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Divided U.S. Supreme Court Rejects Petition to Hear Conn. Land Use Case

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The U.S. Supreme Court has decided not to take up a Connecticut-based "takings" case in which a small company complained that the town of Durham was blocking development of a 10-acre parcel.

On April 25, the court denied Arrigoni Enterprises' petition for a writ of certiorari, though two justices favored granting cert. The company wants to put industrial buildings on the land, but has been unsuccessful for more than a decade in winning approval from Durham's land use boards. In its petition, the company asserted its situation goes to the heart of the Takings Clause of the Fifth Amendment, which prohibits the taking of private property for public use without just compensation.

The company asked the Supreme Court to reconsider and then overrule or modify the portion of its 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, which barred property owners from filing a federal takings claim in federal court until they exhaust state court remedies. While the court majority offered no explanation for its decision to deny cert, Justice Clarence Thomas used strong language in a seven-page dissent joined by Justice Anthony Kennedy.

"In *Williamson County*, the court ruled that a plaintiff's allegation that local government action resulted in a taking is not 'ripe' for review in federal court until the plaintiff 'seeks compensation through the procedures the state has provided for doing so,'" Thomas wrote. "In doing so, the court superimposed a state litigation requirement on the Fifth Amendment's Takings Clause. The Constitution does not appear to compel this additional step before a property owner may vindicate a Takings Clause claim."

According to Thomas, many plaintiffs have sought state court review in similar cases only to have defendant government entities seek to remove cases to federal courts. Once there, some defendants have moved successfully for dismissal on the grounds that the plaintiff didn't first litigate in state court. "This gamesmanship leaves plaintiffs with no court in which to pursue their claims despite *Williamson County's* assurance that property owners are guaranteed access to court at some point," Thomas wrote.

According to Thomas, *Williamson County*, in effect, "forces a property owner to shoulder the burden of securing compensation after the local government effects a taking."

The town of Durham hasn't taken possession of the land in question for any municipal project, such as a school, which is the most common eminent domain scenario. Instead, Arrigoni claims

this is a takings case because the town hasn't allowed the land acquisition and development business to develop the property, rendering it valueless.

Attorney J. David Breemer of the Pacific Legal Foundation in California, who is representing Arrigoni Enterprises, said he is disappointed with the decision. "We continue to believe that *Williamson County* imposes unjust barriers to access to the courts for property owners and that it will ultimately be overruled," Breemer said. "The dissent from denial of the petition by Justices Thomas and Kennedy solidifies that view."

Breemer said the *Williamson County* ruling has had a nationwide impact, which is why several groups, including the libertarian-leaning Cato Institute in Washington, D.C., filed amicus briefs. According to Breemer, the 1985 case has limited property owners' access to the courts, and therefore, harmed their ability to protect their constitutional rights.

Weeding Out Process

Attorney Thomas Gerarde of Howd & Ludorf of Hartford, who represents Durham, had asked the U.S. Supreme Court to deny the petition. Gerarde noted land use boards had asked Arrigoni to submit a "more modest plan" for consideration for the property, but the company has elected not to do so.

"This is a good opportunity to be reminded the Constitution doesn't protect the taking of private property – it protects against the taking of private property without just compensation," Gerarde said. "The majority of the Supreme Court continues to believe this means a takings plaintiff must still take a state law claim, here an inverse condemnation claim, and somehow be less than whole, before they can come to federal court."

In this instance, Gerarde says the statute of limitations has passed for the inverse condemnation claim, which is a lawsuit by the land owner against the state government. "One of the arguments in the dissent is that some people will never get their day in court," Gerarde said. "There is no question that the state requirement weeds out all but the most compelling cases for the federal courts, and that is the way it should be."

The property in question is on Mountain Road in Durham. It is sloped, wooded and mostly rock, and has been in the Arrigoni family since 1955. Before the property can be developed, excavation and rock crushing work is needed. In 2005, Arrigoni began seeking approvals from the town to remove rock and gravel and build light industrial buildings on the site. Its application was denied. Arrigoni appealed to state Superior Court, which upheld the permit denials. The state Appellate Court declined to review the matter.

Arrigoni went back to the town of Durham, applying for a zoning variance that would allow it to process rock on the site, but that application was also denied.

The company then turned to U.S. District Court, alleging the permit denials violated its constitutional rights, including a federal right to "just compensation for a taking." The district court held that it lacked jurisdiction because Arrigoni had not pursued financial compensation through a state inverse condemnation action, in addition to its unsuccessful state court administrative appeal.

Arrigoni appealed to the U.S. Court of Appeals for the Second Circuit, which upheld the district court's decision. It then petitioned the U.S. Supreme Court, asking it to overrule or modify the *Williamson County* decision.