts in determining when a final zoning decision has been made which results in the denial of a landowner's substantive due process rights. Recent cases demonstrate the difficulties federal courts have with the concept of finality and the overbearing obstacles the concept dictates.[11] The Supreme Court has yet to clarify the finality requirement, however. As a result, federal courts continue to deny redress to landowners deprived of their constitutional rights, a result completely contrary to the goals of section 1983.

I. FACTUAL BACKGROUND

On June 30, 1981, Sarasota County (County) adopted a comprehensive plan (Apoxsee) to map out the future development of the property located in the County.[12] Florida's Local Government Comprehensive Planning and Development Regulation Act[13] requires local governments to adopt comprehensive plans to guide and control future development of property within a county or municipality.[14] Af-

8. *See* Linda Bozung & Deborah J. Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners*, 20 URB. LAW. 969 (1988).

9. 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1073 (1991).

10. *Id.* at 718.

11. *See id.* at 722; *see* Greenbriar v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989); Weissman v. Fruchtman, 700 F. Supp. 746 (S.D.N.Y. 1988); Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975).

12. *Eide*, 908 F.2d at 719. Apoxsee provides that "[a]ll development orders [including rezonings] . . . shall be consistent with the primary components of the Sarasota County Comprehensive Plan." *Id.* "Primary Components" is defined as including the future land use map.

13. FLA. STAT. §§ 163.3161-.3243 (1991).

14. FLA. STAT. § 163.3167(2) (1991). Legislative initiatives designed to promote local planning began with the enactment of the Local Government Comprehensive Planning Act of 1975 (LGCPA), Ch. 75-257, 1975 FLA. LAWS 794 (current version at FLA. STAT. §§ 163.3161-.3241) (1991). The LGCPA mandated every local government in Florida to adopt a comprehensive plan consistent with specific statutory requirements by 1979. For an excellent and thorough review of Florida's comprehensive planning process, see Thomas Pelham et al., *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U.L. REV. 515 (1985).

ter a comprehensive plan for a particular area has been adopted, all development approved by a governmental agency must be consistent with the plan.[15]

The County's comprehensive plan stipulated various areas as village activity centers, community centers, and town centers, based on the amount of commercial acres allowed for commercial development.[16] The County allotted 75 acres of commercially zoned land to village activity centers while providing community centers with 125 acres for commercial use.[17] Town centers had no limit as to the amount of commercially zoned land.[18] Centers with less than 50 percent of the land designated commercial were authorized to adopt sector plans.[19] A sector plan is "a generalized plan for commercial development of areas of critical concern identified in *Apoxsee*, or other defined areas of Sarasota County with respect to land use, transportation, environmental protection, drainage, service protection and other matters, consistent with the Comprehensive Plan."[20] Proposed rezoning and development plans of property included in a sector plan had to be consistent with Apoxsee and the sector plan. Simple adoption of a sector plan does not alter the zoning of the properties involved.[21]

Eide owns two parcels of land, one fourteen acres and the other nineteen acres, that lie west of U.S. 41.[22] In addition, Eide owns a parcel east of U.S. 41 which he leases to developers who have converted it into a Kmart shopping center.[23] According to Apoxsee, this area is a village activity center around a regional center (the Sarasota Square Mall). Until a sector plan was developed for this area, the fourteen-acre parcel was zoned RMF-2[24] and the nineteen-acre parcel was zoned RSF-2.[25]

After the County planning staff proposed a sector plan that included only the fourteen-acre parcel, Eide requested that the plan's

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15. FLA. STAT. § 163.3194(1)(a) (1991).
16. Eide v. Sarasota County, 908 F.2d 716, 719 (11th Cir. 1990).
17. *Id.*
18. *Id.*
19. *Id.*
20. SARASOTA COUNTY DEPARTMENT OF PLANNING, GUIDELINES FOR THE PREPARATION OF SECTOR PLANS FOR EXTRA URBAN ENCLAVES, SEMI-RURAL AREAS, RURAL AREAS SOUTH AND WEST OF I-75, UNINCORPORATED COMMUNITIES, BARRIER ISLANDS AND OTHER AREAS OF SPECIAL CONCERN 2 (Revised June 26, 1984). (Document on file with the Journal of Land Use and Environmental Law, Florida State University College of Law, Tallahassee, Florida 32306).
21. *Eide*, 908 F.2d at 719.
22. *Id.*
23. *Id.*
24. *Id.* (residential, multi-family, 9 units/acre).
25. *Id.* (residential, single-family, 3.5 units/acre).

boundary be amended to include his larger parcel as well.[26] According to a County official, inclusion in the sector plan was the only way Eide's properties could be considered for future commercial zoning. The County staff granted Eide's request.[27]

The finished sector plan designated three possible future zoning alternatives; two designated some of Eide's residentially zoned land for commercial development while the third stipulated that Eide's property, except for the Kmart parcel, remain residential.[28] The final version of the plan adopted a hybrid of two of the alternatives and specified that Eide's parcels remain residentially zoned.[29] Further, the plan suggested that all future commercial development should be located east of U.S 41.[30] This version would eliminate Eide's property from consideration for commercial zoning, as it is located to the west of U.S. 41.[31] On September 16, 1986, the County adopted the sector plan.[32]

During the completion stage of the sector plan, Eide petitioned to rezone his fourteen-acre parcel.[33] Before it would consider the petition, however, the County required a traffic study.[34] Eide withdrew his petition after being notified of the required traffic impact analysis.[35]

Eide then challenged the sector plan, contending it to be unconstitutional as applied to his property.[36] His suit, filed in the United States District Court for the Middle District of Florida, requested declaratory and injunctive relief and compensatory damages under 42 U.S.C. § 1983[37] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[38] The County's defenses included a ripeness challenge to Eide's claim that the planning staff's action amounted to a final decision on the property by the County.[39] The district court

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 719-20.
35. *Id.* at 720. Eide did not seek rezoning of his nineteen-acre parcel. *Id.*
36. *Id.*
37. *See supra* text accompanying note 2.
38. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states in relevant part that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*
39. Eide v. Sarasota County, 908 F.2d 716, 720 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991).

rejected the County's ripeness defense and the case proceeded to trial, where a jury found for Eide and awarded $850,000 in damages.[40] Further, the district court "enjoined the County from using any plan, ordinance, zoning code, or regulation to deny Eide commercial zoning."[41] On appeal, the Eleventh Circuit reversed on the basis of the ripeness doctrine, holding the section 1983 action unripe for decision.[42]

II. THE RIPENESS DOCTRINE IN FEDERAL LAND USE LITIGATION

Ripeness is one of the preconditions necessary for a case to be deemed justiciable.[43] Federal courts have developed concepts of justiciability to refine the limits that the Constitution places on the federal judiciary and to illustrate proper occasions for judicial action.[44] Faced with the issue of ripeness, federal courts decide whether a dispute has developed sufficiently to warrant a decision on the merits in order to satisfy the "case or controversy" mandate of Article III of the Constitution.[45] Exercising jurisdiction over a premature claim is beyond the power of the court under Article III. If the court finds itself without jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action.[46]

In land use litigation, the ripeness doctrine has evolved in response to regulatory takings claims.[47] The doctrine applies to both aspects of a takings claim, specifically, "(1) that the regulation has gone so far that it constitutes a taking of a landowner's property and (2) that whatever compensation is available through state procedures is 'unjust.'"[48] For the former prong, the ripeness doctrine requires the court to determine whether a local government's regulation of a landowner's property was sufficiently "final" to enable the court adequately

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40. *Id.*

41. *Id.*

42. *Id.*

43. 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3529 (2d ed. 1984).

44. *Id.*

45. 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3532 (2d ed. 1984). The "cases and controversies" language of Article III limits the types of cases that may be heard by federal courts having Article III powers. *Id.* § 3529.

46. 10 CHARLES A. WRIGHT, ET AL. FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2712-13 (2d ed. 1984).

47. *Id.*

48. 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, 77 (1988).

to assess whether the regulation went "too far."[49] For the latter prong, a landowner must prove that "just" compensation for the regulatory taking was sought through available state inverse condemnation procedures and was denied.[50] If the court finds either prong wanting, the claim will be dismissed.[51]

A. Requirement of Finality

The finality requirement of the ripeness doctrine has several elements that must be satisfied in order to avoid dismissal: an application element, an administrative relief element, and a reapplication element.[52] The application element was first emphasized in *Agins v. City of Tiburon*.[53] In *Agins*, the Court implied that a landowner must provide a land use proposal and receive a decision from the local authority before an "as applied" challenge to the zoning ordinance will be found ripe for decision.[54] The Court further elaborated on the application element by noting that the plaintiffs had not submitted a plan for development of their property in accordance with the local ordinances.[55] As a result, the Court concluded that the zoning ordinance did not constitute a taking because it did not deny "appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."[56]

The Supreme Court articulated the administrative relief element of the finality requirement in *Williamson County Regional Planning Commission v. Hamilton Bank*.[57] In that case, the plaintiff sued in federal court under section 1983, claiming that the local planning commission had taken his property without just compensation and asserting that the commission should be estopped under state law from denying approval of his revised development project.[58] The Supreme Court held that the case was not ripe for adjudication because the

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49. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). This hurdle is termed the "finality requirement" of the ripeness doctrine. *Id.*

50. *Id.* This hurdle is often referred to as the "requirement to seek just compensation in state court." *Id.* Inverse condemnation has been defined as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." United States v. Clarke, 445 U.S. 253, 257 (1980).

51. *Hamilton Bank*, 473 U.S. at 186.

52. *See id.*; *see also* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

53. 447 U.S. 255, 262 (1980).

54. *Id.*

55. *Id.*

56. *Id.* at 262-63.

57. *See* 473 U.S. 172, 186 (1985).

58. *Id.* at 182.

local administrative agency had not "arrived at a final, definitive position" on how it would apply the regulation to the plaintiff's property.[59] Furthermore, while the plaintiff had submitted a plan for development as *Agins* required,[60] he had not sought variances, which were authorized by the subdivision and zoning ordinances. By seeking the variances, the plaintiff could have allowed the commission to rescind its earlier decision.[61] The Court distinguished its finality rule from that proclaimed in *Patsy v. Florida Board of Regents*,[62] which held that a plaintiff need not exhaust administrative remedies before bringing a section 1983 action.[63]

In brief, the Court in *Hamilton Bank* concluded that the plaintiff was required to give the Commission an opportunity to render a final decision in order to have satisfied the second element of finality. According to the Court, the Commission's denial of one application provided by the plaintiff was not sufficient.[64] Finally, because the plaintiff failed to seek variances that could have satisfied the Commission, the plaintiff's claim was not ripe for decision.[65]

The Supreme Court provided the third element, which requires a plaintiff to seek reapplication of a proposed development prior to filing suit, in *MacDonald, Sommer & Frates v. Yolo County*.[66] That case involved a takings claim based on the County's rejection of the plaintiff's subdivision map, which accompanied a proposal for the development.[67] The plaintiff, believing that any request for a variance or other zoning change would be futile,[68] never submitted any additional

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59. *Id.* at 191.

60. *Id.* at 177-81.

61. *See id.* at 187-91. The term "variance" refers to "an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance." 3 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 20.02 (3d ed. 1986).

62. 457 U.S. 496 (1982).

63. *Id.* at 516. In distinguishing the two rules, the Supreme Court in *Hamilton Bank* stated:

> [T]he 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. *Patsy* concerned the latter, not the former.

473 U.S. at 193.

64. *See Hamilton Bank*, 473 U.S. at 187-90.

65. *See id.* at 200.

66. *See* 477 U.S. 340, 351-52 (1986).

67. *Id.* at 342.

68. *Id.* at 344. In Kinzli v. City of Santa Cruz, the court excused the reapplication of a development plan if it would be an "idle and futile act." 818 F.2d 1449, 1454, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (quoting Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1146, n.2 (9th Cir. 1982), *cert. denied*, 464 U.S. 847 (1983).

development proposals or requests for variances.[69] Despite the plaintiff's allegations of futility, the California Court of Appeals affirmed the trial court's dismissal of the plaintiff's action.[70] The court found that the denial of the plaintiff's proposal for intensive subdivision development "cannot be equated with a refusal to permit any development."[71]

Finding the possibility that some future development of the landowner's property may be permitted, the Supreme Court held the case unripe for review.[72] According to the Court, "appellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[73]

Significantly, the Supreme Court placed limitations on the reapplication requirement by allowing an exception where reapplication would be futile. A property owner is not required to resort to piecemeal litigation or unfair procedures in order to satisfy this requirement.[74] According to the Supreme Court, California courts did not imply that "future applications would be futile," but rather that a meaningful application has not yet been made.[75] The Court failed to set out the criteria for a meaningful application, merely remarking that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[76]

B. Requirement to Seek Just Compensation in State Court

The Supreme Court established the second requirement of satisfying the ripeness doctrine, that a plaintiff seek compensation through available state procedures in *Williamson County Regional Planning*

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69. *See Yolo County*, 477 U.S. at 347.

70. *Id.*

71. *Id.* The California Court of Appeals noted the following:

> Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development.

Id.

72. *Id.* at 352-53.

73. *Id.* at 351.

74. *Id.* at 350 n.7.

75. *Id.* at 352 n.8.

76. *Id.* at 353 n.9.

Commission v. Hamilton Bank.[77] If a state provides a procedure for obtaining compensation, the landowner cannot claim a violation of the Just Compensation Clause until the procedure has been used and just compensation has been denied.[78] The Court reasoned that because the Constitution does not require compensation before there has been a taking, a plaintiff cannot seek federal relief until the state's action is complete.[79] The state's action is complete when the state fails to provide adequate compensation following a taking.[80]

C. *Ripeness and Constitutional Claims Filed Under Section 1983*

Section 1983 is an important source of redress for landowners who wish to vindicate their rights against the government.[81] First, a section 1983 cause of action is not subject to all the procedural hurdles related to ripeness that encompass takings cases.[82] Second, a landowner who is successful in court may recover attorneys' fees.[83] As a result of these benefits and despite a low success rate,[84] section 1983 has been considered "the cause of action of choice of property owners who feel victimized by government actions."[85]

Lower federal courts, especially the Ninth Circuit, have considered the applicability of the Supreme Court's ripeness requirements in *Williamson County Regional Planning Commission v. Hamilton Bank* and *MacDonald, Sommer & Frates v. Yolo County*. Both were section 1983 cases involving procedural due process, substantive due process and equal protection claims.[86] In *Kinzli v. City of Santa Cruz*,[87] the Ninth Circuit held that the finality requirement of the Supreme

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77. 473 U.S. 172 (1985).

78. *Hamilton Bank*, 473 U.S. at 195. The Fifth Amendment states in relevant part: "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

79. *See Hamilton Bank*, 473 U.S. at 195.

80. *Id.*

81. Two allegations are required to state a cause of action pursuant to section 1983: The plaintiff must allege (1) deprivation of a federal right, and (2) by someone acting under color of state or territorial law. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

82. Michael M. Berger, *The Civil Rights Act: An Alternative Remedy for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional "Takings" Litigation*, 12 ZONING & PLAN. L. REP. 121, 122 (1989).

83. 42 U.S.C. § 1988 (1982).

84. Between 1983 and 1988, only two of thirty section 1983 land use cases were held ripe for adjudication. *See* Blaesser, *supra* note 48, at 137-40.

85. Berger, *supra* note 82, at 121.

86. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) and McDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) were takings cases.

87. 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

Court's ripeness doctrine applies to equal protection and substantive due process claims.[88] The Ninth Circuit in *Kinzli* also devised a test for finality that required the satisfaction of two prongs: "(1) a rejected development plan, and (2) a denial of a variance."[89]

In *Herrington v. County of Sonoma*,[90] the Ninth Circuit considered whether *Yolo County*'s requirement of reapplication for a less intensive development applied to plaintiffs' section 1983 action.[91] The plaintiffs in *Herrington* alleged violations of procedural due process, substantive due process and equal protection resulting from the County's denial of a subdivision application and a subsequent downzoning of an area in which the plaintiffs' property was located.[92] The court carefully distinguished takings claims from due process/equal protection claims in determining the applicability of the reapplication requirement.[93] On one hand, to succeed with a regulatory takings claim, a landowner must show that "all or substantially all economically viable use of the property has been denied."[94] Further, a takings claim cannot ripen until the developer obtains a final decision as to whether any reasonable alternative use of his property would be granted.[95] On the other hand, the court stated that because the plaintiffs challenged the county's inconsistency determinations as arbitrary and irrational, the plaintiffs' substantive due process and equal protection claims did not require speculation as to what forms of less intensive development

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88. *See id.* 818 F.2d at 1455-56.

89. *Id.* at 1454. The Seventh Circuit also has adopted this approach. *See, e.g.*, Unity Ventures v. County of Lake, 841 F.2d 770, 775-76 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988).

90. 834 F.2d 1488 (9th Cir. 1987), *modified*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

91. *Id.*

92. *Id.* at 1490.

93. *See id.* at 1497-99. The following represents a summary of the court's distinctions between takings claims and substantive due process claims:

> (1) Although both taking claims and substantive due process claims involve a determination of whether the contested action was a reasonable and proper exercise of police power, the test for reasonableness under the takings clause is less deferential to the local government's decisionmaking authority than the test for reasonableness under substantive due process.
>
> (2) A government's regulatory action may be a legitimate exercise of the police power and still constitute a taking. Proof that a regulatory decision "goes too far" does not require a showing that the decision is arbitrary or irrational.
>
> (3) Unlike a damages award from a taking claim for inverse condemnation, a damages award, if appropriate under a substantive due process claim, does not necessarily cover the period of time during which the property owner was denied use of the property.

Daniel R. Mandelker & Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 ZONING & PLAN. L. REP. 49, 54 (1988) (citing *Herrington*, 834 F.2d at 1498 n.7).

94. *Herrington*, 834 F.2d at 1497.

95. *Id.* at 1497-98.

might have been permitted.[96] Thus, the court held the reapplication requirement inapplicable.[97]

On petition for rehearing, however, the court in *Herrington* retreated from its conclusion regarding the reapplication requirement.[98] In the amended opinion, the court deleted its analysis of the distinction between takings and due process/equal protection claims and substituted the following statement: "Our decisions in this area have also clarified that we will apply the same ripeness standards to equal protection and substantive due process claims."[99] In *Bateson v. Geisse*,[100] the court commented on the amended opinion further, which left the relevance of the reapplication requirement unclear.[101] In *Bateson*, the Ninth Circuit stated that "a substantive due process claim does not require proof that all use of the property has been denied,[102] but rather that the interference with property rights was arbitrary or irrational."[103] The court's reasoning in *Bateson* resembled that in the original *Herrington* opinion as to substantive due process/equal protection claims and the reapplication requirement. From the opinion it is uncertain whether it is reasonable to infer that the requirement is no longer necessary in those substantive due process cases.

The second requirement of the finality doctrine also has received attention by the lower federal courts. In *Hamilton Bank*, the Supreme Court held that an unconstitutional taking was not complete until the state had refused compensation.[104] A substantive due process or equal protection violation, however, is complete at the time of the original government action.[105] Therefore, it is insignificant whether the state has a post-deprivation remedy, and the suit is ripe for federal court adjudication without exhaustion of state court remedies.[106]

D. The Futility Exception to the Finality Requirement

The Supreme Court's acknowledgement of the futility exception evidences the Court's view that the ripeness doctrine must be fair to

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96. *Id.* at 1498.
97. *Id.*
98. 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).
99. *Id.* at 569.
100. 857 F.2d 1300 (9th Cir. 1988).
101. *Id.*
102. *Id.* at 1303 (citing *Herrington*, 834 F.2d at 1498).
103. *Id.* (citing Usury v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).
104. *See* 473 U.S. 172, 194 (1985).
105. 818 F.2d 1449, 1455-56, *modified* 830 F.2d 968 (9th cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).
106. Sinola Lake Owners Ass'n v. City of Simi Valley, 864 F.2d 1475, 1485 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); Scott v. Greenville County, 716 F.2d 1409, 1419 (4th Cir. 1983).

landowners.[107] This exception excuses re-submission of a development plan if such an application would be an "idle and futile act."[108] A precise test for this exception, however, has not been pronounced, thus adding to the dismay of many aggrieved landowners. The Supreme Court has stated that a "meaningful application" for regulatory approval is mandatory to satisfy the finality requirement,[109] and such an application does not entail a request for "exceedingly grandiose development."[110] Also, a landowner is not required to pursue an application through unfair procedures.[111]

The Ninth and Eleventh Circuits have tried to clarify the doctrinal meaning of the futility exception. In *Southern Pacific Transportation Co. v. City of Los Angeles*,[112] the Ninth Circuit elaborated on the exception stating, "this exception serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved."[113] This situation existed in *Herrington v. County of Sonoma* where the Board's inconsistency determination as to the landowners' proposed development made it futile for them to pursue further application.[114] Similarly, the Eleventh Circuit in *Corn v. City of Lauderdale Lakes*[115] applied the futility exception in a section 1983 action. In *Corn*, the plaintiff sought damages for an alleged regulatory taking based on the imposition of a local ordinance which placed a development moratorium on his property.[116] The court of appeals found that a request for a variance, one of *Hamilton Bank*'s required elements of the finality rule, would be futile because the ordinance called for a complete moratorium on the plaintiff's development of his property.[117]

III. *EIDE V. SARASOTA COUNTY*: THE ELEVENTH CIRCUIT'S APPLICATION OF RIPENESS

The Eleventh Circuit began its analysis in *Eide v. Sarasota County* with a thorough overview of the four challenges a landowner could

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107. Mandelker & Blaesser, *supra* note 93, at 52.

108. *Kinzli*, 818 F.2d at 1454 (quoting Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1146 n.2 (9th Cir. 1982), *cert. denied*, 464 U.S. 847 (1983).

109. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 352 n.8 (1986).

110. *Id.* at 353 n.9.

111. *Id.* at 350 n.7.

112. 922 F.2d 498 (9th Cir. 1990).

113. *Id.* at 504.

114. 834 F.2d 1488, 1496 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989).

115. 816 F.2d 1514 (11th Cir. 1987).

116. *Id.* at 1515-16.

117. *Id.* at 1516; Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

bring to contest a land use restriction.[118] The Court should be commended for explicitly defining the challenges. Applying an incorrect ripeness analysis to a landowner's claim which results in its dismissal is by no means an isolated occurrence.[119] The court's explanation of the four possible challenges is presented below.

First, a landowner can claim that a particular regulation has taken his or her property without just compensation in contravention of the Fifth Amendment.[120] To recover under this theory, a landowner has to prove that the property was "taken," that the regulation "goes too far," and that there is no provision that awards compensation.[121] The remedy is money damages that are calculated by determining the value of the property rights taken and the duration of the taking.[122] The court's determination of ripeness for this claim followed the Supreme Court's in *Hamilton Bank*.[123]

Second, a landowner can claim that the application of a regulation "goes so far and destroys the value of his or her property to such an extent that it has the same effect as a taking by eminent domain," thus exemplifying an invalid exercise of the police power.[124] Terming this type of challenge a due process takings claim, the court distinguished it from the just compensation claim by the available remedies.[125] The finality requirement of ripeness for the two is similar because it is impossible for a court to conclude whether a regulation has gone too far unless the court actually knows the extent of the regulation.[126]

Third, a landowner may assert that a regulation is "arbitrary and capricious, does not bear a substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise

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118. 908 F.2d 716, 720 (11th Cir. 1990) *cert. denied*, 111 S.Ct. 1073 (1991).

119. *Id.*; *see* Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1573 (11th Cir. 1989). In *Greenbriar*, the Eleventh Circuit erroneously applied the finality requirement of *Hamilton Bank* to an arbitrary and capricious due process claim. *Eide*, 908 F.2d at 724.

120. *Eide*, 908 F.2d at 720 (citing *Yolo County*, 477 U.S. at 533-34).

121. *Id.*

122. *Id.*

123. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). For a takings claim to be ripe, a landowner must satisfy two requirements: the final decision requirement and the just compensation requirement. *Id.* at 186.

124. *Eide*, 908 F.2d at 721.

125. *Id.* "[F]or a due process takings claim, a successful suit would result in an invalidation of the local authority's application of the regulation and, perhaps, actual damages, whereas a just compensation claim is remedied by monetary compensation for the value taken." *Id.* In a footnote, the court noted that the "distinction may be academic if the Supreme Court decides that a non-physical 'taking' claim is properly redressed by only the Just Compensation Clause or only the Due Process Clause." *Id.* at 721 n.8.

126. *Id.* at 721.

of the police power."[127] Calling this an arbitrary and capricious due process claim, the court distinguished it from a due process takings claim,[128] and provided an illustration.[129] The court then explained the difference between a "facial" or an "as applied" arbitrary and capricious due process challenge.[130] For the former, the remedy is to nullify the regulation.[131] In the latter, "the remedy is an injunction preventing the unconstitutional application of the regulation to the plaintiff's property and/or damages resulting from the unconstitutional application."[132]

Finally, a landowner can claim that a regulation denies equal protection. Citing *San Antonio Independent School District v. Rodriguez*,[133] the Court stated that a regulation which violates a fundamental right or acts against a plaintiff because of race, i.e. a suspect class, evidences an equal protection claim and is subject to strict scrutiny.[134] A claim that simply states that the regulation treats the plaintiff differently from another person, however, deserves less scrutiny. Such a claim requires only that the regulation rationally relate to a legitimate government purpose.[135] Like an arbitrary and capricious due process claim, an equal protection claim can attack a statute on its face or as applied to the particular property.[136] The remedy for the facial challenge is to enjoin the government from enforcing the regulation, and for the as applied challenge, the remedy is an injunction against a specific unconstitutional application.[137]

A. Eide's Claim, the Issue, and the Precedential Case Law

In the district court, Eide argued "(1) that the County's denial of commercial zoning for his property was arbitrary and capricious and

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127. *Id.*; *but see* Shelton v. City of College Station, 780 F.2d 475, 482 (5th Cir. 1986) (en banc), *cert. denied*, 477 U.S. 905 (1986).

128. *Eide*, 908 F.2d at 722. To prove a due process takings claim, "a landowner must establish that the regulation goes 'too far,' destroying the value of the property to such an extent that it has the same effect as a taking by eminent domain." *Id.* On the other hand, for an arbitrary and capricious due process claim, "a plaintiff need only prove that the government has acted arbitrarily and capriciously." *Id.*

129. *Eide*, 908 F.2d at 722. The following is the court's illustration: "[I]f a governmental entity has acted arbitrarily and capriciously (e.g., because of race) in the course of eminent domain proceedings, the fact that just compensation is paid would not undo the arbitrary act, nor cure the constitutional violation." *Id.* at 722 n.10.

130. *Id.* at 721-22.

131. *Id.* at 722.

132. *Id.* The court postponed discussion of the ripeness doctrine here until it addressed Eide's claim. *Id.*

133. 411 U.S. 1, 16-17 (1973).

134. *Eide*, 908 F.2d at 722.

135. *Id.*

136. *Id.*

137. *Id.*

(2) that the distinction between his property and those properties which were designated commercial was not rationally related to a legitimate government purpose."[138] His chosen remedy was an injunction preventing the County from using any ordinance, regulation, or land use plan to refuse him commercial zoning.[139] Eide further sought and received damages for the temporary loss of the value of his property for the time in which he was refused commercial zoning.[140] From this, the Court of Appeals determined that Eide was making "an arbitrary and capricious due process challenge to the sector plan as applied to his property."[141] The court explained that because Eide's equal protection claim relied upon the same rationale as his applied arbitrary and capricious due process claim, the same ripeness standard would apply to each claim.[142] In sum, the issue before the court was whether Eide's assertions that the County violated his substantive due process and equal protection rights were ripe for decision.[143]

The court turned to its prior analysis in *Greenbriar, Ltd. v. City of Alabaster*[144] to help resolve the issue. The plaintiff's claim in that case resembled Eide's. In *Greenbriar, Ltd.*, the court applied the *Hamilton Bank* finality prong[145] holding that the plaintiff's claim was ripe since the zoning decision under attack had been finally made and applied to his land.[146] Although *Greenbriar, Ltd.* erroneously applied the *Hamilton Bank* analysis, the court in *Eide* felt bound to follow its prior holding.[147] In a footnote. the court explained the error in *Greenbriar, Ltd.*[148] In an as applied arbitrary and capricious due process claim,[149] the plaintiff does not have to prove that the regulation has gone too far as one does in a due process takings claim. Instead, a plaintiff's rights have been violated when the government acts arbitrarily and that action is applied to the plaintiff's property.[150]

B. As Applied v. Facial Challenge and the Finality Requirement

Eide's claim attacked the decision that applied the land use regulation to his property.[151] He did not make a facial challenge by claiming

138. 908 F.2d 716, 723 (11th Cir. 1990).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 724 n.12.
143. *Id.* at 718.
144. 881 F.2d 1570 (11th Cir. 1989).
145. *Id.*; Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).
146. *Greenbriar, Ltd.*, 881 F.2d at 1576.
147. *Eide*, 908 F.2d at 724.
148. *Id.* at 724 n. 13.
149. *Id.*
150. *Id.*
151. *Id.* at 720.

that any application of the regulation was unconstitutional. This distinction is very important in the context of ripeness. Eide's challenge required proof that the sector plan had been applied to his property.[152] The court reasoned that if the county had not made a final decision regulating Eide's property, then he could not assert his claim.[153] The court found inexplicit support for its finality requirement in *Pennell v. City of San Jose*.[154] In *Pennell*, the Supreme Court failed to specify whether it was applying the finality requirement to an arbitrary and capricious due process claim or a due process takings claim. The Eleventh Circuit, however, found the claim in *Pennell* to be the former thus supporting the applicability of the finality requirement to arbitrary and capricious due process claims.[155]

C. *A Strict View of Finality*

The Eleventh Circuit disposed of the issue in *Eide* on ripeness grounds, reasoning that the decision denying Eide commercial zoning had not been finally made and applied to his property.[156] The court based its conclusion on Eide's failure to submit a plan for commercial development of his properties.[157] Additionally, he never provided a petition to rezone his properties from a residential to a commercial designation.[158] Thus, the County had not received the chance to apply the sector plan to his property.

1. *Futility Exception Inapplicable*

The court acknowledged the futility exception, but did not apply it in Eide's case, citing with approval the Seventh and Ninth Circuits' treatments of the exception.[159] In the court's view, those circuits' demands for a final decision concerning a development plan prior to filing suit is logical because "zoning is a delicate area where a county's power should not be usurped without giving the county an oppor-

152. *Id.* at 724.
153. *Id.*
154. *Id.* (relying on Pennell v. City of San Jose, 485 U.S. 1 (1988)).
155. *See Eide*, 908 F.2d at 725 n.15.
156. *Id.* at 727.
157. *Id.* at 726.
158. *Id.*
159. *Id.* at 726 n.17. (The Seventh and Ninth Circuits have required "one meaningful application" to establish futility and to allow a constitutional challenge to local zoning. Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 379 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988); Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988); Herrington v. Sonoma County, 834 F.2d 1488 (9th Cir. 1987), *modified*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989)).

tunity to consider concrete facts on the merits prior to a court suit."[160] More importantly, the court simply found Eide's claim that the County would not grant him commercial zoning to be insufficient despite contrary findings by the jury in the lower court.[161]

2. *The Consistency Requirement*

Florida law requires that all future zoning be consistent with a comprehensive plan.[162] Eide claimed that additional proceedings before the County would be futile because the County is constrained by Florida law and commercial zoning of his property would be inconsistent with the County's sector plan.[163] In response, the court strongly asserted that the County and Florida courts, not Eide, are arbiters of what is consistent.[164] As noted, "the sector plan does not rezone any land commercial or noncommercial; it merely dictates that all future development be consistent with it."[165]

The court refused to follow the Florida cases that elaborated on the requirement of consistency; instead, it relied on the County Commission hearing produced at trial which illustrated the sector plan's indefinite future applicability.[166] Two Florida state court cases cited by the Eleventh Circuit, *Southwest Ranches Homeowners Ass'n v. Broward County*[167] and *Machado v. Musgrove*,[168] provided uncertainty as to what is meant by "consistency." In the former case, the Fourth District Court of Appeal held that the land use element of a comprehensive plan is not the "sole, controlling document with which subsequent plan elements ha[ve] to comply."[169] In the latter case, however, the Third District Court of Appeal required all elements of the comprehensive plan, including the land use element, to receive strict adherence.[170]

At the County Commission hearing, the Commission Chairman stated the following in reference to Eide's properties: "Commercial [zoning] in that area is not part of the Sector Plan, but that doesn't

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160. *Eide*, 908 F.2d at 726.
161. *Id.* at 726.
162. FLA. STAT. § 163.3194(1)(a) (1991).
163. Eide v. Sarasota County, 908 F.2d 716, 727 (11th Cir. 1990).
164. *Id.*
165. *Id.*
166. *Id.*
167. 502 So. 2d 931 (Fla. 4th DCA 1987).
168. 519 So. 2d 629 (Fla. 3d DCA 1987), *adopted en banc*, 519 So. 2d 629 (Fla. 3d DCA), *review denied*, 529 So. 2d 693, 694 (Fla. 1988).
169. *Southwest Ranches Homeowners Ass'n*, 502 So. 2d at 935.
170. *Machado*, 519 So. 2d at 632.

stop the Board from reversing the staff recommendation."[171] From this evidence, the court decided that Eide's request for commercial rezoning could in the future be considered consistent with the plan, and held Eide's section 1983 claims unripe due to their failure to satisfy the finality requirement of the ripeness doctrine.[172]

D. The Concurring Opinion

Judge Shoob, a district judge sitting by special designation on the Eleventh Circuit panel, briefly raised several critical points regarding the majority's analysis of ripeness issues in *Eide* and chose to concur in the result only.[173] Most importantly, he noted the majority's insufficient deference to the trial court's factual findings in applying the ripeness doctrine.[174] The district court concluded that the adoption of the sector plan satisfied the finality requirement and that any further applications by Eide would be futile.[175] Judge Shoob provided two important reasons why the district court's factual findings should not have been disturbed. First, the court is "infinitely more knowledgeable about the practical realities in this case," and second, a detached view of whether further action in the zoning process would be futile could not be as informed as findings of the trial court.[176]

Judge Shoob was troubled by the majority's application of the futility exception and its approval of the Seventh and Ninth Circuit's view that at least one meaningful application must be submitted before futility may become applicable.[177] This logic "fails to account for specific facts, which, in individual cases, might render even a single application a waste of time."[178] Judge Shoob believed, however, the majority "probably" reached the correct decision, despite its complete disregard for the lower court's factual findings.[179]

IV. SEARCH FOR REFINEMENT NECESSITATES SUPREME COURT ATTENTION

Finality in the context of ripeness has been troublesome for federal courts to apply. Judges have publicly stated their difficulty with this

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171. *Eide*, 908 F.2d at 727. (quoting from transcript of Commission Hearing).
172. *Id.*
173. *Id.* at 727 (Shoob, J., concurring).
174. FED. R. CIV. P. 52(a) provides in pertinent part that "[f]indings of fact . . . shall not be set aside unless clearly erroneous."
175. *Eide*, 908 F.2d at 727 (Shoob, J., concurring).
176. *Id.* at 728.
177. *Id.* at 727.
178. *Id.*
179. *Id.*

requirement in dealing with Constitutional claims brought by landowners under section 1983 and the Fourteenth and Fifteenth Amendments.[180] Instead of refining the issue, most federal courts have yielded to past obscure analyses and have unreasonably held the landowners' claims unripe.[181] Further, federal courts have ineffectively formulated an "appropriate method for determining a local government's position on the proper nature and intensity of development—the critical basis for determining whether or not a particular project may be developed, (i.e., whether or not the project conforms to, [or is consistent with] zoning and planning standards)."[182] As a result, federal courts frequently have found local zoning decisions are matters to be determined at the state level and thus, are rarely appropriate for the federal court system.[183]

The Eleventh Circuit in *Eide* found it premature to determine whether Eide's request for rezoning would be inconsistent with the sector plan and noted that such decisions of consistency should be left to the County and to Florida courts.[184] The court based its holding on Eide's failure to submit a plan for the commercial development of his properties.[185] The court, finding the sector plan indefinite, completely disregarded Eide's claims that the County Planning Commission had refused to acknowledge his request for commercial rezoning in the drafting stages of the plan.[186]

The court's reasoning indicates that Eide should have presented what in this case would have been a futile application and then, if his request was refused, filed suit against the County. By doing this, Eide's claim would be considered ripe for adjudication. This rationale opposes the nature of the futility exception. In *Kinzli v. City of Santa Cruz*, the Ninth Circuit stated that resubmission of a development plan is excused if such an application would be an "idle and futile act."[187] If the application requirement is disregarded for the moment,

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180. *See, e.g.*, HMK Corp. v. Chesterfield County, 616 F. Supp. 667, 671 (E.D. Va. 1985); *see also, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Patsy v. Florida Board of Regents, 457 U.S. 496 (1982).

181. *See, e.g.*, *Eide*, 908 F.2d at 727 (Shoob, J., concurring).

182. Blaesser, *supra* note 48, at 120.

183. *See, e.g.*, Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982).

184. *Eide*, 908 F.2d at 727.

185. *Id.* at 726.

186. *Id.* at 727. The plan suggested residential development in the area where Eide's properties were located. *Id.* at 719.

187. Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (quoting Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1146 n.2 (9th Cir. 1982), *cert. denied*, 464 U.S. 847 (1983)).

it is difficult to distinguish Eide's case from the plaintiffs' situations in *Hoehne v. County of San Benito*[188] and *Corn v. City of Lauderdale Lakes*.[189] The Ninth Circuit's analysis in *Hoehne* suggested that a local government's negative attitudes toward a plaintiff's development proposal would meet the futility exception to the reapplication requirement of finality.[190] In *Corn*, a local ordinance placed a moratorium on development of the plaintiff's property.[191] As a result, the Eleventh Circuit concluded that satisfying the variance requirement of finality was unnecessary since any request would be futile.[192] In *Eide*, the Planning Commission expressed its negative attitude toward Eide's requests and recommended his property remain residential, effectively ruling out any future commercial rezoning of his properties.[193] Therefore, the court in *Eide* could have rationally applied the futility exception to the application requirement, finding support in the above cases.

In addition, the Eleventh Circuit in *Eide* showed little deference to the factual findings in the lower court.[194] Faced with the issue of ripeness, which is reviewed de novo as a question of law, the court was not bound by the jury's determinations in the district court.[195] Thus, by ruling on ripeness grounds, the court supported the notion that it is "not the function of federal district courts to serve as zoning appeal boards."[196] Other circuits have express similar views. In *Lemke v. Cass County*,[197] a five-member concurrence stated the following about land use substantive due process claims:

> Such claims should . . . be limited to the truly irrational—for example a zoning board's decision made by flipping a coin, certainly an efficient method of decisionmaking, but one bearing no relationship whatever to the merits of the pending matter. . . . Such a claim is easily made in every zoning case, and is the stuff of which state administrative law is made. . . . I see no reason to read the Due Process Clause as a constitutionalized Administrative Procedure Act

188. 870 F.2d 529 (9th Cir. 1989).
189. 904 F.2d 585 (11th Cir. 1990).
190. *Id.* at 535.
191. Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir. 1990).
192. 816 F.2d at 1516.
193. 908 F.2d 716, 719 (11th Cir. 1990).
194. *Id.* at 728 (Shoob, J., concurring).
195. Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 377 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988).
196. Nasser v. City of Homewood, 671 F.2d 432, 440 (11th Cir. 1982).
197. 846 F.2d 469 (8th Cir. 1987).

> setting up the federal courts as a forum for the review of every run-of-the-mill land-use dispute.[198]

In *Pearson v. City of Grand Blanc*,[199] the district court refused to follow the arbitrary and capricious due process standard in *Eide*. Instead the court applied a "shocks the conscience" standard.[200] This standard actually "justif[ies] upholding the council's zoning decision even if public health, safety, moral or general welfare interests are not served."[201]

The Eleventh Circuit's analysis in *Executive 100, Inc. v. Martin County*[202] provided a fair interpretation of the ripeness doctrine's finality requirement in a section 1983 equal protection/arbitrary and capricious due process challenge, despite Judge Clark's vigorous dissent on the issue.[203] The plaintiffs challenged, on equal protection grounds, the Board of County Commissioners' rezoning approval of two parcels of land similarly situated to the plaintiffs' land and the Board's refusal to grant the plaintiffs' rezoning request.[204] The plaintiffs grounded their arbitrary and capricious due process claim on the assertion that the value of their property had been significantly lowered due to the Board's action and that such actions had no relation to the public welfare since their land was not suited for the present zoning status.[205] The court found no deficiencies in ripeness, holding the Board's decision to be final and the case ripe for decision.[206]

The disparate treatment of plaintiffs in land use cases demands renewed attention by the Supreme Court. The Court's faulty analysis in this area has been well-articulated.

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198. *Id.* at 472 (Arnold, J., concurring).

199. 756 F. Supp. 314 (E.D. Mich. 1991).

200. *Id.* at 318.

201. *Id.* at 318 n.2.

202. 922 F.2d 1536 (11th Cir. 1991).

203. *Id.* Judge Clark opposed the rationale of the court in *Eide*, and instead adopted the reasoning of the Seventh, Ninth, and Tenth Circuits that the finality requirement applied by the Supreme Court in Macdonald, Sommer, and Frates v. Yolo County, 477 U.S. 340 (1986) and Williamson County v. Hamilton Bank, 473 U.S. 172 (1985) to takings and just compensation claims applies as well to due process and equal protection claims. *Executive 100*, 922 F.2d at 1543 (Clark, J., concurring in part, and dissenting in part).

The plaintiffs in *Executive 100* filed applications for amendments to the Martin County Comprehensive Land Use Plan to change the zoning of their properties from agricultural/rural to industrial. *Executive 100*, 922 F.2d at 1538. The majority found the denial of the plaintiffs' request to be a final determination and the action ripe for adjudication. *Id.* at 1542. Judge Clark viewed the case as unripe, however, asserting that a more reasonable request was required before a final decision could be made. *Id.* at 1551-52 (Clark, J., concurring in part, and dissenting in part).

204. *Executive 100*, 922 F.2d at 1541.

205. *Id.*

206. *Id.*

> The major difficulty is that the Supreme Court has an incorrect view of the land use control process. The Court sees more certainty and less discretion in this process than actually exists, and views its final decision requirement as a simple requirement easily met. Nothing could be further from the truth in a system where judgments are qualitative and administration requires the exercise of substantial discretion.[207]

A proper solution to the controversial ripeness issue would be a rule liberally construed, "based on extreme flexibility, and without any firm boundaries."[208] By this, the factual circumstances of each case could determine "in reality, and not according to artificial 'rules' like the ones applied in . . . *Kinzli*" if the plaintiffs have truly reached an administrative end.[209] Judge Shoob, concurring in *Eide*, would likely find this solution acceptable.

V. CONCLUSION

Section 1983 serves as an important source of redress for landowners wishing to vindicate their rights against the government. Further, a section 1983 action is not subject to all the procedural hurdles in takings cases involving ripeness. The full potential of section 1983 in land use cases entailing substantive due process violations, however, has yet to evolve. The encumbrance lies in the obstacles created by the finality requirement of the ripeness doctrine and federal courts' steadfast refusal to apply the futility exception to the requirement—which is evidenced by *Eide*. The Eleventh Circuit in *Eide* was given the chance to draft a more reasonable standard for the futility exception's applicability to the finality requirement. Instead of meeting the challenge, the court relied on previous analyses of the issue, devoting minor attention to particular facts or to the jury's determinations in the district court. That court found the County's sector plan to be a final determination denying commercial rezoning for Eide's properties. The Supreme Court repeatedly has stated that "the central objective of the Reconstruction-Era civil rights statutes [in regard to section 1983] . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief."[210] Federal courts have disregarded, thus emasculating, this ob-

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207. Mandelker & Blaesser, *supra* note 93, at 52.

208. *Id.* at 63.

209. *Id.*

210. Felder v. Casey, 487 U.S. 131, 139 (1988) (citing Burnett v. Grattan, 468 U.S. 42, 55 (1984)).

jective in land use litigation. Until the finality requirement of the ripeness doctrine is reformulated to rely on the specific facts of each case, federal courts will continue to deny entrance to landowners.