

U.S. Supreme Court Asked to Weigh in On Conn. 'Takings' Case

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It has been more than a decade since a Middlefield-based company first tried to get the necessary approval from Durham's town land use boards to develop a 10-acre parcel it owns. Arrigoni Enterprises wants to construct industrial buildings on the land. Today, it remains rocky and forested, as the company hasn't had any success in getting the approvals it needs.

Now, Arrigoni Enterprises is hoping the U.S. Supreme Court will consider its case. The company has petitioned for a writ of certiorari, asserting that its situation goes to the heart of the Takings Clause of the Fifth Amendment to the U.S. Constitution, which prohibits the taking of private property for public use without just compensation.

The company is asking 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.

The town of Durham hasn't taken possession of the acreage for any municipal project, such as a school, which is the most common eminent domain scenario. Instead, Arrigoni asserts this is a "takings" case because the town hasn't allowed it to develop the property, rendering it valueless.

Attorneys Richard Carella of Updike, Kelly & Spellacy in Hartford and J. David Breemer with the Pacific Legal Foundation in California are representing Arrigoni Enterprises. According to Breemer, Arrigoni Enterprises is a small land acquisition and development business.

"They can't get a permit from the town, and they can't get a hearing in state or federal court because of bizarre procedural rules that apply only to property owners," Breemer said. "This is inconsistent with fundamental fairness and due process of law."

Supreme Court justices are scheduled to discuss the petition on April 1, and the parties indicated they expected to learn quickly whether they will take the case.

'Severely Limited Access'

The case is garnering interest from several national organizations. The Institute for Justice in Virginia, Center for Constitutional Jurisprudence in California, the Cato Institute in Washington

D.C., and the National Federation of Independent Business Small Business Legal Center in Washington D.C., all filed amicus briefs.

Breemer asserted the *Williamson County* case has had a nationwide impact, which is why this petition has garnered broad attention. "There is broad consensus that the *Williamson County* rule is both wrong and harmful," Breemer said. "It has severely limited access to the courts for property owners and thus badly harmed their ability to protect their constitutional rights."

What has happened in the Arrigoni case is a situation that happens "over and over again," according to Breemer.

"Property owners deserve their day in court, but due to *Williamson County*, this can take more than a decade or simply not be an option at all," Breemer said.

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

"Petitioner does no more than disregard the clear dictate of the Fifth Amendment that a taking in and of itself does not give rise to a constitutional injury, rather it is the denial of just compensation upon which a constitutional violation arises," Gerarde wrote, in a brief. "Because the petitioner has not sought just compensation, it has not suffered a constitutional violation."

According to Gerarde, the company never got any final decision from Durham land use officials about what it could and couldn't do on the property. "A scaled back project would be more suitable," Gerarde said.

Light Industrial Uses

The land on Mountain Road in Durham is sloped, wooded and mostly rock, and has been in the Arrigoni family since 1955. Before the property could be developed, excavation and rock-crushing work would have to be performed, court documents show.

The land is zoned as part of the town's "Design Development District," or DDD zone, which allows certain light industrial uses with a special exception permit. The land is surrounded by parcels which have been developed, including through excavation. One neighboring property has an active quarry operation, according to the Arrigoni petition.

In 2005, Arrigoni began seeking the necessary approval from the town to build three light industrial buildings on the site, with plans to use one of the buildings for its own business. It submitted a development plan which included removing and processing about 70,000 cubic yards of rock and gravel. Its application was denied.

Arrigoni challenged the denial in state Superior Court, which upheld the permit denials. While Arrigoni alleged a constitutional takings violation, the trial court never addressed this claim, according to the petition. Arrigoni attempted to appeal to the state Appellate Court, but it 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 in the DDD zone, but that application was also denied.

The company next filed a complaint against the town in 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.

In the pending U.S. Supreme Court petition, Arrigoni is asking the court to overrule or modify the *Williamson County* decision. In the alternative, it asks the court to consider whether federal courts can and should waive any state litigation requirement.

"In *Williamson County*, [the Supreme] Court created an unprecedented and regressive procedural hurdle for property owners seeking to vindicate their Fifth Amendment right to be free from an uncompensated taking of property," the petition states. It argues that the *Williamson* case has "declared that a landowner must unsuccessfully 'seek compensation through the procedures the state has provided for doing so' before claiming the government has unconstitutionally taken private property."

Arrigoni Enterprises asserts this has caused "dysfunction, conflict and injustice" in the area of federal property rights litigation. "When the government makes a final decision denying property use and has no mechanism or intent to provide compensation, a constitutional takings claim is fit for federal review," the petition asserts.

It claims some federal circuit courts now treat the state litigation rule as an advisory concept that may be ignored while others continue to enforce it as a rigid jurisdictional issue.

Ilya Shapiro, senior fellow in constitutional studies with the Cato Institute in Washington, D.C., who co-authored an amicus brief, said the institute's Constitutional Studies Center routinely files amicus briefs on issues relating to individual liberty and constitutionally limited government. The institute's brief states: "Not only does this state-litigation rule severely delay the landowner's remedy; in most cases, it means the taking will go unremedied altogether. One reason to have federal courts is to ensure that citizens whose rights have been violated by their state can have their rights vindicated by a truly impartial judge."