

Inverse Condemnation: Asserting the Ripeness Defense in Federal Courts

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A Practice Note providing considerations to government counsel on asserting the ripeness defense in Fifth Amendment takings, or inverse condemnation, claims. This Note discusses the *Williamson County* exhaustion and finality requirements, the futility exception, and procedural aspects of asserting the defense in a motion to dismiss and a motion for summary judgment.

The Takings Clause of the Fifth Amendment requires the government to pay just compensation when it takes private property for public use. The ripeness defense is one of the strongest, and most litigated, defenses to regulatory takings claims, which are also referred to as inverse condemnation claims.

This Practice Note covers the substantive and procedural requirements for government counsel asserting the ripeness defense to inverse condemnation claims. For information on applying the defense to related constitutional claims, see Practice Note, Inverse Condemnation: Subsumption and Ripeness of Related Constitutional Claims ([w-007-4020](#)).

WILLIAMSON COUNTY RIPENESS REQUIREMENTS

Plaintiffs seeking compensation under a ripeness defense for inverse condemnation claims must satisfy:

- **An exhaustion requirement.** Before filing the Fifth Amendment takings claim in federal court, the plaintiff must seek the state remedy for obtaining compensation for the property and be denied relief. For a claim against a state or local government, this generally means that the plaintiff was required to first file a state law takings claim in state court (see Exhaustion of State Remedies Requirement).
- **A finality requirement.** The government has reached a final decision regarding how the local regulations apply to the plaintiff's

property and how the plaintiff may use and develop the property (see Finality Requirement).

(*Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).)

The *Williamson County* ripeness requirements are threshold issues in a takings case and are most often resolved on a motion to dismiss or a motion for summary judgment (see Motion to Dismiss Stage and Summary Judgment Stage). A federal court cannot hear the unripe takings claim even though the claim otherwise raises a federal question under the Fifth Amendment or is based on the plaintiff's assertion of diversity jurisdiction (see, for example, *Ackermann Enters., Inc. v. City of Bellevue*, 2016 WL 5171864, at *8-9 (E.D. Ky. Sept. 19, 2016)).

However, the *Williamson County* requirements do not need to be met for claims that the government took property for strictly private use, as private-use takings are unconstitutional regardless of whether just compensation is paid (see *Rumber v. District of Columbia*, 487 F.3d 941, 944 (D.C. Cir. 2007)).

EXHAUSTION OF STATE REMEDIES REQUIREMENT

A takings claim is unripe in federal courts unless the plaintiff has first sought compensation through the process provided by the government. The Constitution does not require pre-taking compensation, but there must be a reasonable and adequate provision for obtaining compensation after the taking.

The governmental action is not complete until the state fails to provide adequate compensation for the taking. This means that:

- All claims for just compensation for the taking of property against state and local government entities must first be filed as state law claims in state courts (see Application to State and Local Government Defendants).
- Most takings claims against federal agencies must follow the process provided in the Tucker Act and be filed in the Federal Claims court (see Application to Federal Defendants).

(*Williamson County*, 473 U.S. at 195.)

APPLICATION TO STATE AND LOCAL GOVERNMENT DEFENDANTS

Almost all federal and state law takings claims against states and local governments are tried in state courts, and not federal courts, because of the *Williamson County* exhaustion requirement. Takings claims against state governments and state officials in their official capacities are also generally barred by Eleventh Amendment sovereign immunity in federal courts (see *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952-56 (9th Cir. 2008)). For more information of state sovereign immunity in federal courts, see Practice Note, Sovereign Immunity of States Under the Eleventh Amendment ([W-002-5542](#)).

The specific state remedy that a plaintiff must first seek for the federal takings claim to ripen depends on state law. A plaintiff typically must seek compensation under the state constitution or relevant claims statute (see, for example, *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 234-37 (Tex. 2011)).

Government counsel should also consider whether the state law takings claims have additional exhaustion requirements. In California, for example, a state-law regulatory takings claim is not ripe in state court until the plaintiff files either:

- A declaratory judgment action for facial takings claims.
- A writ for administrative mandamus to review the final decision under Cal. Civ. Proc. Code Section 1094.5.

(*Hensler v. City of Glendale*, 876 P.2d 1043, 1051 (Cal. 1994).)

Sufficiency of State Law Remedies

Plaintiffs may overcome the exhaustion requirement by demonstrating that the state has not provided a sufficient procedure for seeking compensation for a particular governmental action. For example, a plaintiff might argue that the exhaustion requirement is met if a regulation, on its face, makes compensation unavailable or if compensation can be presumed unavailable by the nature of the regulation (*Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1176 (10th Cir. 2011) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998))).

However, proving that the available state remedies are insufficient is a difficult task. Federal courts often summarily dismiss takings claims when the plaintiff has failed to first seek the state law remedy. Most plaintiffs will also find it difficult to survive a government defendant's motion for summary judgment based on the exhaustion requirement (see *Neumont v. Monroe County*, 242 F. Supp. 2d 1265, 1274-75 (S.D. Fla. 2002)).

Government counsel may seek Rule 11 sanctions against a plaintiff making disingenuous assertions regarding the sufficiency of the state remedies (see, for example, *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2d Cir. 2002) (holding that a claimant cannot be permitted to let the time for seeking a state remedy pass, without doing anything to obtain it, and then proceed in federal court on the basis that no state remedies are open) (quoting *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993))).

Federal Takings Claims in State Courts

In state courts, the companion federal takings claim is either:

- Asserted as a separate count by alleging that the government's denial of compensation would violate the Fifth Amendment of the

Federal Constitution (*San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 346 (2005) (holding that state courts are not precluded from simultaneously hearing a plaintiff's state and federal law takings claims)). However, this does not work in reverse. A plaintiff cannot ripen the federal claim in federal court by simply amending the complaint to add on a state law takings claim (*Decker v. Citrus County*, 2015 WL 12844302 (M.D. Fla. May 19, 2015)).

- Not filed, but potentially preserved by including an *England* reservation with the state law complaint in the hopes of filing the federal claim at a later date in federal court (*England v. La. Bd. of Med. Exam'rs*, 375 U.S. 411 (1964); see Preclusive Effect of Exhaustion Requirement).

Preclusive Effect of Exhaustion Requirement

The exhaustion requirement is controversial and often referred to by frustrated plaintiffs' counsel as the "*Williamson County* trap" (see, for example, *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (dissenting opinion) (denying certiorari)). The plaintiff's ability to file a takings claim in federal court, after an unsuccessful trial in state court, is largely a legal fiction.

A plaintiff who properly files their takings claim in state court and loses is generally precluded by collateral estoppel, or issue preclusion, from later re-litigating the same issues in federal court (*San Remo Hotel, L.P.*, 545 U.S. at 336-38; see *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1149-50 (9th Cir. 2010)).

Plaintiffs may attempt to preserve the federal takings claim by filing an *England* reservation in the state court and only pursuing the state law claim (see, for example, *Los Altos El Granada Inv's v. City of Capitola*, 583 F.3d 674 (9th Cir. 2009)). An *England* reservation, named for the Supreme Court's decision in *England v. Louisiana Board of Medical Examiners*, permits a plaintiff in certain state court actions to reserve federal claims for subsequent review in a federal forum (375 U.S. 411 (1964)).

The federal takings claim itself is not technically barred by res judicata if an *England* reservation was raised in the state court action (see, for example, *R & J Holding Co. v. Redevelopment Auth.*, 670 F.3d 420 (3d Cir. 2011)). However, the practical ability to later litigate the federal claim is difficult as the issues will likely be similar, if not identical in both state and federal claims, such as whether:

- The plaintiff held an actionable property interest.
- The regulation or government action took the property under the *Penn Central* factors.

(See *San Remo Hotel, L.P.*, 545 U.S. at 338-41; *Ackermann Enters.*, 2016 WL 5171864, at *9.)

Government counsel should keep in mind that a plaintiff's *England* reservation does not make an unripe federal takings claim ripe in federal courts (see *Carroll v. Township of Mount Laurel*, 500 F. App'x 118 (3d Cir. 2012)).

APPLICATION TO FEDERAL DEFENDANTS

Williamson County's exhaustion requirement has a more limited application to federal defendants because of other constitutional and statutory limitations on federal court jurisdiction. It only requires that takings claims be filed in the US Court of Federal Claims under the

Tucker Act (*Williamson County*, 473 U.S. at 195; *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990)).

After the property owner tries that process and is denied compensation, further litigation must allege that the process for receiving compensation, for example the Tucker Act itself, is not a reasonable, certain, and adequate provision for obtaining compensation or that the adequate procedures were not followed (see *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999)).

Some federal statutes, such as the Agricultural Marketing Agreement Act, provide a comprehensive remedial scheme that withdraw Tucker Act jurisdiction over the takings claim. To determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must examine:

- The purpose of the statute.
- The entire text of the statute.
- The structure of review the statute creates.

(*Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2061-63 (2013); *E. Enters.*, 524 U.S. at 520; *United States v. Fausto*, 484 U.S. 439, 444 (1988).)

FINALITY REQUIREMENT

Takings claims are not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue (*Williamson County*, 473 U.S. at 186; *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)). The final decision requirement is of greater concern for as-applied regulatory takings claims, because courts assume this requirement is met for physical invasion takings claims and most facial takings claims (see *Finality Requirement Is Not Applicable to Categorical Claims*).

To satisfy the final decision requirement, courts generally require plaintiffs to demonstrate that:

- They submitted at least one meaningful application seeking an approval from the government agency that has authority to grant variances or exceptions to allow reasonable development on the property (see *Meaningful Application*).
- The government's action was a definitive position as to how the plaintiff can use and develop the property (see *Government Action Is Final Under Local Law*).
- The submission of additional applications for zoning relief would be meaningless and futile (see *Alternative Plans and Variances*).

MEANINGFUL APPLICATION

A landowner may not prove a taking until a land-use authority has the opportunity to exercise its full discretion and decide the reach of the challenged regulation, using its own reasonable procedures (*Palazzolo*, 533 U.S. at 620). A takings claim is not ripe unless the claimant has made at least one meaningful application for approval of the development (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352-53 & n.8 (1986)). The plaintiff must first give the government an opportunity to actually say "no" to the proposed development through the local process before having a viable claim.

In some instances the plaintiff will have made no application at all before filing suit, especially if the plaintiff disagrees with the

government's interpretation of its own regulation and the need for local approval. Courts have held, for example:

- The plaintiffs' takings claim was not ripe because they did not make at least one meaningful application and instead repeatedly refused to apply for a conditional use permit that would allow the desired use (*Bee's Auto, Inc. v. City of Clermont*, 927 F. Supp. 2d 1318, 1331 (M.D. Fla. 2013)).
- The plaintiff did not submit a meaningful application for purposes of a temporary takings claim. The delay in plaintiff's development came from its own refusal to apply for approvals, and there was no meaningful application submitted during the period of the alleged temporary taking. (*Ostego County v. Bradford Scott Corp.*, 2011 WL 2936806 (Mich. Ct. App. July 21, 2011).)
- The plaintiffs' failure to apply to rezone its property to permit a manufactured housing community effectively denied the township any opportunity to consider whether that alternative use of the land would be acceptable (*Hendee v. Putnam Township*, 786 N.W.2d 521, 531 (Mich. 2010)).

GOVERNMENT ACTION IS FINAL UNDER LOCAL LAW

The nature of the government's action must be sufficiently final to actually determine the permitted uses and extent of development allowed on the property. The plaintiff must take reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering the development plans for the property, including the opportunity to grant any variances, waivers, and administrative appeals allowed by law (*Palazzolo*, 533 U.S. at 620-21; see also *Williamson County*, 473 U.S. at 190 (holding that denial of a preliminary plat was not a definitive final determination about whether the landowner would be denied all reasonable beneficial use of its property where the landowner failed to follow procedures for seeking a variance)).

This inquiry heavily focuses on:

- The local procedures of the entity.
- The authority of various government actors.

Plaintiffs who have not followed available routes of relief cannot claim to have obtained a final decision, particularly if they chose not to bring their proposal before a decision-making body with broad authority to either:

- Grant different forms of relief.
- Make policy decisions which might abate the alleged taking.

(See *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990).)

Distinguishing Interim from Final Decisions

Claims based on the interim decisions of staff members, particularly claims arising from code enforcement notices and stop work orders, are seldom ripe. These interim actions are typically not final in nature and subject to appeals to the governing body. Courts have held, for example:

- A county had not made a final decision by sending the plaintiff a code enforcement notice of violation. The notice made it obvious that the decision of the code enforcement investigator to send the notice, much like the decision of a police officer to make an arrest,

was not a final decision. If a local code investigator's issuance of a citation was all that was necessary for a claim to ripen, the federal courts would become master zoning boards in disputes which are best handled at the local level. (*Tari v. Collier County*, 56 F.3d 1533, 1536 (11th Cir 1995).)

- A takings claim was unripe because the plaintiff failed to appeal a stop work order to the zoning board that halted all construction (*Wiacek Farms, LLC v. City of Shelton*, 2005 WL 2850154, at *5 (D. Conn. Oct. 28, 2005)).
- The plaintiff's claim, which was based on a stop work order issued after driveway permit was erroneously approved, was not ripe. Owners could not show that they had obtained a final decision by the village on the location of the driveway. (*Gottlieb v. Village of Irvington*, 69 F. Supp. 2d 553 (S.D.N.Y. 1999).)
- An opinion letter from the city attorney was not a final decision for purposes of ripeness as:
 - the ordinance did not grant any final or binding authority to the city attorney; and
 - the property owner otherwise failed to make application through the administrative process.
 (*Manufactured Home Cmty's, Inc. v. City of San Jose*, 420 F.3d 1022, 1036 (9th Cir. 2005).)
- A building permit withheld until the plaintiff sought another approval was not a final action (*Norwood v. Salvatore*, 2015 WL 631960, at *5 (N.D.N.Y. 2015)).

ALTERNATIVE PLANS AND VARIANCES

Even if the government makes a final decision denying a specific development request, the claim is not ripe unless the plaintiff also applies for a less intensive form of development (see *MacDonald*, 477 U.S. at 342-43, 351-53 (concluding that the property owner had not met the finality requirement. Even though the government denied the landowner's sole subdivision proposal, the record held open the possibility that some development would be permitted)). If the government denies an exceedingly grandiose development plan, that decision does not logically imply that less ambitious plans will also be denied (*MacDonald*, 477 U.S. at 353 n.9).

The requirement that plaintiff submit alternative development proposals for the property reflects the high degree of discretion land-use boards have in softening the strictures of the general regulations they administer (*Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. at 738; *Williamson County*, 473 U.S. at 190-91). 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 (*MacDonald*, 477 U.S. at 347). By requiring developers to make a good faith effort to satisfy the permitting agency's concerns after an initial denial, the ripeness doctrine reflects the reality that land development often involves a process of negotiation between the permitting agency and the developer (see *Good v. United States*, 39 Fed. Cl. 81, 102-03 (1997); *Alachua Land Inv'rs, LLC v. City of Gainesville*, 107 So. 3d 1154 (Fla. 1st DCA 2013)).

Factors for Determining Sufficiency of Alternative Plans

No bright-line test exists for determining how far the landowner must go in challenging the limits of allowable development under

the regulations before the claim ripens (see *Williamson County*, 473 U.S. at 199 (acknowledging that defining whether a regulation goes too far is a difficult problem)). However, courts are generally less skeptical of this argument if government counsel can succinctly articulate:

- The specific administrative procedures available to plaintiff that, if sought, could ripen the claim. A court may otherwise view the government's position as requiring the plaintiff to submit to an unfair, vague, and never-ending process of submitting applications with no better likelihood of approval (see Futility Exception).
- The reasonable concerns of neighboring property owners, expert witnesses, government staff, and the governing body to the specific development request.
- Other available development options for the property under the existing regulations. Describing the permitted uses currently available to the plaintiff, even if they are not identical to the desired use or intensity, puts the takings claim in the proper regulatory context.
- The willingness and discretion of the final decision makers to consider additional proposals and how the plaintiff's additional proposals realistically could be approved. It is particularly helpful to have positive comments from members of the governing body that they are open to other forms of development or uses of the property (see *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 524-25 (Fla. 4th DCA 1994); *Palazzolo*, 533 U.S. at 620-21).
- The relationship between the finality requirement and the elements of the takings claim itself. Counsel should point out the practical difficulty of litigating an unripe takings claim based on speculation regarding the extent of permitted development.

FUTILITY EXCEPTION

The final decision requirement is relieved if the plaintiff shows, by more than mere allegations, that additional development applications or variances from the existing code requirements would be an exercise of futility (see *Eide v. Sarasota County*, 908 F.2d 716, 726 (11th Cir. 1990)). This futility exception often applies when the government:

- Concedes that the proposed development would be impermissible regardless of whether the plaintiff submitted an application for approval (see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1011-13 & n.3 (1992)).
- Delayed the development process so much that:
 - reaching a final decision is a practical impossibility; or
 - the property lost its beneficial use.

(See *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990).)

Limitations of Futility Exception

Plaintiffs typically raise the futility exception in cases where they did not submit a meaningful application or failed to seek available variances and administrative appeals. When opposing the futility exception in these circumstances, government counsel should consider that:

- A plaintiff typically cannot raise the futility exception unless they have already submitted at least one meaningful application (see

DLX, Inc. v. Kentucky, 381 F.3d 511, 525 (6th Cir. 2004)). The futility 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 (*Southern Pac. Transp. Co.*, 922 F.2d at 504).

- A plaintiff's delay and failure to seek extensions of time to provide the government an opportunity to make a reasonable accommodation precludes it from invoking futility exception (*County View Estates @ Ridge LLC v. Town of Brookhaven*, 452 F. Supp. 2d 142, 154-55 (E.D.N.Y. 2006)).
- The governing body's alleged hostility and bias is not imputed to the zoning board simply because the town appoints the members. This is especially true when the zoning board itself makes no mention of whether it would consider a variance or special permit to allow plaintiff's plans for the property. (*S&R Development Estates, LLC, v. Bass*, 588 F.Supp.2d 452, 463-44 (S.D.N.Y. 2008).)
- Plaintiffs often confuse futility with invalidity. An assertion that the plaintiff does not have to apply for a permit because of the law's invalidity is not the same as arguing that applying for the permit would be futile and could not result in an approval. Due process issues regarding validity tell the court nothing about the actual burden the regulation imposes on property rights. Invalid regulations may not substantially interfere with property rights at all. (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Rith Energy Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) ("[I]n a takings case we assume that the underlying government action was lawful, and we decide only whether the government action in question constituted a taking for which compensation must be paid. [Plaintiff's] complaints about the wrongfulness of the permit denial are therefore not properly presented in the context of its takings claim."))

FINALITY REQUIREMENT IS NOT APPLICABLE TO CATEGORICAL CLAIMS

The finality inquiry is generally relieved or assumed met for physical invasion and facial claims. These categorical (or per se) takings occur when either:

- The government physically appropriates property.
- The mere enactment of a regulation precludes all development of the property and deprives the property owner of all reasonable economic use of the property.

For a physical invasion of property, such as a road built improperly across private property, a taking occurs as soon as the invasion occurred and the governmental entity cannot do or say anything after that to make the taking any more final (*Athanasiou v. Town of Westhampton*, 30 F. Supp. 3d 84, 90 n.4 (D. Mass. 2014)).

A final decision is also unnecessary for a true facial takings claim, because a facial claim is necessarily premised on an assertion that any application of the regulation violates the Fifth Amendment (see *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006)). Facial challenges to a regulation are generally ripe the moment the regulation is passed. Plaintiffs face an uphill battle, however, since it is difficult to demonstrate that the enactment of a piece of legislation deprived the owner of all economically viable uses of their property (*Suitum*, 520 U.S. at 736 n.10).

Future Events

If the physical appropriation of property or enactment of legislation has not yet occurred, the claim is likely not ripe. A claim is not ripe for adjudication if it rests on contingent future events that may not occur as anticipated or may not occur at all. (*Texas v. United States*, 523 U.S. 296, 300 (1998); see also *Residents Against Flooding v. Reinvestment Zone No. 17*, 2017 WL 1901660, at *35 (S.D. Tex. May 9, 2017).)

As-Applied Claims Disguised as Facial Claims

A plaintiff may attempt to circumvent the final decision requirement by characterizing an as-applied takings claim as a facial claim. This tactic is often employed on-the-fly at a hearing. (See, for example, *Thunderbird Hotels, LLC v. City of Portland*, 670 F. Supp. 2d 1164, 1178-79 (2009) (holding that the plaintiff's challenge is best described as an as-applied rather than a facial challenge).)

Government counsel should counter this mischaracterization by explaining to the court how the regulation itself does not prevent development. Government counsel should also provide the specific local procedures that the plaintiff could have pursued to permit the desired use. In most takings cases, if the plaintiff failed to seek an approval from the government, the extent of permitted development under the challenged ordinance is unknown and speculative. (*Southern Pac. Transp. Co.*, 922 F.2d at 503-04.)

MOTION TO DISMISS STAGE

WILLIAMSON COUNTY RIPENESS REQUIREMENTS ARE PRUDENTIAL

Federal district courts generally do not have subject matter jurisdiction over unripe claims. The accepted practice has been to assert the *Williamson County* ripeness requirements in motions to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1) (see Lack of Subject Matter Jurisdiction Under FRCP 12(b)(1)).

However, unlike typical ripeness defenses, the Supreme Court has stated that the *Williamson County* requirements only determine "prudential ripeness" and are not, strictly speaking, jurisdictional (*Horne*, 133 S. Ct. at 2062). This means the federal courts could technically retain subject matter jurisdiction over a plaintiff's takings claim that are otherwise unripe under *Williamson County* (see, for example, *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010) (waiving the *Williamson County* requirements on prudential grounds); see also Removal).

Some district courts have recently described this disconnect between the accepted practice and the Supreme Court's holdings and, as a precaution, held that the takings claims are prudentially unripe in the alternative under both FRCP 12(b)(1) and 12(b)(6) (see *Hayes Oyster Co. v. Or. Dep't of Env'tl. Quality*, 2017 WL 1381659, at *3 n.1 (D. Or. Apr. 17, 2017); *Goldstein v. U.S. Dep't of State*, 153 F. Supp. 3d 319, 331 n.9 (D.D.C. 2016)).

Until the issue is resolved, practitioners should consider filing the motions to dismiss in the alternative under both FRCP 12(b)(1) and 12(b)(6) (see, for example, *St. Clair v. City of Chico*, 880 F.2d 199, 201-02 (9th Cir. 1989) (holding that the issue of ripeness has nothing to do with the merits of a claim challenging land use regulations, and therefore the district court properly dismissed the complaint under FRCP 12(b)(1))).

The distinction between prudential and jurisdictional ripeness does not arise often. District courts often summarily dismiss unripe takings based on the facial allegations in the pleadings due to plaintiff's failure to meet the exhaustion requirement.

LACK OF SUBJECT MATTER JURISDICTION UNDER FRCP 12(B)(1)

The government defendant often asserts that the court should dismiss the takings claim under either requirement of *Williamson County* at the pleadings stage in a motion to dismiss under FRCP 12(b)(1) for lack of subject matter jurisdiction (see, for example, *Witt v. Village of Mamaroneck*, 992 F. Supp. 2d 350 (S.D.N.Y. 2014)). The motion must be filed before filing a responsive pleading to the complaint. For more information on filing a motion to dismiss under FRCP 12(b)(1), see Practice Note, Motion to Dismiss: Overview: Lack of Subject Matter Jurisdiction ([8-523-9648](#)).

The primary benefits to the government defendant of making a factual challenge to the court's subject matter jurisdiction in a FRCP 12(b)(1) motion include:

- The ability to attach additional supporting evidence outside of the complaint to the motion. Attaching affidavits, local code provisions, or other documents to the motion can rebut generic statements in the complaint that the plaintiff has met all pre-suit requirements by demonstrating that:
 - the plaintiff has not first sought and been denied compensation in state courts; or
 - the government provided information on the specific permitting or administrative appeal processes that could resolve the plaintiff's issue, but the plaintiff did not avail itself of those remedies and chose to file suit prematurely.

For more information, see Practice Note, Motion to Dismiss: Drafting and Filing a Motion to Dismiss ([1-524-1621](#)), Opposition, and Reply: Supporting Evidence ([1-524-1621](#)).

- The burden of proof being on the plaintiff, as the party seeking federal jurisdiction, to present further evidence in support of its position (see, for example, *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013); *Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 713 (D. RI. 1994)).
- A district court being free to weigh the facts without being constrained to view them in the light most favorable to the plaintiff (see *Sentry Ins. a Mut. Co. v. Provide Commerce, Inc.*, 2016 WL 1241553, *2 (S.D. Cal. Mar. 30, 2016)).
- The possibility in some courts of limited discovery and hearings on the jurisdictional question. No statute or rule specifies a format for evidentiary hearings on jurisdiction, so the court can use any rational mode of inquiry (*Crawford v. U.S.*, 796 F.2d 924, 929 (7th Cir. 1986)).

FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6)

A court may find that a motion to dismiss based on lack of ripeness under *Williamson County* is more properly considered under FRCP 12(b)(6) for failure to state a claim due to the prudential, and not jurisdictional, nature of the inquiry. An FRCP 12(b)(6) motion is more limited than one filed under FRCP(12)(b)(1) because a court determining the sufficiency of the takings claim must accept all non-conclusory allegations as true and is limited to the pleadings.

The motion must be filed before filing a responsive pleading to the complaint. For more information on filing a motion to dismiss see Practice Note, Motion to Dismiss: Overview: Failure to State a Claim on Which Relief Can Be Granted ([8-523-9648](#)).

Defense counsel's inability to supplement the record on a FRCP 12(b)(6) motion makes prevailing at the pleadings stage more challenging, especially on the finality requirement (see Asserting the Finality Requirement). Persuading the court that the government's action did not have the requisite finality to ripen a takings claim typically requires reference to local policies, correspondence, and public hearing minutes or transcripts.

PRACTICAL CONSIDERATIONS FOR ASSERTING RIPENESS REQUIREMENTS

Asserting the Exhaustion Requirement

Federal district courts typically summarily grant motions to dismiss on the exhaustion requirement (see Exhaustion of State Remedies Requirement). Most courts will also apply this requirement to ancillary due process or equal protection claims. When asserting that the court should dismiss the takings claim as unripe under the exhaustion requirement, consider that:

- It can sometimes be difficult to prove a negative. However, if the plaintiff vaguely alleges that all pre-suit requirements have been met, defense counsel can typically prevail by pointing out that the complaint does not allege that the plaintiff filed a state law inverse condemnation action in state courts and was denied compensation.
- This requirement should be a yes or no question for the court. It is important to clearly explain to the court what specific state law remedy the plaintiff is required to seek in state courts before the federal claim ripens.
- Plaintiff's counsel may voluntarily dismiss the takings claim in federal court when confronted with a motion to dismiss based on the exhaustion requirement rather than allow the court an opportunity to dismiss the action. As many land use disputes take place over many years and multiple lawsuits in state and federal courts, defense counsel should keep in mind that voluntarily dismissing the same claim twice acts as an adjudication on the merits of the claim in favor of the government defendant (the "two-dismissal rule") (FRCP 41(1)(b)).

Asserting the Finality Requirement

A court's inquiry into whether the government has issued a final decision that determines the extent of permitted development on a property can involve questions of law and fact. When arguing the finality requirement on a motion to dismiss, consider:

- Requesting that the court take judicial notice of the relevant regulations. A federal court may, in its discretion, take judicial notice of municipal ordinances and consider their contents in resolving a motion to dismiss as they are public records and not typically in dispute (see, for example, *Demick v. City of Joliet*, 108 F. Supp. 2d 1022, 1025 (N.D. Ill. 2000)). However, some state courts are precluded from taking judicial notice of local ordinances (see, for example, Mass. R. Evid. § 202 ("A court is not permitted to take judicial notice of municipal ordinances ...")).

- Explaining the practical effect of the code provisions. Government counsel should avoid lengthy recitations of local codes or overloading the court with citations to the regulations, but should clearly explain to the court why a specific government action is not final by pointing out available administrative appeals and variance applications.
- Relating the finality requirement to the elements of the takings claim. Explain to the court the practical rationale underlying this requirement: without a final decision from the governing body on how the regulations actually apply to the subject property, it is impossible to determine whether the takings occurred or how much compensation is due. For example, if no final decision has been made, the court's inquiry devolves into mere speculation. The court cannot concretely determine any of the ad hoc factual inquiries required to resolve the claim, such as:
 - the nature and extent of development allowed;
 - the regulation's economic effect on the landowner;
 - the regulation's effect on investment backed expectations; and
 - the character of the government action.

(*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-25 (1978); see also *Williamson County*, 473 U.S. at 190-91).
- Providing context by explaining the available development options on the property and not just focusing solely on the plaintiff's specific development plan. For example, the uses of the property a new owner could take advantage of under the existing regulations if the property were sold to a new owner.

Removal

Federal courts increasingly disapprove of government defendants removing takings and related constitutional claims to a federal court only to assert that the federal court does not have jurisdiction because the claims are unripe under the *Williamson County* exhaustion requirement (see, for example, *Race v. Bd. of Cty. Comm'rs*, 2016 WL 1182791, at *3 (D. Colo. Mar. 28, 2016); *River N. Props., LLC v. City & County of Denver*, 2014 WL 1247813 (D. Colo. Mar. 26, 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013)). Attempting this strategy will likely result in the federal court ruling that the government has waived the exhaustion defense.

Subject matter jurisdiction cannot normally be conferred to a federal court by the agreement or waiver of the parties. However, many courts now hold that due to the prudential nature of the *Williamson County* inquiry, a federal court has subject matter jurisdiction over an otherwise unripe takings claim if the government defendant removed the claim from state to federal court.

For more information on removal, see Practice Note, Removal: Overview ([3-532-4248](#)).

SUMMARY JUDGMENT STAGE

If government counsel is unsuccessful on its motion to dismiss, counsel should raise lack of ripeness as an affirmative defense in the answer. For more information on responsive pleadings and asserting affirmative defenses, see Practice Note, Responsive Pleadings: Answering the Complaint ([2-521-6409](#)).

The ripeness defense, and the finality requirement in particular, is most commonly reasserted in a motion for summary judgment under FRCP 56 (see, for example, *Brubaker v. East Hempfield Township*, 234 F. App'x 32 (3d Cir. 2007)). However, as some courts view the *Williamson County* ripeness requirements as jurisdictional, a court may consider the arguments in the summary judgment motion as a suggestion of lack of subject matter jurisdiction under FRCP 12(h)(3).

For more information on filing a motion for summary judgment, see Practice Note, Summary Judgment: Overview ([8-520-5163](#)).

The argument in the motion for summary judgment will be largely identical to the prior arguments made in the motion to dismiss. The summary judgment stage also permits the use of discovery to support the ripeness argument. Government counsel should target early discovery requests and depositions specifically to the question of the takings claim's ripeness, such as requesting that the plaintiff admit that it:

- Has not yet filed the inverse condemnation claim in state court and been denied just compensation.
- Never sought available permits, administrative appeals, or variances that could allow the desired use of the property.
- Has not sought less intensive forms of development and uses on the property.
- Agrees with the authenticity of correspondence with staff members, public meeting minutes or transcripts, and the evidentiary record before the governing body, including all:
 - permit applications;
 - staff reports;
 - expert opinions and related reports; and
 - evidence from lay witnesses.

For more information on conducting discovery, see:

- Requests for Admission in Federal Court Toolkit ([8-571-2585](#)).
- Deposition Toolkit ([3-532-3606](#)).
- Document Discovery Toolkit ([7-529-3645](#)).
- Interrogatories in Federal Court Toolkit ([9-555-3345](#)).

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Inverse Condemnation: Subsumption and Ripeness of Related Constitutional Claims

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A Practice Note discussing strategies and procedure for obtaining dismissal of constitutional claims that are ancillary to an inverse condemnation, or regulatory takings, claim. This Note describes the application of the *Williamson County* ripeness requirements to related constitutional claims, including procedural due process, substantive due process, and equal protection claims. This Note also discusses a takings claim's potentially preclusive effect on related claims that are coextensive with, and subsumed by, the takings remedy.

The Takings Clause of the Fifth Amendment allows landowners to seek compensation for the government's deprivation of their vested property rights. However, due to the difficulty in maintaining a takings claim, plaintiffs often allege various ancillary constitutional violations. A plaintiff typically has an incentive to file these companion claims as a fallback to the takings claim because they provide an opportunity to obtain similar relief for the injury to property, as well as attorneys' fees and costs (see 42 U.S.C. §§ 1983 and 1988).

While it is possible to include distinct constitutional claims and a takings claim in the same lawsuit, federal courts disapprove of litigating unripe takings claims under the guise of other constitutional rights. To prevent this scenario, district courts routinely apply the takings claim's ripeness requirements to related constitutional claims when all claims are based on the same nucleus of facts or property loss.

A minority of circuits apply this principle more broadly and dismiss the ancillary claims because the court deems them concurrent with, or subsumed by, the takings remedy.

This Note discusses substantive and procedural considerations for seeking dismissal of constitutional claims that are ancillary to a takings claim. For more information on the ripeness requirements of an inverse condemnation claim, see Practice Note, *Inverse Condemnation: Asserting the Ripeness Defense in Federal Courts* ([w-007-4853](#)).

SUBSUMPTION AND THE WILLIAMSON COUNTY RIPENESS REQUIREMENTS

When asserting that a Fifth Amendment takings claim is not ripe, government counsel should also consider seeking dismissal of any ancillary constitutional claims by arguing that:

- The takings claim's ripeness requirements also apply to the related constitutional claims, especially if all claims arise from the land use context (see *Application of Williamson County Ripeness Requirements to Related Claims*).
- The takings remedy itself precludes and subsumes the related constitutional claims (see *Subsumption of Related Claims*). However, the subsumption argument is only recognized in a minority of jurisdictions.

Although the ripeness and subsumption defenses have different origins, they apply in similar ways. Practically, both defenses preclude ancillary constitutional claims that are largely duplicative of an unripe takings claim.

APPLICATION OF WILLIAMSON COUNTY RIPENESS REQUIREMENTS TO RELATED CLAIMS

Plaintiffs must overcome strict ripeness hurdles when filing inverse condemnation claims in federal court by satisfying:

- **The exhaustion requirement.** The plaintiff must show that it first sought the state remedy for obtaining compensation for the taken property and was denied relief. This typically means the plaintiff was required to first file an inverse condemnation claim in state court.
- **The finality requirement.** The plaintiff must show that the government has reached a final decision regarding how the local regulations apply to its property.

(*Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).)

Most federal courts (and some state courts) also apply both *Williamson County* ripeness requirements to companion constitutional claims that are based on the same facts (or the same loss of property) as the takings claim. Therefore, if a court dismisses the takings claim as unripe, it may also quickly dispose of the related constitutional claims as similarly unripe. (See *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 514-16 (2d Cir. 2014).) Even in the absence of a takings claim, some circuits independently apply *Williamson County*'s finality requirement to all constitutional land use claims (see, for example, *Insomnia Inc. v. City of Memphis*, 278 Fed.Appx. 609, 613 (6th Cir. 2008); *Murphy v. New Milford Zoning Com'n*, 402 F.3d 342 (2d Cir. 2005); *Signature Properties Intern. Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1265 (10th Cir. 2002)).

Dismissing the related constitutional claims prevents plaintiffs from circumventing the *Williamson County* ripeness requirements by alleging a more generalized constitutional violation, most commonly the Fourteenth Amendment rights to procedural and substantive due process and equal protection (see, for example, *Simons v. Town of Sherman*, 2017 WL 1025169, at *4 (D. Conn. Mar. 16, 2017)). This rule applies even though generally:

- A court may find an interference with individual property rights to breach more than one provision of the Constitution (*United States v. James Daniel*, 510 U.S. 43, 49-50 (1993)).
- Different standards may otherwise govern the ripeness of stand-alone due process and equal protection claims (*Rocky Mountain Materials & Asphalt, Inc. v. Bd. of Cty. Comm'rs*, 972 F.2d 309, 310-11 (10th Cir. 1992)).

SUBSUMPTION OF RELATED CLAIMS

A minority of federal and state courts sometimes apply this anti-circumvention principle more broadly in favor of the government defendant. In addition to applying the *Williamson County* ripeness requirements to related claims, these courts may hold that the ancillary claims are entirely precluded because they are coextensive with, or subsumed by, the takings remedy. (See *Rocky Mountain Materials & Asphalt, Inc.*, 972 F.2d at 311; *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 960 (9th Cir. 2011); see also Considerations for Procedural Due Process Claims, Considerations for Substantive Due Process Claims, and Considerations for Equal Protection Claims.)

PROCEDURE FOR RAISING DEFENSE

The ripeness and subsumption arguments are both premised on the interconnected nature of the ancillary constitutional claims and the takings claim. The government asserts these arguments at the pleadings stage on a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (FRCP) (see Motion to Dismiss Stage). The government cannot raise them for the first time in a reply brief (see, for example, *FlightCar, Inc. v. City of Millbrae*, 2014 WL 2753879, at *4 (N.D. Cal. June 16, 2004)).

If the motion is unsuccessful, government counsel should:

- Include the argument as an affirmative defense in the answer.
- Raise the issue later in either:
 - a motion for summary judgment under FRCP 56; or
 - a suggestion of lack of subject matter jurisdiction under FRCP 12(h)(3) (see Summary Judgment Stage).

CONSIDERATIONS FOR PROCEDURAL DUE PROCESS CLAIMS

If a procedural due process claim focuses mostly on the property deprivation and lack of compensation rather than a lack of process that causes a separate and distinct injury, it is likely an improperly pleaded takings claim in disguise (see, for example, *DiLuzio v. Village of Yorkville*, 2014 WL 11515878, at *2-3 (S.D. Ohio Sept. 8, 2014)).

Plaintiffs commonly assert that the taking itself occurred without sufficient process, making the takings claim and any procedural due process claim essentially interrelated. Unlike the Due Process Clause, however, the Takings Clause of the Fifth Amendment does not require pre-taking notice, an opportunity to be heard, or pre-taking compensation (*Martini v. City of Pittsfield*, 2015 WL 1476768 (D. Mass. Mar. 31, 2015)) (for more information on Section 1983 procedural due process claims, see Practice Note, Section 1983 Procedural Due Process Land Use Claims ([w-004-1682](#))). The only procedure required by the Takings Clause is that a state action for inverse condemnation be available to the plaintiff (see *Pande Cameron & Co. of Seattle, Inc. v. Cent. Puget Sound Reg'l Transit Auth.*, 610 F. Supp. 2d 1288, 1309 (W.D. Wash. 2009); *Williamson Cty.*, 473 U.S. at 195 n.14).

Therefore, if the plaintiff fails to plead insufficient process separate from the taking itself, some courts will dismiss the procedural due process claim as ancillary to, and subsumed by, the plaintiff's takings claim (see *Presley v. City of Charlottesville*, 464 F.3d 480, 490 (4th Cir. 2006); *Rocky Mountain Materials & Asphalt, Inc.*, 972 F.2d at 311).

CONSIDERATIONS FOR SUBSTANTIVE DUE PROCESS CLAIMS

Substantive due process generally does not apply where a more specific constitutional provision protects against the challenged governmental action (see *Graham v. Connor*, 490 U.S. 386, 395 (1989)). While there is no blanket rule that a takings claim precludes all substantive due process claims, some district courts, particularly within the US Courts of Appeals for the Fifth and Ninth Circuits, will dismiss substantive due process claims as subsumed by the takings remedy if the claims are both premised on the lack of compensation for the property deprivation (see *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1093-94 (9th Cir. 2015); *White Oak Realty, LLC v. US Army Corp of Eng'rs*, 2016 WL 355485, at *6-7 (E.D. La. Jan. 28, 2016)).

The Fifth Circuit has held that substantive due process is not the appropriate avenue of relief for most landowner complaints and that, with rare exceptions, Takings Clause jurisprudence cannot be circumvented by artful pleading of substantive due process claims (see *Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009)). However, the Supreme Court has left open the possibility of an independent substantive due process claim where a property regulation that fails to serve any legitimate governmental objective is so arbitrary or irrational that it violates the Due Process Clause (*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005); see, for example, *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, 2005 WL 1541860, at *25-30 (Tenn. Ct. App. June 30, 2005)). For more information on defending substantive due process claims, see Practice Note, Section 1983: Substantive Due Process Land Use Claims ([w-002-4377](#)).

Substantive due process and regulatory takings claims have had a complicated and confused relationship. Courts at all levels have

intertwined aspects of the two claims, and counsel should push back against allegations in a complaint that assert:

- Substantive due process considerations as being relevant to, or dispositive of, the takings claim, such as whether the underlying government action was arbitrary or otherwise invalid (see *Lingle*, 544 U.S. at 542).
- A federal “due process takings” cause of action separate from a Fifth Amendment takings claim or a substantive due process claim (see, for example, *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (holding that the court has abandoned the distinction between takings claims and claims under a due process takings theory)).

CONSIDERATIONS FOR EQUAL PROTECTION CLAIMS

A property owner may be able to raise a successful equal protection challenge to a local land use decision in some situations (see, for example, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985)). However, plaintiffs cannot avoid the *Williamson County* requirements by recasting a takings claim as an equal protection claim (*Donohoo v. Hanson*, 2015 WL 5177968, at *6 (W.D. Wis. Sept. 2, 2015); *Muscarello v. Ogle Cty. Bd. of Comm’rs*, 610 F.3d 416, 423 (7th Cir. 2010) (“Any equal protection claim based on a taking would be unripe and subject to [the *Williamson County* requirements] in connection with the takings claim.”)).

A minority of courts may also dismiss an equal protection claim if it finds that the claim is coextensive with, and subsumed by, another constitutional claim (see, for example, *Flanagan v. Harris*, 2017 WL 729788, at *5 (C.D. Cal. Feb. 23, 2017)).

For more information on defending equal protection claims, see Practice Note, Section 1983: Equal Protection Claims ([W-002-6708](#)).

MOTION TO DISMISS STAGE

The government commonly argues in a motion to dismiss that the court should dismiss the ancillary constitutional claims:

- Under FRCP 12(b)(1) for lack of subject matter jurisdiction, because the claims are unripe under *Williamson County* (see Lack of Subject Matter Jurisdiction for Unripe Claims Under FRCP 12(b)(1)).
- Under FRCP 12(b)(6) for failure to state a claim, because the claims are either prudentially unripe under *Williamson County* or more broadly precluded and subsumed by the takings remedy (see Failure to State a Claim Under FRCP 12(b)(6)).

LACK OF SUBJECT MATTER JURISDICTION FOR UNRIPE CLAIMS UNDER FRCP 12(B)(1)

Federal courts do not have subject matter jurisdiction over unripe claims. Therefore, the government typically asserts that the court should dismiss the related constitutional claims because they are unripe under *Williamson County* in a motion to dismiss under FRCP 12(b)(1) for lack of subject matter jurisdiction. The motion must be filed before filing a responsive pleading to the complaint, although a court may dismiss an action for lack of subject matter jurisdiction at any time. For more information on filing a motion to dismiss under FRCP 12(b)(1), see Practice Note, Motion to Dismiss: Overview: Lack of Subject Matter Jurisdiction ([8-523-9648](#)).

Benefits of 12(b)(1) Motions for Government Defendants

The primary benefits to the government defendant of making a factual challenge to the court’s subject matter jurisdiction in a 12(b)(1) motion include:

- The ability to attach additional supporting evidence outside of the complaint to the motion. Attaching affidavits or other documents to the motion can rebut generic statements in the complaint that the plaintiff has met all pre-suit requirements by demonstrating that:
 - the plaintiff has not first sought and been denied compensation in state courts; or
 - the government provided information on the specific permitting or administrative appeal processes that would resolve the plaintiff’s issue, but the plaintiff did not avail itself of those remedies and chose to file suit prematurely.

For more information, see Practice Note, Motion to Dismiss: Drafting and Filing a Motion to Dismiss, Opposition, and Reply: Supporting Evidence ([1-524-1621](#)).

- The burden of proof is on the plaintiff to present further evidence in support of its position that the requirements for subject matter jurisdiction are met (see, for example, *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013); *Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 713 (D.R.I. 1994)).
- A district court being free to weigh the facts without being constrained to view them in the light most favorable to the plaintiff (see *Sentry Ins. A Mut. Co. v. Provide Commerce, Inc.*, 2016 WL 1241553, at *2 (S.D. Cal. Mar. 30, 2016)).
- The possibility in some courts of limited discovery and hearings on the jurisdictional question. No statute or rule specifies a format for evidentiary hearings on jurisdiction, so the court can use any rational mode of inquiry (*Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986)).

Unlike typical ripeness defenses, the Supreme Court has stated that the *Williamson County* requirements are prudential requirements, not jurisdictional ones (see *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053, 2062 (2013)). This means that a federal court could retain subject matter jurisdiction over a takings claim that is unripe under *Williamson County* (see, for example, *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010)).

What prudential ripeness means for a motion to dismiss is unclear, and government counsel may want to file a motion to dismiss under both FRCP 12(b)(1) and 12(b)(6).

FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6)

A motion to dismiss asserting that the related constitutional claims are more broadly precluded because they are coextensive with, and subsumed by, the takings remedy is often considered an attack on the merits of the plaintiff’s claim under FRCP 12(b)(6).

Outside of the Fifth and Ninth Circuits, most courts are reluctant to broadly dismiss the related constitutional claims as subsumed by the takings claim. However, even if the court will not consider the subsumption argument, pointing out that the related claims are essentially takings claims disguised as other constitutional claims,

much like a trojan horse, can support more direct arguments that the due process and equal protection claims fail to state a claim under FRCP 12(b)(6).

Unlike a motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1), a court determining the sufficiency of a claim must accept all non-conclusory allegations as true, and its inquiry is limited to the pleadings. For more information on filing a motion to dismiss under FRCP 12(b)(6), see Practice Note, Motion to Dismiss: Overview: Failure to State a Claim on Which Relief Can Be Granted ([8-523-9648](#)).

CONTENTS OF THE MOTION TO DISMISS

The motion to dismiss under either FRCP 12(b)(1) or 12(b)(6) should focus on minimizing the related claims as largely duplicative of the inverse condemnation claim, while highlighting the similar facts that support all of the claims.

If asserting that all of the claims are unripe, government counsel need only prove that the takings claim is unripe. Counsel need not separately apply the *Williamson County* requirements to each ancillary constitutional claim for these claims to be dismissed as unripe.

Since the ripeness argument is the most effective, motions to dismiss typically lead with it, and are followed by arguments that connect the remaining claims back to the takings remedy to convince the court that allowing the claims to move forward would circumvent the *Williamson County* requirements.

Similarity of Facts

There is no strict nationwide test for determining whether the related constitutional claims are precluded by the takings claim's lack of ripeness or the takings remedy itself. Courts generally consider whether the claims are based on the same nucleus of facts or seek identical damages for the same injury to property. Therefore, an effective motion to dismiss should compare the factual allegations supporting each claim and highlight the similarities. For example, counsel should question whether all of the claims generally involve the same:

- Government action that led to the alleged property loss, such as the same:
 - permit denial;
 - code enforcement action; or
 - quasi-judicial decision.
- Property interests of the plaintiff, such as a particular:
 - vested right; or
 - nonconforming use.
- Relief sought, specifically whether each claim seeks similar damages for the same property deprivation or independently alleges unique injuries and damages separate from the value of the property, such as:
 - commercial expectations;
 - costs incurred in seeking to obtain the permits; and
 - punitive damages.

(See, for example, *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1298 n.19 (10th Cir. 2008); *R Bend Estates II, LLC v. St. John the*

Baptist Parish, 2016 WL 4087490, at *5 (E.D. La. Aug. 2, 2016); *White Oak Realty*, 2016 WL 355485, at *6-7.)

The facts supporting the related claims do not need to be identical to the takings claim for the court to dismiss the related claims. Courts often address this inquiry in a general way, and will dismiss the related claims, even those that could arguably stand as separate claims under different theories of liability, if the claims rest on the same foundation, or nucleus of facts, as the takings claim. (See, for example, *Deem v. Village of Pomeroy*, 2014 WL 2767608, at *4-5 (S.D. Ohio June 18, 2014); *Alto Eldorado Partners v. City of Santa Fe*, 644 F. Supp. 2d 1313, 1349-50 (D.N.M. 2009).)

REMOVAL AS A WAIVER OF THE DEFENSE

Federal courts are increasingly disapproving of the practice of government defendants removing takings and related constitutional claims to federal court, only to assert in a motion to dismiss that the federal court does not have jurisdiction because the claims are unripe under the *Williamson County* exhaustion requirement (see, for example, *Race v. Bd. of Cty. Commr's*, 2016 WL 1182791, at *3 (D. Colo. Mar. 28, 2016); *River N. Props., LLC v. City & County of Denver*, 2014 WL 1247813 (D. Colo. Mar. 26, 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013)).

This strategy is typically counterproductive and transparent because the removing defendant ultimately bears the burden of proving that removal was proper. Removing a takings claim to federal court and then asserting that the federal court lacks subject matter jurisdiction will likely result in either:

- The federal court ruling that the government has waived the ripeness defense.
- The plaintiff seeking to remand the case to state court. If granted, the district court might also award attorneys' fees and costs to the plaintiff for having to litigate the government defendant's improper removal.

Subject matter jurisdiction cannot normally be conferred on a federal court by the agreement or waiver of the parties. However, many courts now hold that due to the prudential nature of the *Williamson County* inquiry, an otherwise unripe claim can be deemed ripe for subject matter jurisdiction purposes if the government waived the ripeness defense by removing the claims to federal court.

For more information on removal, see Practice Note, Removal: Overview ([3-532-4248](#)).

Federal Court May Be the Better Venue for Litigating the Related Claims

Federal courts are often the preferred venue for litigating the related Fourteenth Amendment claims, particularly those that arise from land use disputes. Aside from their familiarity with Section 1983 litigation, federal courts are generally more hostile to sitting as master zoning boards of appeal and suspicious of run-of-the-mill local disputes being categorized as violations of constitutional law. For example, the First Circuit has stated that most local planning disputes are not actionable under substantive due process, yet the court will leave "the door slightly ajar for federal relief in truly horrendous situations" (*Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992)).

Government counsel should keep in mind that if the federal court rules in the government's favor on ripeness or other jurisdictional grounds, the plaintiff will likely refile all of the same claims in state court. The government should therefore aggressively pursue alternative bases for the federal court to dismiss the related constitutional claims for failure to state a claim. A state court is typically unlikely to disturb a federal court's previous ruling that the plaintiff cannot state a basic element of the claim, such as the lack of a cognizable property interest that could support a Fourteenth Amendment due process or equal protection claim.

For more information on seeking the independent dismissal of due process and equal protection claims, see Practice Notes:

- Section 1983: Substantive Due Process Land Use Claims ([W-002-4377](#)).
- Section 1983: Procedural Due Process Land Use Claims ([W-004-1682](#)).
- Section 1983: Equal Protection Claims ([W-002-6708](#)).

SUMMARY JUDGMENT STAGE

If government counsel is unsuccessful on the motion to dismiss, counsel should list the ripeness and subsumption arguments as affirmative defenses in the answer. For more information on responsive pleadings and asserting affirmative defenses, see Practice Note, Responsive Pleadings: Answering the Complaint ([2-521-6409](#)).

Government defendants often target early discovery requests specifically to the question of the takings claim's ripeness, such as requesting that the plaintiff admit that it:

- Has not yet filed the inverse condemnation claim in state court and been denied just compensation.
- Never sought available permits, administrative appeals, or variances that could allow the desired use of the property.

For more information on sending requests for admission, see Requests for Admission in Federal Court Toolkit ([8-571-2585](#)).

Limited discovery on the alleged injuries to plaintiff's property interests and the related damages can sometimes help to convince a court that all of the claims are essentially the same as the takings claim; particularly if the facts show that the plaintiff is ultimately asserting that all of the constitutional claims injured the same property right to a similar degree.

The ripeness and subsumption arguments are typically reasserted in a motion for summary judgment under FRCP 56 (see, for example, *Ackermann Enters., Inc. v. City of Bellevue*, 2016 WL 4499659, at *5 (E.D. Ky. Aug. 24, 2016)). The court may consider the *Williamson County* ripeness arguments in the motion as a suggestion of lack of subject matter jurisdiction under FRCP 12(h)(3). Regardless, the legal arguments to the court are the same as those made at the motion to dismiss stage (see Motion to Dismiss Stage).

For more information on filing a motion for summary judgment, see Practice Note, Summary Judgment: Overview ([8-520-5163](#)).

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