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Cover Page Footnote

This article won first prize in the 1993 R. Marlin Smith Student Writing Competition sponsored by the Planning and Law Division of the American Planning Association. This competition honors the late R. Marlin Smith, a prominent land use lawyer and teacher who contributed greatly to the theory and practice of land use law. This article is dedicated to the late Richard F. Babcock, long-time partner of Marlin Smith, author of *The Zoning Game*, and one of my law school mentors. I offer my thanks to Charles Siemon and Wendy Larsen, who prompted me to research ripeness issues, and to Norman Williams, whose guidance and friendship I always welcome.

FINALITY RIPENESS IN FEDERAL LAND USE CASES FROM HAMILTON BANK TO LUCAS*

R. JEFFREY LYMAN**

"Ripeness is all"¹

Ever since the Supreme Court re-entered the land use field,² scholars and practitioners have bemoaned the chaos³ wrought by the high Court's pronouncements on the "taking issue."⁴ Perhaps such despair has been warranted in many aspects of this field of constitutional jurisprudence.⁵ Nonetheless, close examination of one procedural element of takings law—the finality prong of the ripeness doctrine—reveals that subsequent lower federal court decisions on this point have amplified the Supreme Court's holdings so as to create a predictable and understandable body of law.⁶

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1. WILLIAM SHAKESPEARE, *KING LEAR* act 5, sc. 2.

2. Between 1928 (*Nectow v. City of Cambridge*, 277 U.S. 183) and 1974 (*Village of Belle Terre v. Boraas*, 416 U.S. 1), the Supreme Court decided only two land use cases. *Berman v. Parker*, 348 U.S. 26 (1954); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). Since 1974, the Court has examined the impact of land use regulations on private property interests with regularity.

3. See, e.g., 1 NORMAN WILLIAMS, *AMERICAN LAND PLANNING LAW* ch. 5A (rev. ed. 1988); Charles L. Siemon, *Who Owns Cross Creek?*, 5 J. LAND USE & ENVT. L. 323 (1990).

4. For a study published just before the Supreme Court's re-entry, see FRED BOSSELMAN, DAVID CALLIES, AND JOHN BANTA, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973).

5. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting) ("Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence.").

6. This conclusion is not typical. Even a perusal of the titles of leading articles on this topic suggests criticism of the doctrine: Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court converted Federal Judges into Fruit Peddlers*, *INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN* (1991) [hereinafter Berger, "Ripeness" Mess]; 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 (1989) [hereinafter Blaesser, *Closing the Door*]; Michael M. Berger, "Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions Is An Exercise in Futility, 11 *Zoning & Plan. L. Rep.* 57 (1988) [hereinafter Berger, "Ripeness" Test]; Daniel R. Mandelker and Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 *Zoning & Plan. L. Rep.* 49 (1988) [hereinafter Mandelker &

I. INTRODUCTION

In reaching this conclusion, this article looks closely at finality ripeness⁷ as framed in a pair of Supreme Court land use cases⁸ in the middle 1980s, as interpreted in the lower federal courts in the subsequent half dozen years, and as modified by last term's opinion in *Lucas v. South Carolina Coastal Council*.⁹ From these cases it is apparent that finality ripeness can bar judicial review¹⁰ of a

Blaesser, *Applying Ripeness*]; Gus Bauman, *Hamilton Bank - Supreme Court Says: Don't Make a Federal Case Out of Zoning Compensation*, 8 Zoning & Plan. L. Rep. 137 (1985); see also BRIAN W. BLAESSER & ALAN C. WEINSTEIN, eds., *LAND USE AND THE CONSTITUTION*, § 6.06, at 103 (1989).

7. Finality is a small component of the ripeness doctrine. In the leading ripeness case, Justice Harlan explained for the Court the "two-fold aspect" of ripeness, requiring a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 149 (1967). The fitness aspect involves two prongs, whether "the issue tendered is a purely legal one" and whether the regulation challenged constitutes a final governmental action. *Id.*

In the land use context, finality requires final determination on a development proposal and rejection of a just compensation claim in state court. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). This article looks exclusively at the final determination aspect of finality.

8. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Hamilton Bank*, 473 U.S. at 172.

9. 112 S. Ct. 2886 (1992).

10. Review in which courts? There can be no doubt that finality ripeness applies to the federal courts. Its effect upon state court review depends on the authority and rationale supporting this "threshold matter." *Lucas*, 112 S. Ct. at 2890.

If finality ripeness is a prudential concern, then any court may exercise its discretion to bar a developer's claims. If it is animated by Article III of the federal Constitution, however, then the doctrine is applicable only to the federal courts. PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, ch. II, § 5, at 231-69 (3d ed. 1988).

In *Lucas*, the Justices were divided in their characterization of finality ripeness. The majority termed it prudential. *Lucas*, 112 S. Ct. at 2892. Justice Stevens, although dissenting, agreed. *Id.* at 2918 (Stevens, J., dissenting). Justice Blackmun, author of *Hamilton Bank*, disagreed sharply, deeming the doctrine to be an Article III concern. *Id.* at 2906-07 (Blackmun, J., dissenting). Justice Kennedy's concurrence indicates no view. *Id.* at 2902 (Kennedy, J., concurring). Justice Souter did not reach the issue. *Id.* at 2925-26 (statement of Souter, J.). Justice Blackmun's apparent isolation is misleading. Lower courts and commentators have routinely agreed that Article III jurisdictional constraints animate finality ripeness. See, e.g., *Southview Assocs. v. Vermont Env'tl. Bd.*, 782 F. Supp. 279, 281 (D.Vt. 1991), *aff'd*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); see also Blaesser & Weinstein, *supra* note 6, at 109 (1989).

Of course, the conclusion of a majority of Supreme Court Justices would appear to have settled the question. Unfortunately, the *Lucas* opinions were singularly unconvincing. Justice Scalia's opinion for the majority offers no explanation for its chosen label. *Lucas*, 112 S. Ct. at 2890-92. Justice Stevens' extensive quotation from Justice Brandeis' "deservedly famous concurring opinion" in *Ashwander v. Tennessee Valley Authority* merely demonstrates that there are prudential considerations by which a court should restrain itself, not that finality ripeness is among them. *Id.* at 2918 (Stevens, J., dissenting). Justice Blackmun's syllogistic argument has force only because of a play on the word 'final'. *Id.* at 2906-07 (Blackmun, J., dissenting). The final judgment requirement arises from section 28 U.S.C. § 1257 (1988), one of the congressional limits on Supreme Court jurisdiction, and the basis for the Court's dismissal of a land use case a dozen years earlier. See *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621, 630 n.10 (1981). It addresses Supreme Court review of final state court

developer's¹¹ constitutional claims¹² until the jurisdiction whose regulations the developer challenges has issued "a final and

proceedings, in contrast to finality ripeness, which deals with judicial review of final administrative action. In sum, none of the *Lucas* opinions definitively resolves the question of finality ripeness' rationale and authority.

Moreover, the Court's previous efforts to describe ripeness doctrine generally suggest that the Court may later offer a different label. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162 n.64 (listing cases that label ripeness prudential), 163 n. 65 (1987) (listing cases that label ripeness jurisdictional). Little is settled by this "arbitrary labeling based on unarticulated judicial judgments." Erwin Chermersky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692 (1990). Perhaps the rationale and authority for ripeness can be discerned, not from the Court's efforts to describe the doctrine, but from its pattern of applying it. It has been suggested that when ripeness is labeled constitutional, the hardship factor dominated the analysis. ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.4.1, at 101 (1988). Correspondingly, cases such as *Lucas* that focus on the finality prong of the fitness aspect label ripeness prudential. *Id.*

This does not resolve the ultimate question of the availability of the doctrine in state court. Ripeness may indeed be an Article III doctrine, and the finality prong may be prudential only in the sense that it is applied with flexibility. Only if ripeness is deemed purely a "judge-made rule," *Lucas*, 112 S. Ct. at 2917 (Stevens, J., dissenting), rather than a derivative of a constitutional command to the federal courts, may it be applied in all courts. This has not been settled.

11. The term "developer" appears throughout this article to describe any property owner aggrieved by land use regulations it deems too restrictive. See Norman Williams, Jr., *et al.*, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 198, 204-06 (1984). The use of this term is not meant to imply negative connotations. But see, Michael M. Berger & Gideon Kanner, *Thoughts on "The White River Junction Manifesto": A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685, 688 n.13 (1986) [hereinafter Berger & Kanner, *Thoughts*]. Similarly, nothing negative is intended by the pronoun "it", which has been chosen for its gender neutral qualities, and in recognition that some developers are corporations or partnerships.

12. What sort of deprivations? Certainly takings claims are subject to finality requirements, since the doctrine is "compelled by the very nature of the inquiry required by the Just Compensation Clause." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985). Due process claims have also been subjected to finality demands, because

[v]iewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.

Id. at 199. Apparently, the Supreme Court holds equal protection claims to the same standard. *Pennell v. City of San Jose*, 485 U.S. 1, 11 n.5 (1988).

The lower federal courts have not always agreed that a uniform ripeness standard is appropriate. The Ninth Circuit initially appeared uncertain. See, e.g., *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1207 (N.D.Cal. 1988) (quoting *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988)) (substantive due process ripeness standard was "presently in conflict" in the circuit); *Hoehne v. San Benito County*, 870 F.2d 529, 532 (9th Cir. 1989) (noting the same standard was "most likely applicable to related procedural due process claims"). The Eleventh Circuit contemplated a less exacting standard for substantive due process than for other constitutional claims. *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). Only one case clearly departed from the uniform approach, although it dealt with the right of privacy, which it termed "some substantive, constitutional right other than one premised on the Takings Clause." *P.L.S. Partners, Women's Medical Center of Rhode Island, Inc. v. City of Cranston*, 696 F. Supp. 788, 796 (D.R.I. 1988). More recent cases adopt the Supreme Court's uniform approach. See, e.g., *Del Monte Dunes v. Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990).

authoritative determination"¹³ of how much and what type of development it will permit. In order to fulfill this requirement, a developer must make a "meaningful application"¹⁴ that prompts the town¹⁵ to apply its regulation. If the town rejects the meaningful application, the developer must then seek a variance under the regulations or modify its proposed development, if to do so would not be futile.¹⁶ A developer who passes across each threshold, or demonstrates the futility of an attempt at either of the last two, will have received the town's final determination. If the developer feels aggrieved by the town's decision, its claims of unconstitutional deprivations will be ripe.

Beyond reaffirming this previously recognized¹⁷ framework for determining finality ripeness, this article offers a new synthesis¹⁸ of

A uniform approach is appropriate for two reasons. First, it recognizes that developers' various constitutional claims require similar analysis. These analyses are necessarily reflected in ripeness determinations that are tied to the substance of the underlying claims. G. Joseph Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1522 (1971). Each claim ordinarily brought by a developer requires an assessment of the burden it has borne as the result of regulation—an excessive "diminution in value" under the takings clause, an improper "balance" of private loss and public gain under substantive due process analysis, or a disproportionate impact when compared to those similarly situated under the equal protection clause. See generally, Jeffrey T. Haley, Comment, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315 (1979). Under each clause, the developer's claim cannot be ripe until a court can determine how great a burden the developer must bear. This assessment ripens uniformly.

Second, the uniform approach recognizes the real world interplay between developer and regulator. As the Court acknowledged in *MacDonald*, "[t]he local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *MacDonald*, 477 U.S. at 350. Consequently, "securing . . . a development permit is a process [E]ntail[ing] negotiation, [and] modification of plans. . . ." *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1452 (9th Cir.), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988). The interplay between developer and regulator requires the evenhanded approach offered by a uniform standard.

13. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

14. *Id.* at 352 n.8.

15. Although most recent instances of finality ripeness have arisen in the context of zoning decisions made by a town, the doctrine applies to any regulation applied to restrict the use of land. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n* 452 U.S. 264 (1981) (Federal Surface Mining & Reclamation Act); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (Clean Water Act § 404); see also *Sierra Club v. Yuetter*, 911 F.2d 1405 (1990) (Federal Reserved Water Rights in Wilderness Areas).

16. *MacDonald*, 477 U.S. at 352 n.8.

17. See Blaesser, *Closing the Door*, *supra* note 6, at 78-82.

18. The traditional analysis has focused on the performance of circuit courts individually, thus obscuring these points. See *infra* notes 25-27 and accompanying text. The passage of time is also relevant. With one exception (Berger, "Ripeness" Mess), the major articles were all published within two years of the Supreme Court's ripeness cases.

Indeed, one early commentary recognized that the doctrine might mature. Mandelker & Blaesser, *Applying Ripeness*, *supra* note 6, at 53 ("the Ninth Circuit has had the most opportunities to refine this [finality] prong But its decisions have not yet yielded any predictable approach . . ."). To borrow one of Attorney Michael Berger's colorful analogies,

the case law, thus revealing three novel and important points. First, the threshold for a meaningful application is exceptionally low.¹⁹ In essence, any formal interplay between the developer and regulator will suffice.²⁰ Second, a variance request is demanded sparingly.²¹ A developer need not change its proposal under this requirement, but must ascertain whether the town is willing to shape its regulations to fit the proposal as originally offered.²² Third, the futility exception may be invoked only after a developer has made at least one attempt to secure development approval; thereafter, a wide array of barriers can generate a circumstance in which a developer's further efforts would be futile.²³ Taken together, these observations suggest a body of law remarkably tolerant of developers' efforts to reach federal courts.

Last term's *Lucas* decision made this body of law yet more receptive to developers. In a footnote, the *Lucas* majority created a "pointlessness" modification to the futility exception.²⁴ Under this new standard, a developer need not make even one try at securing development approval before bringing a ripe claim. Unfortunately, many of the important attributes of finality ripeness were served by the requirement of at least one application. While its ultimate impact remains uncertain, *Lucas*' pointlessness modification may endanger the predictability and coherence carefully accrued by the lower courts.

II. THE TRADITIONAL ANALYSIS

Previous analyses of finality ripeness have tended to focus on the performance of individual courts,²⁵ or to compare and contrast the performance of different courts.²⁶ In so doing, these analyses largely

only after the courts have had several years to chew on a number of cases can observers surmise how the courts might digest a full bowl of ripe fruit. See generally Berger, *Ripeness Mess*, *supra* note 6.

As for Berger's more recent condemnation of the "ripeness mess," it is important to remember that he considers himself someone with an 'ax[] to grind.' Berger & Kanner, *Thoughts*, *supra* note 11, at 685 n.* (citation omitted).

19. See *infra* part III.A.

20. But see Berger, "Ripeness" Test, *supra* note 6, at 61-62.

21. See *infra* part III.B.1.

22. But see Berger, "Ripeness" Mess, *supra* note 6, § 7.03[3], at 7-24-27.

23. See *infra* part III.C.. But see Berger, "Ripeness" Test, *supra* note 6, at 60.

24. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892 n.3. (1992).

25. Berger, "Ripeness" Test, *supra* note 6 (analyzing decisions of the Ninth Circuit Court of Appeals).

26. Berger, "Ripeness" Mess, *supra* note 6, § 7.03[5]-[6] (analyzing decisions of the Ninth and Eleventh Circuit Courts of Appeals, and the Claims Court); Blaesser, *Closing the Door*, *supra* note 6 (analyzing all Circuit Courts).

validated their supposition of chaos.²⁷ In contrast, the courts themselves have not viewed jurisdictional lines so rigidly. Rather than citing precedent only from the Supreme Court and their own previous decisions,²⁸ the courts tend to examine cases by focusing on the similarity of issues to those presented in the particular matter then before them. Before fashioning a new synthesis for finality ripeness using this latter approach, this article surveys the cases using the traditional analysis.

A. The Supreme Court

Through the early 1980s, the Supreme Court issued several rulings in which it disposed of land use cases on ripeness grounds. These cases occasioned much frustration. Yet, with the passage of time, it has become apparent that these cases related to a very narrow class of circumstances. As such, they serve merely as the foundation upon which the lower federal courts have built the structure of finality ripeness.

In two cases decided in successive terms in the mid-1980s, the Supreme Court elaborated most thoroughly on finality ripeness doctrine, which it had been developing incrementally for the preceding six years.²⁹ Because these cases shaped much of the doctrine following, it is appropriate to spell out their factual background thoroughly.

In *Williamson County Planning Commission v. Hamilton Bank*,³⁰ issued on the last day of the term in 1985, the Court clarified previously murky ripeness standards, and extended them moderately in line with the particular facts of that case. The plaintiff/respondent in *Hamilton Bank* was the successor-in-interest to the would-be developer of a golf course and clustered residential subdivision on 676 acres, to be known as Temple Hills Country Club Estates.³¹ The defendant/petitioner, a County Planning Commission, approved a preliminary subdivision plat, detailing, *inter alia*, the number and basic design of the dwelling units, and the location of existing and

27. See, e.g., Berger, "Ripeness" Mess, *supra* note 6, § 7.01, at 7-3 ("no easily discernible pattern"); Blaesser, *Closing the Door*, *supra* note 6, at 76 ("overburdensome and inconsistent"); Berger, "Ripeness" Test, *supra* note 6, at 57 ("haphazard"), 62 ("mystifying"); Mandelker & Blaesser, *Applying Ripeness*, *supra* note 6, at 52 ("difficult practical problems").

28. The ripeness cases cited in this article eschew this approach.

29. Most commentators have criticized these cases as the merciful conclusion to a series of aborted attempts to reach the merits of a takings claim. See, e.g., Norman Williams, *A Narrow Escape?*, 16 Zoning & Plan. L. Rep. 112, 115-116 (April 1993). That may well be an accurate description. These cases were also the culmination of the Court's refinement, in the land use context, of a pre-existing procedural doctrine.

30. 473 U.S. 172 (1985).

31. *Id.* at 177.

proposed infrastructure facilities.³² According to Planning Commission regulations, the approved initial plat, while serving as the basis for a final plat, did not inexorably transmute into an approved final plat.³³ To merit approval, the final plat had to contain significantly greater detail, including precise location of street, lot, and boundary lines.³⁴ Only after this second approval would the County allow development to proceed.³⁵

Even by preliminary plat standards, the initial submission for the Temple Hills development provided incomplete detail on the layout of all the intended lots.³⁶ Nevertheless, the Planning Commission approved the preliminary plat, and, over the course of the next six years, granted final approval for nearly a third of the intended lots, as the developer provided sufficient detail for successive phases of the project.³⁷ After the County revised its zoning ordinance, however, it required the developer to submit a revised preliminary plat for those sections of the total project that remained undeveloped.³⁸ The revised plat was rejected on the basis that the density calculations erroneously neglected to apply deductions for roadways and areas with steep slopes.³⁹ The developer appealed to the County Zoning Board of Appeals, which ruled that the density deduction for roadways did not apply to Temple Hills, because that provision appeared only in the revised zoning ordinance.⁴⁰ After the plaintiff/respondent reapplied to the Planning Commission, however, that body refused to follow the ruling of the Board of Appeals and again rejected the revised plat on eight grounds.⁴¹ The plaintiff then filed suit in the District Court for the Middle District of Tennessee.⁴²

A jury awarded damages for a temporary taking, but the court entered a judgment notwithstanding the verdict, reasoning that as a matter of law, a temporary deprivation of all economically viable use could not constitute a taking.⁴³ The court did, however, permanently

32. *Id.*

33. *Id.*

34. *Id.*

35. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 177 (1985).

36. *Id.* at 177-78.

37. *Id.*

38. *Id.* at 178-79.

39. *Id.* at 179-80.

40. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 181 (1985).

41. *Id.*

42. *Id.* at 182.

43. *Id.* at 182-83.

enjoin the Planning Commission from applying its revised ordinance to Temple Hills.⁴⁴ On appeal, the Circuit Court reversed.⁴⁵

On certiorari review, the Supreme Court held that the claim was not ripe.⁴⁶ In short, the Court concluded a "final decision"⁴⁷ required both a "plan for developing [the] property,"⁴⁸ and an application for variances.⁴⁹ While the developer and the bank, as its successor-in-interest, did have a plan, the Court reasoned that variance applications might have allowed the Planning Commission to resolve at least five of the eight objections most recently impeding these plans.⁵⁰ Without determinations on the possibility of variance relief, the Court would not consider the rejection of the preliminary plat a final decision by the Planning Commission.⁵¹

Nearly one year later in *MacDonald, Sommer & Frates v. Yolo County*,⁵² the Court again found that a developer's claim was not ripe. As in *Hamilton Bank*, the developer in *MacDonald* sought subdivision approval, although without pursuing a clustering arrangement.⁵³ Proposing 159 single and multi-family units on agricultural lands, the plaintiff/appellants submitted a preliminary plat for approval by the County Planning Commission.⁵⁴ The developer was unable to proceed with a revised plat because its initial submission was rejected by the Planning Commission, and rejected on appeal by the County Board of Supervisors.⁵⁵

The developer filed suit seeking mandamus and declaratory relief coupled with damages for inverse condemnation.⁵⁶ In its complaint, the developer focused on four of the County's objections to its plat: the only public access to the site was from a street unlikely to be extended; sewer service was not planned; insufficient police protection

44. *Id.* at 183.

45. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 183-84 (1985).

46. *Id.* at 185.

47. *Id.* at 186. *See also id.* at 191 (noting "final, definitive position regarding how [the governmental entity] will apply the regulations at issue to the particular land in question" is required).

48. *Id.* at 187.

49. *Id.* at 188.

50. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 189-90 n.11 (1985).

51. The Court also faulted the plaintiff/respondent's failure to employ state-created just compensation mechanisms. *See id.* at 194-97.

52. 477 U.S. 340 (1986).

53. *Id.* at 342.

54. *Id.*

55. *Id.*

56. *Id.* at 343-44.

was available; and water service was not planned.⁵⁷ The developer disputed that these objections were appropriate or justified.⁵⁸

In the trial court, the defendant/respondent County and City demurred to the claims for declaratory relief and damages.⁵⁹ Granting their motion, the court noted that the property remained suitable for agriculture, including accessory uses.⁶⁰ The intermediate appellate court affirmed by focusing, like the trial court, on the question of the legal availability of monetary damages.⁶¹ After the California Supreme Court denied the developer's petition, it filed a writ of certiorari with the United States Supreme Court, which granted a hearing.⁶²

The Court, as it had done the previous term in *Hamilton Bank*, found that the developer's claim was not ripe. This time, it demanded a "final and authoritative determination of the type and intensity of development legally permitted on the subject property."⁶³ It found such a determination lacking, because only a 159 unit subdivision appeared to be precluded.⁶⁴ Indeed, the Court felt it significant that the trial court believed "valuable use might still be made of the land"⁶⁵ from continued agriculture, and the state appellate court believed that "valuable residential development was open"⁶⁶ to the developer.

MacDonald's lasting impact comes from two lengthy footnotes, appended to the opinion's penultimate sentence.⁶⁷ In the first, the Court discussed in three long paragraphs the developer's contention that future applications would be futile.⁶⁸ This discussion has spawned extensive law review commentary and lower court adjudication.⁶⁹ In the second footnote, the Court analogized to the *Agins v. City of Tiburon*⁷⁰ case that it had dismissed as unripe several terms

57. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 344 & n.2 (1986).

58. *Id.* at 344.

59. *Id.* at 345.

60. *Id.*

61. *Id.* at 346. At that time, the California Supreme Court's decision in *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd*, 47 U.S. 255 (1980), precluded awards of monetary damages for successful inverse condemnation claims. Of course, this changed with the United States Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

62. *MacDonald*, 477 U.S. at 348.

63. *Id.*

64. *Id.* at 351 & 352 n.8.

65. *Id.* at 352 n.8.

66. *Id.*

67. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8, 353 n.9 (1986).

68. *Id.* at 352 n.8.

69. *See, e.g.*, articles cited, *supra* note 6.

70. 447 U.S. 255 (1980).

previously.⁷¹ Therein, it fostered the reapplication requirement, in a discussion that borders on the bizarre.⁷² Each footnote is shaped largely in terms specific to the posture of *MacDonald* itself.⁷³ Nevertheless, the doctrine that follows from these peripheral comments has evolved coherently.⁷⁴

Although most subsequent lower court doctrine builds upon their foundations, these two cases are not the totality of the high Court's rulings on finality ripeness. Indeed, in the first six years of the 1980s, the Supreme Court disposed of six land use takings cases on ripeness grounds.⁷⁵ Moreover, the landmark *Penn Central Transportation Co. v. City of New York* case from the 1978 term was decided in part on ripeness grounds.⁷⁶ The analytical framework for finality ripeness first took shape, however, in a case decided in the 1980 term.

71. *Id.* at 353 n.9.

72. Attorney Michael Berger has demonstrated convincingly both how the Court's characterization of the *MacDonald* plans as "exceedingly grandiose" is unsupported in the record or common sense, and how the analogy to the *Agins*' situation is entirely absurd. Berger, "Ripeness" *Mess*, *supra* note 6, § 7.02[2][b], at 7-12-13.

73. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 344 (1986) ("The complaint alleged, in capital letters and 'WITHOUT LIMITATION BY THE FOREGOING ENUMERATION' that 'ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER RELIEF WOULD BE FUTILE'" (quoting App. at 58)); *id.* at 346-47 ("the California Court of Appeal determined that . . . 'the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development.'" (quoting App. at 133)).

For an earlier land use example of a legal test arising just as cavalierly, see *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978) (discussing "economically viable" use) (quoting Transcript of Oral Argument at 42-43).

74. See *infra* part III.

75. One of these ripeness cases actually involved a lack of jurisdiction as not presenting a "final judgment or decree" under 28 U.S.C. § 1257. See generally, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

76. See *Penn Central*, 438 U.S. at 136-37, where the Court concluded that it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition 'would harmonize in scale, material and character with [the Terminal].' Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

(citation omitted).

Interestingly, this passage from *Penn Central* is entirely consistent with the doctrine enunciated in the later cases. For example, if *Penn Central* were analyzed under the rubric established in *MacDonald*, it could be said that the railroad company had submitted an "exceedingly grandiose plan" and there was a "logical implication" that "less ambitious plans" might receive a better review. Thus, the railroad company would have been required to reapply for development approval. See *MacDonald*, 477 U.S. at 353 n.9.

Agins v. City of Tiburon presented both an as-applied and a facial takings claim. While reaching the merits of the facial claim,⁷⁷ the Court disposed of the as-applied claim on ripeness grounds, concluding that the developer had failed to make even an initial application for development permission. This threshold requirement has been recognized throughout all subsequent cases.⁷⁸

In *Agins*, the plaintiff appellants bought five acres of what they alleged was the most valuable suburban property in all of California.⁷⁹ Not long after, the town rezoned the property in compliance with new state planning legislation.⁸⁰ Even though the new regulation might have permitted as many as five units on the property, the *Agins* alleged a taking of all value from their property.⁸¹ The *Agins* sought damages and declaratory relief in state court.⁸² The City's demurrer was sustained in the California Superior and Supreme Courts.⁸³ The United States Supreme Court found the *Agins*' as-applied claim unripe: "[b]ecause the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions."⁸⁴ While this utter failure to seek development approval might actually have been sensible,⁸⁵ the Court deigned to consider only the *Agins*' facial claim.

In the following term, the Court identified a circumstance under which even a facial takings claim would not be ripe. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*,⁸⁶ the Court contemplated a generalized challenge to the steep-slope provisions of the Federal Surface Mining Act. Brought by an industry trade association, the action failed to "identif[y] any property in which appellees have an interest that has allegedly been taken by operation of the

77. *Id.* at 260-63. The Court enunciated a two-part test for a regulatory taking that has resounded throughout subsequent cases: "a taking [occurs] if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Id.* at 260 (citations omitted).

78. *But see infra* part IV.

79. 447 U.S. 255, 258 (1980).

80. *Id.* at 257.

81. *Id.*

82. *Id.* at 258.

83. *Id.* at 259.

84. *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980).

85. The City had begun, and then abandoned, condemnation proceedings. *Id.* at 258 n.3. Given that the new zoning encouraged open space conservation, and that the *Agins*' parcel sat atop a ridge surveying San Francisco harbor, it is not hard to imagine that the City would have denied any development application. In fact, it so stipulated. Berger, "*Ripeness*" *Mess*, *supra* note 6, § 7.02(2)[a], at 7-8. It appears that the City hoped to maintain the open space without accruing time and expense for itself.

86. 452 U.S. 264 (1981).

Act."⁸⁷ Thus, the Court concluded the Association's claim was not ripe.⁸⁸

Several terms later, sandwiched between *Hamilton Bank* and *MacDonald*, an as-applied challenge to the Army Corps of Engineers' wetlands authority under the Clean Water Act was found unripe,⁸⁹ for precisely the same reason that the Agins' challenge to Tiburon's revised zoning ordinance was premature. Without applying for an available permit, the Court noted "[t]he reasons are obvious" why a developer cannot suggest that a regulation takes its property: in short, a permit may grant permission.⁹⁰ If permission results, then the property owner's plans have not been restricted. Until the extent of the restriction is known, a court cannot examine a claim.

Taken together, these cases do not tell much. From Supreme Court doctrine alone, commentators have adopted their usual despair⁹¹ over this unpredictable fifth period⁹² in land use law. Most likely for developers, the doctrine was too vague to be meaningful: before filing an as-applied claim, make some application; before filing a facial claim, identify some property. Perhaps it is clear though, after *Hamilton Bank* and *MacDonald*, how much effort to obtain local subdivision approval is necessary before a claim ripens. From this starting point any broader understanding appears elusive. Given these limited lessons, the commentators' despair about Supreme Court doctrine is not surprising.

B. Selected Circuit Courts

There have been doctrinal variations among the circuits as they applied Supreme Court doctrine. Documenting this point, one article assessed finality ripeness (and its companion doctrine, abstention) in federal land use cases by tracing the different approaches employed by different courts.⁹³ Following its lead, other articles have focused

87. *Id.* at 294.

88. Several terms later, relying heavily upon *Virginia Surface Mining*, the Court dismissed as unripe a nearly identical claim brought by an association of landlords that contested a rent control ordinance. *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988); see also *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532 (1992) (finding a facial challenge to a rent control ordinance was ripe).

89. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

90. *Id.* at 127.

91. See, e.g., articles cited, *supra* note 6.

92. 1 NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* § 5.08 (rev. ed. 1988). Williams explains that "American land use law in the twentieth century falls rather obviously into five periods, which differ from each other primarily in the attitude towards claims made by the developers." *Id.* at 103. The fifth period represents a shift back to courts upholding the validity of general principles of land use controls, but frequently invalidating the application of such controls to a particular parcel of land. *Id.*

93. Blaesser, *Closing the Door*, *supra* note 6.

exclusively on a single circuit.⁹⁴ All of these articles bemoaned the resultant chaos. In contrast, this article argues that a coherent understanding of finality ripeness can be reached only after examining the decisions of all courts.

Three courts have taken the lead in applying the ripeness doctrine. Considering that each encompasses within its jurisdiction geographic areas or statutory schemes particularly innovative in land use and environmental law, the prominence of these three courts is unremarkable. The Ninth Circuit, a source of more ripeness cases than any other court,⁹⁵ exercises review authority over the District Courts of California, "the crucible of innovative experimentation."⁹⁶ The Eleventh Circuit, generator itself of a substantial body of ripeness cases, encompasses Florida, home of "our nation's most ambitious experiment in growth management."⁹⁷ Finally, the Claims Court and the Federal Circuit hear "cases in which a property owner had to obtain some federal permit,"⁹⁸ including those dealing with a wide array of environmental regulations. Taken together, these three courts have produced the vast majority of ripeness cases, and virtually all of the cases deemed significant.⁹⁹ Even so, they present only a fragmented picture of finality ripeness doctrine.

A full and accurate picture of finality ripeness requires a look at all of the cases considering the doctrine, from all of the courts. This is so for two reasons. First, this body of law is not like that under more traditional ripeness doctrine. Whereas ripeness has traditionally related to federal administrative action,¹⁰⁰ finality ripeness in the land use context arises in local and regional jurisdictions operating

94. Berger, "Ripeness" Test, *supra* note 6.

95. During the years covered in this article (1985-92), the Ninth Circuit considered finality ripeness in nearly two dozen land use cases. The next busiest circuit, the Eleventh, had only half a dozen. The remainder looked at scarcely a handful apiece.

96. Berger & Kanner, *Thoughts, supra* note 11, at 691. As two astute land use practitioners have noted, "California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat." RICHARD F. BABCOCK & CHARLES SIEMON, *THE ZONING GAME REVISITED* 293 (1985); *see also* 1 NORMAN WILLIAMS, *AMERICAN LAND PLANNING LAW* § 6.03, at 184-85 (rev. ed. 1988).

97. Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973, 974 (1992). Attorney Thomas Pelham was Secretary of Florida's Department of Community Affairs, responsible for writing and implementing the program to which this statement applies.

98. Berger, "Ripeness" Mess, *supra* note 6, § 7.03[6][c] at 7-35.

99. This judgment rests on a rough count of the citations of cases by other jurisdictions. The Ninth and Eleventh Circuits, in particular, far outstrip their companion federal appeals courts.

100. *See generally*, 4 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 25, at 349 (2d. ed. 1983); *see also* LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* ch. 10, at 395 (1965).

throughout the nation. As has been long recognized, "[z]oning, as an administrative process, does not readily lend itself to customary techniques of critical analysis."¹⁰¹ Whereas the Administrative Procedure Act ordinarily provides a starting point for analyzing "final agency action,"¹⁰² finality in land use must be contemplated in a wide array of local systems, each with its own procedural and substantive nuances. Consequently, coherence appears only in a generalized analysis of a large number of cases. By looking only at a single circuit, other commentators have precluded such an analysis.

Examining the cases of each circuit independently also ignores the structure of our federal court system. Note for contrast the mode of understanding state court doctrine:

At first glance the vast body of [state land use] law appears forbidding, a trackless waste; yet on careful analysis it turns out to be quite different—a carefully structured body of law, responding clearly to the needs of the various parties of interest involved—albeit differently in different decades. The patterns of decision, while complex in the extreme, are highly repetitive within each state, and so at the state level there is a quite high degree of predictability.¹⁰³

Of course, this difference can be explained simply: each state's courts receive their authority from an independent sovereign, while the federal courts all operate under a single sovereign. In light of this structure for the court system, and the prevailing arrangement of land use decision making, the doctrine of finality ripeness can be understood only by looking at the decisions of all federal courts together.

III. A NEW SYNTHESIS

This article examines each element of finality ripeness—meaningful application, variance request, reapplication and futility exception—to fashion an understanding from the decisions of all circuit courts. By blending together the contributions of various circuit courts, this approach reveals a coherence obscured by the traditional approach.

Phrased succinctly, the finality requirement simply demands a development proposal that prompts a town to apply its regulation. If the proposal is rejected, the town must be allowed to shape its regulation to the proposal. The developer may also be asked to shape

101. Richard F. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 511 (1959).

102. Administrative Procedure Act of 1946 ch. 324, § 10(c), 5 U.S.C. § 704 (1988).

103. Norman Williams & R. Jeffrey Lyman, *Where Are South Carolina and the Supreme Court Taking Us?*, 16 VT. L. REV. 1111, 1115 (1992) (footnote omitted).

its proposal to fit the regulation. If the regulation and proposal do not fit, or if it would be futile to reshape them, the developer can then bring a ripe claim.

A. Meaningful Application Requirement

Developers have passed the "meaningful application"¹⁰⁴ threshold in a number of ways. The Supreme Court has uniformly concluded that a developer's application was meaningful, except when it made no effort at all with local regulators.¹⁰⁵ Lower federal courts have limited this lenient standard moderately by finding claims unripe where a developer, even after making demonstrable efforts, failed to make its development intentions clear. Of course, making development intentions clear can be accomplished in numerous ways, so this lower court modification scarcely erects a barrier to the courthouse. Reflecting the leniency of the standard, the First Circuit suggested that "[t]o be 'meaningful,' an application . . . must be essentially complete, must realistically describe the desired use, and must be reasonably current."¹⁰⁶ Consistent with the Supreme Court's rulings, a meaningful application serves simply as an indication of a developer's intentions so that the town can initially determine the type and intensity of development it will allow.

The meaningful application requirement will not be satisfied if a landowner who alleges a taking has made no effort or merely a token effort to apply for development approval. For example, in *Virginia Surface Mining*, the Court found a taking claim by an association of coal miners was not ripe because they "made no showing . . . that they own[ed] tracts of land that [were] affected by th[e challenged] provision."¹⁰⁷ Likewise, the claim of a landlord and a landlords' association that a rent control ordinance constituted an as-applied taking was unripe because "no landlord has ever had its rent diminished by as much as one dollar because of the application of this provision."¹⁰⁸ Without even token efforts to ascertain the official policy for applying a regulation to their property, these plaintiffs did

104. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.8 (1986).

105. In fact, only in *Agins* did the Court find a meaningful application lacking. This was not because the application was not meaningful, but because there had been no application. See *Hamilton Bank*, 473 U.S. at 187 (noting "the property owners had not yet submitted a plan for development of their property") (citing *Agins*, 447 U.S. at 260).

106. *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir. 1991) (terming unmeaningful an application rejected eight years before the initiation of litigation), *cert. denied*, 112 S. Ct. 192 (1991).

107. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 n.37 (1981).

108. *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988); see also, *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992) (noting that failure to seek rent increase would render unripe an as-applied challenge to a rent control ordinance).

not satisfy the meaningful application requirement and were precluded from bringing their claims.

Some courts have said that, even if a property owner does make significant efforts, these efforts must be directed specifically to applying regulation to the property. A property owner must be seeking to develop the land, rather than simply preserving a favorable zoning classification. Mere opposition to a down-zoning, coupled with suggestions to continue pre-existing zoning, will not suffice; a property owner must give an "indication . . . of how [it] might intend to develop the property if permitted to do so."¹⁰⁹ Moreover, a would-be developer's efforts must be current. Hence, when a developer's application for industrial uses was rejected, and its property subsequently rezoned for agricultural uses, its claim would not be ripe until the developer applied, even with a similar plan, under the new ordinance.¹¹⁰ In short, a court will not infer what a developer's intentions are; the efforts that a property owner makes must clearly show how and what it intends to develop.

A meaningful application can be a development proposal that requires up-zoning for more intensive use. Most significantly, a submission seeking approval for a Planned Development District constitutes a meaningful application, even if the town urges an "alternative, less ambitious scheme" under existing single family residential zoning.¹¹¹ Similarly, in *Eide v. Sarasota County*, a court determined that the owner of two residentially zoned parcels could bring a ripe claim after presenting a plan for the parcels' commercial development or a petition for their rezoning.¹¹² In that case, while the parcels were zoned residential, the county held out the possibility of commercial use, under a so-called sector plan.¹¹³ The crux of the court's concern was that the county should be "given an opportunity to apply the sector plan."¹¹⁴ Hence, the court was unconcerned that the developer did not wish to apply for residential development.¹¹⁵

109. *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1992); *see also* *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 941-42 (D. Hawaii 1986) ("plaintiffs have been involved in an ongoing attempt to develop . . . a resort. The majority of their activity, however, has been attempts to influence the drafting of the . . . Plan and amendments Plaintiffs have made no attempt to apply for development permits, zoning changes or variances . . . under [the] present zoning"), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 997 (1991).

110. *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987), *cert. denied*, 482 U.S. 906 (1987).

111. *See Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989).

112. *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990).

113. *Id.*

114. *Id.* at 726.

115. *Id.*

One court explained the policies urging treatment of an up-zoning request as a meaningful application:

In dismissing Plaintiff's taking claim as unripe, this Court adds a word of caution. This decision should not be misinterpreted as requiring Plaintiff to exhaust every possible administrative avenue of relief. Such a requirement would unfairly force Plaintiff and others like her to repeatedly navigate through a procedural labyrinth of [the applicable] ordinances. Instead, to determine the administrative finality of a zoning regulation as applied to a given parcel of land, plaintiffs must make "at least one meaningful application" for a reasonable development project.¹¹⁶

Hence, the question remains whether a court can ascertain how a town or county intends to apply a particular regulation, rather than all conceivably applicable regulations.¹¹⁷

A meaningful application must be filed formally, and be essentially complete. Only in this way can a town be expected to state its intended decision on a proposal under a particular set of provisions. For example, a public works director reviewing a plan for a sewer connection does not convey a town's position on that matter, when permits are issued by the town's elected governing Board of Trustees.¹¹⁸ Even the mayor's rejection of a proposal does not necessarily indicate the town's official position, at least when he states after his review that "[a]s a matter of record [the town] has never taken the position that it will never consent to the connection."¹¹⁹ Actually filing an application can be insufficient, if pursuit of approval is abandoned "at an early stage."¹²⁰ Here, the Ninth Circuit recognized that "securing . . . a development permit is a process requiring the consideration and approval of an application by numerous state and local agencies . . . entail[ing] negotiation, [and] modification of plans."¹²¹ Thus, this ruling shows that a discouraging prognosis for approval informally conveyed by a city engineer, based on an unofficial map, will not justify a conclusion that the city has reached its final position.¹²² Even so, an application that contains the functional

116. *Stephans v. Tahoe Regional Planning Agency*, 697 F. Supp. 1149, 1154 (D. Nev. 1988) (quoting *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454-55 (9th Cir.) (emphasis in original), modified, 830 F.2d 968 (9th Cir. 1987), cert. denied 484 U.S. 1043 (1988).

117. This having been said, the developer bringing a ripe claim after an upzoning request faces an uphill battle to establish an unconstitutional taking on the merits, at least if it is premising its claim on a diminution in value theory.

118. *Unity Ventures v. Lake County*, 841 F.2d 770 (7th Cir. 1988), cert. denied, *Alter v. Schroeder*, 488 U.S. 891 (1988).

119. *Id.* at 775.

120. *Kinzli*, 818 F.2d at 1452.

121. *Id.*

122. *Id.*

equivalent of all filing requirements may be satisfactory, even if it is not technically complete.¹²³ Importantly, when its preliminary plans were rejected as part of a two-stage permitting process, a developer was not required to proceed to subsequent filings before bringing a ripe claim.¹²⁴

The tolerant approach fashioned by the lower courts is entirely consistent with Supreme Court doctrine. *Hamilton Bank* demonstrated that a meaningful application could exist even when only one of two required subdivision plats was filed. The threshold for a meaningful application remains exceptionally low.

B. Additional Requirements

If a developer's meaningful application is rejected, finality ripeness requires one course of action, and perhaps another, before acknowledging that a local government has reached its final and definitive position.¹²⁵ First, a developer must seek a variance as permitted under the regulation governing the rejected proposal.¹²⁶ Second, a developer may be expected to reapply for development approval under the same or a different provision.¹²⁷ Only by ascertaining the availability of administrative relief or the acceptability of reapplication can a developer obtain the local government's decision.

1. Variance Request

A variance must be sought only from the provision specifically governing the developer's original proposal. In other words, the developer must determine whether the town is willing to shape its regulation to fit the proposal. The Supreme Court made this limited variance requirement clear in *Hamilton Bank*.¹²⁸ In that case, the claim was not ripe because the developer did not seek variances allowing development according to its proposed plat.¹²⁹ The Court stressed the limited scope of the variance requirement repeatedly, stating that the variance procedure should be used to determine whether the land owner could "develop the subdivision in the manner [it] proposed."¹³⁰ Significantly, the Court never suggested that a variance was required for some other, less intense development proposal.

123. *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

124. *See Formanek v. United States*, 18 Cl. Ct. 785, 794 (1989).

125. Each requirement can be waived upon a demonstration of futility. *See infra* part III.C.

126. *See Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 189 (1985).

127. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.8 (1986).

128. 473 U.S. 185 (1985).

129. *Id.* at 188.

130. *Id.* at 193.

Illustrating the narrow scope of the *Hamilton Bank* variance requirement, other courts have adhered to the Supreme Court's rule when considering requests for proposals at densities greater than permitted under existing zoning. For example, after its request to rezone for apartments was rebuffed, a developer could bring a ripe claim so long as it sought a variance to develop the more dense apartment use it proposed, irrespective of possible development opportunities under existing zoning.¹³¹ Similarly, a request for "a variance or density transfer" could follow a rejected Planned Unit Development and still yield a ripe claim if the town rejected the developer's efforts a second time.¹³² Likewise, a developer proposing a 350 foot tall condominium complex, in an area with height restrictions of 25 feet, could bring a ripe claim after seeking a variance to pursue its proposal, especially where "other exceptions to the ordinance's height restriction ha[d] been granted during the long course of th[e] litigation."¹³³ Hence, the nature of the proposal made by the developer defines the scope of the variance requirement.

The variance requirement is appropriately limited in light of the reality of decision-making on land use matters. Implementing land use regulations involves a complex interplay between property owners seeking development approval and public sector agencies, often entailing extensive and extended "negotiation, [and] modification of plans."¹³⁴ Variances are an appropriate component in this dynamic process. Nevertheless, the process of obtaining development approval is potentially (and seemingly) endless. In finding a case ripe, a court must answer the question "[w]hen is enough, enough?"¹³⁵ Lest developers be required "to repeatedly navigate through a procedural labyrinth," a variance request must be required only to ascertain the government's position on the specific proposal.¹³⁶ "[A]s long as the process is limited and reasonably short in duration, and is guaranteed to culminate in either a 'yes' or a 'no,'" it may be just to require it before deeming a claim ripe for judicial consideration.¹³⁷ Only a variance relevant to the developer's original proposal meets this test.

131. *Calibre Spring Hill, Ltd. v. Cobb County*, 715 F. Supp. 1577, 1580 (N.D. Ga. 1989).

132. *Amwest Investments, Ltd. v. City of Aurora*, 701 F. Supp. 1508, 1513 (D. Colo. 1988).

133. *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir. 1988), *cert. denied*, 488 U.S. 994 (1988).

134. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1452 (9th Cir.), *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied* 484 U.S. 1043 (1988).

135. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1346 n.3 (9th Cir. 1990) (Kozinski, J., dissenting in part), *cert. denied*, 499 U.S. 943 (1991).

136. *Stephans v. Tahoe Regional Planning Agency*, 697 F. Supp. 1149, 1154 (D. Nev. 1988), *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied* 108 S. Ct. 775.

137. *Tahoe-Sierra Preservation Council*, 911 F.2d at 1339.

In addition to the indisputable inequities inherent in endless proceedings, requiring a variance on any but an original application would ignore the posture in which a variance request arises, and the effect of its disposition. First, a variance is a form of administrative relief designed to relieve hardship resulting from the incompatibility of a development proposal and the applicable land use regulations.¹³⁸ As such, it must pertain specifically to the proposal advanced by a developer. Thus, requiring variance applications under other provisions ignores the purpose of variances.

Moreover, because "the governing law sets guidelines for what variances are permissible," a denial of a variance request, following a rejected application, presents the final decision of the governmental regulator.¹³⁹ Thus, any requirement that a landowner pursue additional relief contradicts the realities of land use law; after something is final, all that follows is literally anticlimactic.

Finally, limiting the variance requirement to an original proposal does not damage the interests of regulators. Finality ripeness requires a court to wait until it can know whether a regulation might go "too far."¹⁴⁰ Naturally, if a court can perceive that a regulation might go too far, then regulators should be able to reach the same realization themselves, before being dragged into court. If "literal enforcement" of a regulation would amount to a taking, the availability of a variance allows regulators to avoid going too far.¹⁴¹ A single opportunity to grant a variance is sufficient to serve this interest.

2. Reapplication

Under this component of ripeness, a developer might be required to determine whether its proposal can be shaped to fit the town's regulation. Even beyond the futility exception, the reapplication requirement has a limited scope. Indeed, a reapplication is required only after the rejection of "exceedingly grandiose development plans" and when there is no evidence that less ambitious plans will receive similarly unfavorable reviews.¹⁴² While grandiose plans have not

138. 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 130.01 (rev. ed. 1985); see also *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985) (contrasting variance procedures with administrative remedies).

139. *Tahoe-Sierra Preservation Council*, 911 F.2d at 1345 (Kozinski, J., dissenting in part).

140. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922)).

141. See, e.g. *Smithfield Concerned Citizens v. Town of Smithfield*, 719 F. Supp. 75 (D.R.I. 1989), *aff'd*, 907 F.2d 239 (1st Cir. 1990).

142. *MacDonald*, 477 U.S. at 353 n.9.

been defined in any significant way,¹⁴³ the cases have suggested what is necessary to "logically imply"¹⁴⁴ a more favorable review. Again, the standard followed by the courts suggests a body of law sympathetic to developers trying to reach federal court.

The Supreme Court cases have required reapplication only when there is affirmative evidence in the record that a more favorable review might follow reapplication. In *MacDonald*, the Court noted that lower court findings "dispell[ed] any doubt" about the likely favorable reception for less ambitious plans.¹⁴⁵ This was so because the County had indicated that the proposal was insufficient merely "in certain limited respects,"¹⁴⁶ which might easily be corrected in a new application. Likewise, in *Penn Central*, counsel for the City conceded that the commission might approve a smaller office tower perched above Grand Central Terminal.¹⁴⁷ Thus, under Supreme Court doctrine, it would appear that a regulator could claim a reapplication was necessary if it could point to some evidence in the record that it might respond more favorably to a reapplication than it did to the rejected initial application.

Lower courts have been willing to lean somewhat more heavily on the logical implication language, requiring reapplication where there is merely a suggestion of a more favorable review of a future application. For example, when there is a broadly applicable rezoning that includes land for which development approval had been rejected under the old ordinance, reapplication is appropriate, simply because there is sufficient evidence that a proposal might receive a more favorable review under the new ordinance.¹⁴⁸ An additional indication of likely favorable reviews is repeated approval of previous applications, similar to that anticipated from a reapplication.¹⁴⁹ These lower court decisions extend Supreme Court doctrine only moderately. In each instance, the regulator was able to point to some significant and affirmative action it took, before it could convince a reviewing court that it should have a second opportunity.

In sum, the reapplication requirement will burden a developer only occasionally, even without precise definition of exceedingly grandiose plans. Perhaps more importantly, whatever burden is

143. Some refinement might be possible. Plans are presumably not grandiose if the only available alternative is not economically viable. A more thorough definition might prove difficult. See Berger, "Ripeness" Mess, *supra* note 6, § 7.02[2][b], at 7-13.

144. *MacDonald*, 477 U.S. at 353 n.9.

145. *Id.*

146. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 385 (1988) (construing *MacDonald*).

147. *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 137 n.34 (1978).

148. *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987).

149. *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989).

borne will be mitigated by the favorable review almost invariably following reapplication.

C. Futility Exception

In the years during which the Supreme Court was silent on ripeness, lower courts repeatedly held that applying for a variance, or reapplying for development approval, was not required if it would be futile to make such applications.¹⁵⁰ A developer's efforts would be futile when

the agency has no power to grant relief; the agency lacks the power to grant relief which would permit the proposed project to be developed; the community is openly hostile to the property owner's proposal; the regulatory agency is openly hostile either toward the property owner, his proposal, or the type of development proposed; or the regulation was adopted to preclude the type of development the owner wishes to make.¹⁵¹

If any one of these circumstances exists after "at least one"¹⁵² initial application, then a variance request or reapplication would be futile, and the developer's claim ripe.¹⁵³

The most common futile circumstance involves the lack of authority to grant relief, either generally, or relating to the specific proposal. Hence, it would be futile for a developer pursuing approval for a Planned Development District to seek a variance when the only available variances related to subdivisions, rather than to its specific Planned Development District intentions.¹⁵⁴ Likewise, when a General Plan amendment is the only available option according to planners for the defendant county, further pursuing development approval would be futile.¹⁵⁵ In such a situation, a variance is not "a legally viable option," and need not be sought before a claim ripens.¹⁵⁶

Allegations of perceived community and agency hostility are most routinely justified by the presence of insurmountable regulatory hurdles, such as moratoria. Because hostility is an amorphous concept, courts will infer its presence only when, for example, a

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

151. *Berger, "Ripeness" Test*, *supra* note 6, at 60 (citing 3 RATHKOPF, THE LAW OF ZONING AND PLANNING, § 35.02(2)).

152. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987) (citing *MacDonald, Hamilton Bank, and Agins*); *accord*, *Yee v. City of Escondido*, 112 S. Ct. 1522, 1523 (1992).

153. *Kinzli*, 818 F.2d at 1454.

154. *Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570 (11th Cir. 1989).

155. *Herrington v. Sonoma County*, 857 F.2d 567 (9th Cir. 1988).

156. *Id.* at 570; *accord* *Beure-Co. v. United States*, 16 Cl. Ct. 42, 49 (1988), *Formanek v. United States*, 18 Cl. Ct. 785, 791 (1985).

municipality repeatedly rezones a property for less intensive development.¹⁵⁷ By acting affirmatively a number of times in succession, the municipality provides a perceptible indication that it is hostile to the developer's intentions. Similarly, a drastic governmental action, even if occurring in isolation, can suggest hostility, as when a parcel originally capable of subdivision into twelve lots was rezoned to a classification allowing only a single lot.¹⁵⁸ Whenever a municipality makes it impossible to "fulfill the [regulatory] condition precedent on which [it] insisted," a court will infer that the government has imposed a "complete moratorium" on development.¹⁵⁹ Thus, presented with drastic or repeated governmental acts affirmatively taken, a court will infer a complete moratorium, rendering further applications futile.

Hostility may be found even without erection of specific hurdles, although in this circumstance the developer bears a "heavy burden" of establishing futility.¹⁶⁰ A "quasi-official stonewall policy" may indicate the requisite hostility for meeting the futility requirement.¹⁶¹ Such a policy might be evident from "excessive delay" imposed by administrative inaction, or from repeated rejection of submitted applications.¹⁶² No court has established a bright line test for excessive delay, although six to eight months has been termed "strikingly short" when juxtaposed against the eight year time frame in *Hamilton Bank*.¹⁶³ Even a long delay is acceptable, however, if the properties for which relief is being sought continue to be "used in an economically viable way."¹⁶⁴ Repeated rejection also is not subject to a clear-cut test, although courts remain aware that a claim of futility could not be supported in *Penn Central* where the developer had already faced two rejections.¹⁶⁵ Similarly, when public officials stated in good faith that a current rejection might be followed by future development approval, the developer cannot claim futility.¹⁶⁶ An

157. See, e.g., *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987).

158. *Hoehne v. County of San Benito*, 870 F.2d 529, 531 (9th Cir. 1989).

159. *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483, 1487 (11th Cir. 1988), cert. denied, 490 U.S. 1020 (1989).

160. *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, 980 (9th Cir.) (citing *American Sav. and Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981)), amended, 841 F.2d 872 (9th Cir. 1987), cert. denied, 488 U.S. 827 (1988).

161. *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 721 n.2 (10th Cir. 1989).

162. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987) (citing *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986), and *American Savings*, 653 F.2d at 371).

163. *Landmark Land Co.*, 874 F.2d at 722.

164. *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 n.12 (1st Cir. 1991).

165. *Kinzli*, 818 F.2d at 1454 (citing *Penn Central*, 438 U.S. at 104).

166. *Unity Ventures v. Lake County*, 841 F.2d 770 (7th Cir. 1988).

allegation of futility based on unofficial policy is difficult to establish, absent years of delay or multiple application rejections.

On the other hand, outright rejection of an application under a flexible permitting process can indicate an unofficial policy of agency hostility. If an agency is authorized to modify a proposal, or require specific mitigation as a condition to permit issuance, its permitting process is flexible; the agency may "take with the one hand [what it] may give back with the other."¹⁶⁷ When the agency chooses not to exercise that flexibility, but instead resorts to the traditional dichotomy of outright approval or denial, it has rendered its final decision.¹⁶⁸ Correspondingly, in a flexible permitting situation, futility will not be found until after the body chooses not to use its discretion to grant a permit.¹⁶⁹ A governmental regulator with a full range of decision-making options must employ them, or the thwarted developer can argue successfully that resort to variance procedures, or reapplication, is inherently futile.¹⁷⁰

Thus, the futility exception applies only when a court has before it strong evidence that the developer will not, and cannot, succeed. To be sure, the courts have inferred futility in a wide variety of circumstances. But one point has been critical: futility has been found only after the developer has made at least one application. Otherwise, the court is forced to speculate about how the developer and regulator might interact, since there has been no interplay thus far. The community or agency must have something to be hostile about. Without at least one application, the developer has provided no fuel for the locals' fire. And, no matter how much the developer may wish to avoid this conflagration, the courts must see the smoke before they can douse the flames. Only by this limit does the futility exception remain consistent with ripeness' core concerns for judicial certainty and clarity.

IV. POINTLESSNESS MODIFICATION

In last term's *Lucas* decision, the Supreme Court dwelt considerably on the "threshold matter"¹⁷¹ of finality ripeness. Most of the majority's discussion focused on the effect of the state court disposition on the posture of the case before it.¹⁷² This important issue has

167. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986); see also *Penn Central*, 438 U.S. 104 (noting flexibility in scheme designating landmarks and authorizing transferable development rights).

168. *Formanek v. United States*, 18 Cl. Ct. 785, 793 (1985).

169. See *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 380 (9th Cir. 1988), cert. denied, 488 U.S. 851 (1988).

170. *Id.*

171. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2890 (1992).

172. *Id.* at 2891-92.

little relevance here. Appended to this discussion, however, was a brief rebuttal to Justice Blackmun's dissent. This two sentence comment, buried in a footnote, modified existing doctrine significantly. The Court said:

Justice Blackmun insists that this aspect of Lucas's [sic] claim is "not justiciable," . . . because Lucas never fulfilled his obligation under [*Hamilton Bank*] to "submi[t] a plan for development of [his] property" to the proper state authorities. . . . [b]ut such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application.¹⁷³

While the recitation of the facts is accurate, these few words extend the legal standard for finality ripeness in a way that the Court itself, and lower federal courts, have repeatedly refused to accept. As indicated above, the Court's previous holdings indicated to lower federal courts that the futility exception was available only after "at least one"¹⁷⁴ meaningful application had been submitted. Here, however, no application was ever submitted, yet the Court concluded that it would have been "pointless" for Lucas to make a submission to the Coastal Council.¹⁷⁵

This conclusion ignored that Lucas had two avenues available to him. First, he could have sought a building permit.¹⁷⁶ Second, Lucas could have petitioned to have the baseline and setback lines moved to allow construction on his property.¹⁷⁷ By deeming Lucas' claim ripe,

173. *Id.* at 2891 n.3.

174. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987) (citations omitted).

175. *Lucas*, 112 S. Ct. at 2891 n.3.

176. Had Lucas applied for a building permit, it would have been rejected. The Coastal Council so stipulated. Record at 14. Note, however, that in *Agins* the Court found that the property owners' as-applied claim was not ripe until they applied for building permission under the zoning ordinance, even though the parties stipulated that any application would have been denied. Berger, "Ripeness" *Mess*, *supra* note 6, § 7.02[2][a], at 7-8 (The *Agins* were represented by Mr. Berger's frequent colleague Professor Kanner. See, e.g., Berger & Kanner, *Thoughts*, *supra* note 11.).

177. For this administrative relief, futility is not particularly evident. The Coastal Council's stipulation appears to encompass only building permits. Record at 14 ("The South Carolina Coastal Council agrees that any application for a permit to build would have been denied[;] however, it reserves as an argument concerning temporary damages that no permit has been applied for by Plaintiff.") The administrative relief is not a permit, in any traditional sense of the word, nor does it grant an allowance to build. Rather, it might create a circumstance under which building might be allowed (as when, e.g., a lot located seaward of the baseline finds itself between the revised setback and baseline) or would be allowed (as when, e.g., a lot located between the revised setback and baseline finds itself located landward of the revised setback line). See generally, S.C. Code. Ann. § 48-39-280(E).

Moreover, it appears Lucas was prepared to make the sort of arguments necessary to have the lines moved. See Record at 20, 25, 36 (cited in *Lucas*, 112 S. Ct. at 2907 (Blackmun, J., dissenting)).

after characterizing pursuit of either avenue "pointless," the Court modified its previous standard.

The pointlessness modification undermines the instrumental benefits of the previous finality ripeness requirements by leaving courts with precious little guidance when they review future allegations of futility or pointlessness. Under the previously existing standard, their judgment could be informed by at least one identifiable interaction between the developer and the regulatory body. The record created by that interplay, while likely to be scanty, particularly in the context of locally controlled zoning, would nevertheless provide some indication of the posture struck by the regulators.¹⁷⁸ In contrast, courts henceforth will often be forced to speculate on the basis of a bald assertion and an abbreviated response.¹⁷⁹

The inappropriateness of the pointlessness modification can be seen by contrasting the option available to Lucas with those available in previous futility cases.¹⁸⁰ In his situation, Lucas had the legally viable option of challenging the location of the baseline and setback line. Unlike amending a General Plan,¹⁸¹ moving these lines is a ministerial function. Whereas the Plan details legislative policy, the precise placement of baseline and setback lines merely implements such a policy. These situations would be analogous if Lucas' only option had been lobbying the legislature to add to the BMA policies an interest in promoting single family housing construction along the beachfront. He need not have done this, given the possibility of administrative and judicial challenges to the line locations.

The placement of the lines is also relevant to Lucas' specific intentions.¹⁸² Indeed, a completely successful challenge by Lucas would place both lines seaward of his lots, leaving them entirely free of Coastal Council jurisdiction. Even a modestly successful challenge, placing him between the lines, would allow the possibility of building a single family house of up to 5,000 square feet. Given that the Coastal Council lines were the only barrier to building single family houses on Lucas' lots,¹⁸³ a petition to move the lines would

178. Even assuming that an initial application would be rejected, it does not inexorably follow that any effort would be pointless. Subsequent efforts by the developer might be fruitful.

179. The concerns expressed here may be slightly overstated. If the court is significantly worried about the possibility of speculation, it can refuse, prudently, to hear the case. Dangers remain when, as here, a sloppily drafted stipulation conveys an unintended impression to a judge unaccustomed to land use practice.

180. See *supra* part III.C.

181. See *Herrington v. Sonoma County*, 857 F.2d 567 (9th Cir. 1988).

182. Note, however, that the lack of any application leaves great doubt about Lucas' specific intentions, including the critical question of the precise location of each house on the lots.

183. *Lucas*, Record at 94-95.

relate directly to his intentions. This is distinct from a landowner seeking Planned Development approval,¹⁸⁴ for whom the only option is a variance provision relating to subdivisions. That proposal and that mechanism have nothing to do with each other. If Lucas' challenge had been successful, he might have been able to proceed as of right, or he might have been subjected to a special permit process. Each result, however, would have provided potential development opportunities for Lucas. Consequently, he had a legally viable option, countering the argument that pursuit of development approval would have been futile.

The burden on developers is undoubtedly lessened by *Lucas'* pointlessness modification. Now, if a developer can prompt a compliant or inattentive regulator to agree to certain stipulations before trial, it may be able to sue without ever submitting any application for development. But the pointlessness modification has other ramifications. Unlike the futility exception, which allows at least some record of interplay between developer and regulator to appear on the trial record, the pointlessness modification may leave the trial judge guessing, or relying upon uncontroverted testimony about a developer's intentions and a regulator's responses. Such uncertainty undermines the very purposes of ripeness doctrine, which is designed to postpone litigation until a record exists that allows for clear resolution. While wary regulators, on the eve of defending a suit, may henceforth guard against allowing invocation of the pointlessness modification, the mere existence of this addition has added an unwanted element to an otherwise predictable body of law.

V. CONCLUSION

This article has provided a new synthesis for understanding finality ripeness. As a more general matter, it has also revealed how lower federal courts clarify vague and broad standards enunciated by the Supreme Court. The resulting body of law has been remarkably tolerant of developers' efforts to reach the federal courts. This is scarcely surprising, given the tendency of current federal judges to favor the interests of developers.¹⁸⁵ The recent *Lucas* modification of the doctrine synthesized in this article may make developers' efforts to reach federal court that much easier. It may also have eviscerated the progress made in creating a sensible doctrine. Yet, even if the specific doctrinal outlines sketched here have been erased, the

184. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989).

185. *But see* FRANK I. MICHELMAN, *FEDERALISM AND JURISPRUDENCE IN Lucas* 3-5 (Nov. 1992) (on file with author) (exploring judges' "cross-fire of conflicting inclinations" between "putting some muscle back into constitutional protections for property rights" and serving the "complex of concerns" relating to "our federalism").

broader lessons about application and refinement of Supreme Court doctrine may continue to have relevance beyond the terms of finality ripeness.

AFTERWARD

In response to an advance manuscript of this article, Attorney Michael Berger kindly provided "a few random thoughts" on this article's observations and thesis.¹⁸⁶ This afterward summarizes and responds to his thoughts.

Berger perceives inflexibility throughout ripeness.¹⁸⁷ In a case in which he was developer's counsel, for example, Berger recalls that "the court harshly criticized the property owner for failing to apply for one of the permitted uses under the existing general plan, instead applying for a general plan change, in spite of evidence which showed that none of the uses then permitted was [sic] economically viable."¹⁸⁸ Yet, Berger's client had "admit[ted] that it ha[d] submitted to the county only an *informal* development proposal,"¹⁸⁹ thus failing to meet the meaningful application requirement.¹⁹⁰

Berger doubts that the variance requirement is "limited."¹⁹¹ Although some dicta erroneously suggest that futility may not be

186. Letter from Michael M. Berger, Attorney, Berger & Norton, to R. Jeffrey Lyman, Attorney, Robinson & Cole 1 (Dec. 3, 1993) [hereinafter Berger Letter] (on file with author). Naturally, I appreciate his candor in responding to an article whose thesis contrasts so sharply with that of his own published writings. See, e.g., Berger, "Ripeness" Mess, *supra* note 6; Berger, "Ripeness" Test, *supra* note 6.

187. Berger would apply the futility exception to the meaningful application requirement, thus undermining ripeness' policy of avoiding judicial speculation. Berger Letter, *supra* note 186, at 3 (citing *Kinzli v. Santa Cruz*, 818 F.2d 1449 (9th Cir.), modified, 830 F.2d 968 (9th Cir. 1987), cert. denied, 499 U.S. 943 (1991)); see *supra* notes 178-184 and accompanying text.

188. Berger Letter, *supra* note 186, at 2 (citing *Lake Nacimiento Ranch Company v. San Luis Obispo County*, 841 F.2d 872 (9th Cir. 1987), cert. denied, 488 U.S. 827 (1988)). Berger conflates ripeness and the merits here and when positing "that the First Circuit has never ruled in favor of a property owner in constitutional litigation against the government." *Id.* at 1; see *supra* note 106 and accompanying text.

189. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (emphasis supplied).

190. See *supra* notes 118-124 and accompanying text.

191. Berger Letter, *supra* note 186, at 2-3; see *supra* notes 128-141 and accompanying text. Berger correctly notes that satisfying the variance requirement does not alone ripen a claim. Berger Letter, *supra* note 186, at 2. He incorrectly asserts, however, that the variance requirement obligates a developer to do more than ascertain whether the town will shape its regulation to fit the developer's proposal. *Id.* (citing *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990), cert. denied, 112 S. Ct. 382 (1991)). Berger also argues that reapplications will be less favorably received than this article suggests. *Id.* at 3. Perhaps in California, where "things are very different," according to Berger, a town will readily deny a reapplication (for less intense development) even after being hauled into federal court, but this is surely the exception. *Id.*; see *supra* note 96.

invoked until after a variance request,¹⁹² the case Berger cites was unripe because the developer failed to file a meaningful application.¹⁹³ Berger also perceives an incompatibility between state and federal variance requirements,¹⁹⁴ without observing that different rules serve different policies, and that the record in the case he cites suggested that a variance would be forthcoming.¹⁹⁵ In sum, Berger's random thoughts are consistent with this article's thesis, notwithstanding his contrary claims.

However, Berger may be correct in believing that *Lucas* did not change ripeness¹⁹⁶—at least for now.¹⁹⁷ One post-*Lucas* decision applied the pointlessness modification only because the challenged ordinance included no permitting mechanism for the developer.¹⁹⁸ Another court analyzed the pointlessness modification as one of several factors in determining post-*Lucas* ripeness.¹⁹⁹ These cases, like those immediately following *Hamilton Bank*²⁰⁰ and *MacDonald*,²⁰¹ should be read cautiously, however, since they appear early in the process whereby lower courts build an elaborate doctrine on the foundation laid by the Supreme Court.

192. Berger Letter, *supra* note 186, at 2 (citing *Lake Nacimiento Ranch Co.*, 841 F.2d 872). But see *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987) (cited in Berger Letter, *supra* note 186, at 2), *cert. denied*, 489 U.S. 1090 (1989); see also *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir.), *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 499 U.S. 943 (1991).

193. *Lake Nacimiento Ranch Company v. San Luis Obispo County*, 841 F.2d 872, 876 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988); see also *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988).

194. Berger Letter, *supra* note 186, at 2 ("a variance must be applied for as a manner of federal ripeness law even though the State Supreme Court had already held that it could not be required as a matter of state planning law.") (emphasis supplied) (citing *Shelter Creek*, 838 F.2d 375).

195. *Shelter Creek*, 838 F.2d at 379 (quoting district court).

196. Berger Letter, *supra* note 186, at 3 (citing *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992)). Berger erroneously characterizes *Lucas* as a facial claim. *Id.*

197. One court noted *Lucas*' pointlessness modification but found the claim unripe on other grounds. *Christensen v. Yolo County Board of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993).

198. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068, 1072 (M.D.N.C. 1992). *Naegele* may extend *Lucas* slightly. In *Lucas*, the Coastal Commission stipulated that permission would not be granted. *Lucas*, 112 S. Ct. at 2891 n.3. In *Naegele*, however, the City merely did "not contend that there is any realistic likelihood that *Naegele* would be granted a variance." *Naegele*, 844 F.2d 172, 175 (4th Cir. 1988).

199. *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 98 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); accord *Celentano v. West Haven*, 815 F. Supp. 561, 568-69 (D. Conn. 1993).

200. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

201. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

