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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NORTH MILL STREET, LLC,

Plaintiff - Appellant,

v.

THE CITY OF ASPEN; THE ASPEN CITY COUNCIL,

Defendants - Appellees.

No. 20-1130

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CV-00188-PAB-GPG)

Christopher D. Bryan (David L. Lenyo, with him on the briefs), of Garfield & Hecht, Aspen, Colorado, for Plaintiff - Appellant.

Josh A. Marks, Berg Hill Greenleaf & Ruscitti, Boulder, Colorado, for Defendants - Appellees.

Before **HOLMES**, **BALDOCK**, and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

North Mill Street, LLC ("NMS") owns commercial property in Aspen, Colorado. It sued the City of Aspen and the Aspen City Council (collectively, the "City") in federal court. The complaint alleged several claims, including that the City's changes to Aspen's

zoning laws and denial of a rezoning application caused a regulatory taking of NMS's property without just compensation in violation of the Takings Clause of the Fifth Amendment. The district court concluded NMS's action was not ripe under Article III of the Constitution because NMS has not obtained a final decision from the City on how the property may be developed. The court thus dismissed the case for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm on the alternative ground that NMS's claims lack prudential ripeness.[1]

I. BACKGROUND

A. *Factual History*

NMS owns Mill Street Plaza ("MSP"), a parcel of commercial real estate in Aspen, Colorado. MSP is located within a Service Commercial Industrial ("SCI") zoning district. When NMS's predecessor in interest purchased the property in 2007, free

[1] This opinion contains many acronyms. To aid the reader, we list them as follows:

Acronym	Definition
AACP	Aspen Area Community Plan
CCMP	Civic Center Master Plan
CDD	Community Development Department
FMR	Free Market Residential
LUC	Land Use Code
MSP	Mill Street Plaza
NMS	North Mill Street
NMSI	North Mill Street Investors
P&Z	Planning and Zoning
PD	Planned Development
SCI	Service Commercial Industrial

market residential ("FMR") development was allowed in the SCI zone as a "conditional" or "ancillary" use.[2] Of the four SCI-zoned properties in Aspen, only MSP lacked any FMR units. NMS alleged that without the opportunity to develop FMR units at MSP, "future redevelopment of the Mill Street Plaza is not economically viable." App., Vol. 1 at 60.

1. **Ordinance 29**

In 2017, the Aspen City Council adopted Ordinance 29. Ordinance 29 amended Chapter 26.710 of the Aspen Land Use Code ("LUC") to eliminate FMR housing as a permitted conditional use within the SCI zoning district.[3]

Section 26.310.040 of the LUC provides the standards the City must consider when amending the LUC, as it did with Ordinance 29. The standards include:

- "Whether the objectives of the proposed amendment further[] an adopted policy, community goal, or objective

[2] NMS purchased MSP in 2018 from North Mill Street Investors ("NMSI"). In 2007, NMSI purchased the property for the purpose of "redeveloping it as a mixed use building, incorporating service, commercial and light industrial uses, together with free market residential units." App., Vol. 1 at 52. NMSI assigned to NMS "all of its rights, interests and claims pertaining to Mill Street Plaza, including, but not limited to, those reflected in the Rezoning Application." *Id.* at 56. For simplicity, we will refer to NMS and NMSI collectively as "NMS" in this opinion.

[3] The LUC governs zoning districts in Aspen and is codified as Title 26 of the Aspen Municipal Code. *See* Aspen, Colo. Code, § 26.104.010 (2021), https://library.municode.com/co/aspen/codes/municipal_code.

"Federal Rule of Evidence 201 authorizes federal courts to take judicial notice of adjudicative facts, including provisions in municipal ordinances, at any stage of the proceedings." *Boyz Sanitation Serv., Inc. v. City of Rawlins*, 889 F.3d 1189, 1196 n.9 (10th Cir. 2018).

> of the City including, but not limited to, those stated in the Aspen Area Community Plan," and
>
> - "Whether the objectives of the proposed amendment are compatible with the community character of the City and in harmony with the public interest and the purpose and intent of this Title."

LUC § 26.310.040.

In the resolution adopting Ordinance 29, the City Council found that the amendments to the LUC prohibiting FMR development in the SCI zone met or exceeded these standards. App., Vol. 1 at 101.

2. **Rezoning Application**

After Ordinance 29 was adopted, NMS filed a rezoning application with the City's Community Development Department ("CDD").[4] The application requested that the City rezone MSP to a Mixed Use zoning district. Parcels that are zoned for Mixed Use may combine commercial uses with FMR and affordable housing units.

The CDD staff prepared a report (the "CDD Report") recommending denial of the rezoning application. The CDD Report considered the review criteria for rezoning set forth in Section 26.310.090 of the LUC. That section provides, "In reviewing an amendment to the Official Zone District Map, the City Council and the Planning and Zoning Commission shall consider," among other things:

[4] NMSI originally filed the rezoning application. NMS purchased MSP from NMSI in 2018 while the rezoning application was pending.

- "Whether the proposed amendment is compatible with surrounding zone districts and land uses, considering existing land uses and neighborhood characteristics;" and
- "Whether the proposed amendment is consistent and compatible with the community character in the City and in harmony with the public interest and the intent of [the LUC]."

LUC § 26.310.090(a), (d). The staff found that the rezoning proposal failed to meet either criterion. App., Vol. 2 at 38-41.

The CDD Report also found the loss of SCI-zoned land would run counter to the goals of the "Aspen Area Community Plan" ("AACP") and the "Civic Center Master Plan" ("CCMP"). According to the Report, "[t]hough not a regulatory document, the [AACP] provides aspirational guidance for long term goals of the Aspen community." *Id.* at 30. The CCMP, "which was adopted by the City Council in 2006, is a regulatory document that contains a section relating to sustainable locally serving businesses." *Id.* at 30.

The City's Planning and Zoning ("P&Z") Commission, having considered the CDD Report, adopted a resolution recommending that the City Council should deny the rezoning application (the "P&Z Resolution"). The P&Z Resolution agreed with and adopted the CDD Report's findings. It found:

> [P]ursuant to Land Use Code Section 26.310.090(A) the rezoning proposal is not compatible with surrounding zone districts and land uses, when considering existing land use and neighborhood characteristics; and, the Planning and Zoning Commission further finds that the proposed rezoning is inconsistent with the goals and statements of the Aspen Area Community Plan (AACP), the 2006 Civic Center Master Plan, and the 2018 Commercial, Lodging, and Historic

> District Design Standards and Guidelines—River Approach Area . . . .

Id. at 52. The City Council, acting on the P&Z Commission's recommendation, denied the rezoning application.

3. **PD Review**

Planned Development ("PD") review is a process that "allows for the site specific development of mixed land uses in circumstances that warrant variation from the standard permitted zone district land uses." App., Vol. 1 at 96-97.

> The purpose of Planned Development review is to encourage flexibility and innovation in the development of land which, [among other things,] [p]romotes the purposes, goals and objectives of applicable adopted regulatory plans, [and] [a]chieves a more desirable development pattern, a higher quality design and site planning, a greater variety in the type and character of development and a greater compatibility with existing and future land uses than would be possible through the strict application of the zone district provisions.

LUC § 26.445.010. The LUC sets out a detailed procedure through which a landowner may submit a proposal for a specific Planned Development. *See id.* ch. 26.445.

In PD review, "[a] development application may request variations in the allowed uses permitted in the zone district." *Id.* § 26.445.060. Section 26.445.060 of the LUC provides that the City "shall consider" the following four criteria in determining whether to vary existing zoning restrictions for a Planned Development:

> (a) The proposed use variation is compatible with the character of existing and planned uses in the project and surrounding area. In meeting this standard, consideration shall be given to the existence of similar uses in the immediate vicinity, as well as how the proposed uses may enhance the project or immediate vicinity.

> (b) The proposed use variation is effectively incorporated into the project's overall mix of uses. In meeting this standard, consideration shall be given to how the proposed uses within a project will interact and support one another.
>
> (c) The location, size, design, and operating characteristics of the proposed use variation minimizes adverse effects on the neighborhood and surrounding properties.
>
> (d) The proposed use variation complies with applicable adopted regulatory plans.

Id. Section 26.445.060 further specifies that "[t]he permitted and conditional uses allowed on the property according to its zoning shall be used as a guide, but not an absolute limitation, to the land uses which may be considered during the review." *Id.*

Although NMS applied to rezone MSP for Mixed Use, it has not submitted a development application for PD review.

B. ***Procedural History***

Rather than seek PD review, NMS sued the City of Aspen and the Aspen City Council in federal district court.[5] NMS's amended complaint asserted Fifth and Fourteenth Amendment substantive due process, equal protection, and regulatory takings claims under 42 U.S.C. § 1983. In addition to relief under § 1983, NMS requested a declaratory judgment that Ordinance 29 is invalid and unenforceable, and a permanent

[5] In 2019—with the rezoning application still pending—NMS initially commenced a state law inverse condemnation action in Colorado state court. At the time, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), required that a plaintiff bring an inverse condemnation action in state court before asserting a Takings Clause claim in federal court. The Supreme Court has since overruled that requirement in *Knick v. Township of Scott*, *Pennsylvania*, 139 S. Ct. 2162 (2019).

injunction against its enforcement. The amended complaint also asserted a "Reverse Spot Zoning and/or Piecemeal Downzoning" claim under "the United States and Colorado Constitutions, state statutes, the City of Aspen Home Rule Charter, and City of Aspen Municipal ordinances." App., Vol. 1 at 33-34.

The City moved to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(1), arguing that NMS's claims were not ripe and the court therefore lacked subject matter jurisdiction.[6] It argued that the City Council had "not definitively determined if free market residential uses are permissible at Mill Street Plaza" because NMS had not yet pursued PD review. *Id.* at 79.

The district court agreed with the City and dismissed the amended complaint without prejudice for lack of subject matter jurisdiction under Rule 12(b)(1).[7]

[6] The City also moved under Rule 12(b)(6), arguing that NMS failed to state viable claims for relief under § 1983. The district court did not reach that argument.

[7] The district court concluded that, because NMS's Takings Clause claim is unripe, all of NMS's remaining claims fall with it. As we explain later in this opinion, due process and equal protection claims that rest upon the same facts as a concomitant takings claim are subject to the same ripeness requirements as the takings claim. *See Schanzenbach v. Town of La Barge*, 706 F.3d 1277, 1282-83 (10th Cir. 2013). NMS has not articulated an independent legal or factual basis for its "reverse spot zoning" claim. To the extent that claim was premised on state law, the district court declined to exercise supplemental jurisdiction over it.

II. DISCUSSION

A. *Legal Background*

1. Regulatory Takings

The Fifth Amendment's Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Supreme Court has recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). The Court has identified two categories of regulatory action that are "per se" takings: (1) "where government requires an owner to suffer a permanent physical invasion of her property—however minor," and (2) "regulations that completely deprive an owner of '*all* economically beneficial use' of her property." *Id.* at 538 (alteration omitted) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

Outside of these categories, when a regulation

> impedes the use of property without depriving the owner of all economically beneficial use, a taking may still be found based on a "complex of factors," including (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action.

Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). "The general rule . . . is that while property may be regulated to a

certain extent, if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

2. **Ripeness of a Takings Claim**

a. *The finality requirement*

Ripeness doctrine draws "both from Article III limitations on judicial power and prudential reasons for refusing to exercise jurisdiction." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1092 (10th Cir. 2018) (quotations omitted). Article III and prudential ripeness are both "concerned with whether a case has been brought prematurely, but they protect against prematureness in different ways and for different reasons." *Simmonds v. I.N.S.*, 326 F.3d 351, 357 (2d Cir. 2003).

Until recently, the Supreme Court recognized "two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court." *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 733-34 (1997). In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court held that a regulatory takings claim is not ripe until the plaintiff has (1) received a "final decision regarding the application of the [challenged] regulations to the property at issue" from "the government entity charged with implementing the regulations," and (2) sought "compensation through the procedures the State has provided for doing so." *Id.* at 186, 194. In 2019, the Court overruled the second requirement in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019). But *Williamson County*'s "finality" requirement remains. *Id.* at 2169.

The Supreme Court recently reaffirmed that "[w]hen a plaintiff alleges a taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision." *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2228 (2021) (per curiam) (quoting *Suitum*, 520 U.S. at 737). This finality requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum*, 520 U.S. at 738. "A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo*, 533 U.S. at 618 (citations omitted). "These matters cannot be resolved in definitive terms until a court knows 'the extent of permitted development' on the land in question." *Id.* (quoting *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 351 (1986)). "After all, until the government makes up its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation." *Pakdel*, 141 S. Ct. at 2228.

The finality requirement is satisfied when "there is no question about how the regulations at issue apply to the particular land in question." *Id.* at 2230 (alterations omitted) (quoting *Suitum*, 520 U.S. at 739). A regulatory takings claim is therefore likely to have ripened once "[(1)] it becomes clear that the agency lacks the discretion to permit any development, or [(2)] the permissible uses of the property are known to a reasonable degree of certainty." *Palazzolo*, 533 U.S. at 620.

Generally, a developer must "at least 'resort to the procedure for obtaining variances and obtain a conclusive determination by the [agency] whether it would allow' the proposed development, in order to ripen its takings claim." *Suitum*, 520 U.S. at 733 (alterations and citation omitted) (quoting *Williamson Cnty.*, 473 U.S. at 193); *see also Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1174 (10th Cir. 2011) ("First, there must be a final decision about how a regulation will be applied to the property in question, including whether the implementing administrative body will grant any waiver or variance."). But the Supreme Court has also instructed us to "bear in mind the purpose that the final decision requirement serves," explaining that "ripeness jurisprudence imposes obligations on landowners because a court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *Palazzolo*, 533 U.S. at 622 (quotations and alteration omitted). Thus, "[r]ipeness doctrine does not require a landowner to submit applications for their own sake." *Id.*

The Supreme Court recently explained that the "finality requirement is relatively modest" and "nothing more than *de facto* finality is necessary." *Pakdel*, 141 S. Ct. at 2230. It is not an administrative exhaustion requirement. *Id.* at 2231. That is, it does not require "compliance with an agency's deadlines and other critical procedural rules." *Id.* at 2230 (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)). But "a plaintiff's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision." *Id.* at 2231.

b. *Futility*

Some of our sister circuits have recognized futility as an "exception" to the *Williamson County* final decision requirement.[8] We have never explicitly done so. In *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, we assumed without deciding that futility may be an exception to the final decision requirement. 874 F.2d 717, 721-22 (10th Cir. 1989), *abrogated on other grounds by Fed. Lands Legal Consortium ex rel. Robart Est. v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999). We also followed that course in an unpublished decision. *See Dakota Ridge Joint Venture v. City of Boulder*, 162 F.3d 1172 (Table), 1998 WL 704694 (10th Cir. 1998) (unpublished).

B. ***Analysis***

We first discuss (1) whether the district court lacked subject matter jurisdiction over NMS's claims for lack of ripeness. As explained below, because *Williamson County*'s finality requirement is prudential, not jurisdictional, we conclude that the district court erred by dismissing the amended complaint for lack of jurisdiction. We then address (2) whether NMS's claims nonetheless should be dismissed due to lack of

[8] *See Freeman v. United States*, 875 F.3d 623, 628 (Fed. Cir. 2017) ("A failure to secure a final decision may be excused under the futility exception where an agency's decision makes clear that pursuing remaining administrative remedies will not result in a different outcome." (quotations and alteration omitted)); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349 (2d Cir. 2005) (A property owner "need not pursue [further administrative action] when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied."); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 93 n.5 (1st Cir. 2003); *Eide v. Sarasota Cnty.*, 908 F.2d 716, 726 (11th Cir. 1990); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987).

prudential ripeness, and we conclude they should. Finally, we consider (3) NMS's arguments concerning its non-takings claims. Because all of NMS's claims are prudentially unripe, we affirm the district court's dismissal of the amended complaint.

1. **Article III Jurisdiction**

The district court concluded that it lacked subject matter jurisdiction over NMS's claims because NMS has not pursued PD review and thus has not received a "final decision" from the City. The court therefore dismissed the amended complaint under Rule 12(b)(1). Although we agree that NMS has failed to satisfy *Williamson County*'s finality requirement, we do not agree that the district court lacked Article III subject matter jurisdiction. But we hold dismissal was proper for lack of prudential ripeness.

a. *Is the* Williamson County *finality rule jurisdictional?*

The Supreme Court has said the existence of a "discretionary" procedure by which a takings plaintiff "may regain . . . beneficial use of his land goes only to the prudential 'ripeness'" of his challenge. *Lucas*, 505 U.S. at 1013. The Court later described *Williamson County*'s ripeness requirements as "two independent prudential hurdles." *Suitum*, 520 U.S. at 733-34. And the Court has recognized, in addressing *Williamson County*'s (now defunct) state-litigation requirement, that such prudential considerations are "not, strictly speaking, jurisdictional." *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 (2013) (citing *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 729 & n.10 (2010)). This is so because a claim is "ripe insofar as Article III standing is concerned" when the plaintiff "has been deprived of property." *Stop the Beach Renourishment*, 506 U.S. at 729 n.10; *see Horne*, 569 U.S. at 526 n.6 ("A 'Case'

or 'Controversy' exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court.").[9]

In *Bateman v. City of West Bountiful*, we stated that "whether a claim is ripe for review bears on the court's subject matter jurisdiction under Article III of the Constitution," and "a ripeness challenge, like most other challenges to a court's subject matter jurisdiction, is treated as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)." 89 F.3d 704, 706 (10th Cir. 1996). We then applied the *Williamson County* ripeness test within this jurisdictional framework, without referencing the Supreme Court's earlier statement in *Lucas* about prudential ripeness. *Id.* at 706-08; *see*

[9] The majority of circuit courts that have addressed the issue also have described *Williamson County*'s ripeness requirements as prudential rather than jurisdictional. *See Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1169 (9th Cir. 2020), *rev'd on other grounds*, 141 S. Ct. 2226 (2021) ("Because *Williamson County*'s ripeness requirements are prudential, not jurisdictional, we do have some discretion whether to impose them."); *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014) ("Because *Williamson County* is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case." (quotations omitted)); *Sansotta v. Town of Nags Head*, 742 F.3d 533, 545 (4th Cir. 2013) (same); *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011) ("[T]he Supreme Court has . . . explicitly held that *Williamson County*'s ripeness requirements are merely prudential, not jurisdictional."); *Peters v. Vill. of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) ("*Williamson County's* ripeness requirements are prudential in nature.").

But see Snaza v. City of Saint Paul, 548 F.3d 1178, 1182 (8th Cir. 2008) ("[W]e have held that *Williamson County* is jurisdictional."); *Perfect Puppy, Inc. v. City of E. Providence*, 807 F.3d 415, 420-21 (1st Cir. 2015) (noting that the First Circuit has described *Williamson County* as jurisdictional, but "confess[ing] that we are not 100% sure that the state-exhaustion requirement *actually* is jurisdictional"); *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1411-12 (2016) (Thomas, J., dissenting from denial of cert.) (identifying split among courts of appeals).

also Rocky Mountain Materials & Asphalt, Inc. v. Bd. of Cnty. Comm'rs of El Paso Cnty., 972 F.2d 309, 311 (1992) (stating, without referencing *Lucas*, that a procedural due process claim identical to a takings claim "should have been dismissed for lack of jurisdiction on ripeness grounds"). But in cases decided after *Bateman*, the Supreme Court has continued to describe both *Williamson County* requirements as "prudential hurdles." *Suitum*, 520 U.S. at 733-34; *Horne*, 569 U.S. at 526.[10]

The tension between *Bateman* and Supreme Court precedent has caused significant confusion in our circuit. In *SK Finance SA v. La Plata County, Board of County Commissioners*, we described *Williamson County*'s ripeness requirements as "bear[ing] on the court's subject matter jurisdiction." 126 F.3d 1272, 1275-76 (10th Cir. 1997) (quoting *Bateman*, 89 F.3d at 706). Then, in *B. Willis, C.P.A., Inc. v. BNSF Railway Corp.*, we treated *Williamson County* as prudential, stating that where a plaintiff "asserts a 'genuine case or controversy,' ripeness implicates only prudential concerns." 531 F.3d 1282, 1299 n.20 (10th Cir. 2008). And in *Alto Eldorado Partnership v. County*

[10] *Bateman* was decided when courts, including the Supreme Court, were "sometimes . . . profligate in [their] use of [jurisdictional terminology]." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006). "[T]he Supreme Court has instructed courts to give 'no precedential effect' to such 'drive-by jurisdictional rulings.'" *Sinclair Wyo. Refin. Co. v. A&B Builders, Ltd.*, 989 F.3d 747, 782 n.26 (10th Cir. 2021) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). Cases that "employ the jurisdictional label with little or no analysis" are "exactly the sort of 'drive-by jurisdictional rulings' the Court tells us to view with a jaundiced eye." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1159 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring). Such rulings "too easily can miss the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnik*, 559 U.S. 154, 161 (2010) (quotations and alteration omitted).

of Santa Fe, we acknowledged the Supreme Court's "characterization of the *Williamson County* requirements as 'prudential,'" but nonetheless affirmed the district court's Rule 12(b)(1) dismissal. 634 F.3d at 1179-80 (2011).

Some district courts within our circuit, following Supreme Court precedent, have treated *Williamson County* as prudential. *E.g. River N. Props., LLC v. City & Cnty. of Denver*, No. 13-cv-1410-CMA-CBS, 2014 WL 1247813, at *4-*6 (D. Colo. Mar. 26, 2014); *Race v. Bd. of Cnty. Comm'rs of the Cnty. of Lake*, No. 15-cv-1761-WJM-KLM, 2016 WL 1182791, at *2 (D. Colo. Mar. 28, 2016); *Lech v. Jackson*, No. 16-cv-01956-PAB-MJW, 2018 WL 10215862, at *5 (D. Colo. Jan. 8, 2018). But others have relied on *Bateman* to dismiss takings claims for lack of subject matter jurisdiction under Rule 12(b)(1) when *Williamson County* was not satisfied. *See River N. Props.*, 2014 WL 1247813 at *5 n.5 (collecting cases).

The Supreme Court's statements in *Lucas*, *Suitum*, and *Horne* control. "When the Supreme Court speaks, it (of course) supercedes our prior case law." *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1163 (10th Cir. 2010) (en banc).[11] Although decisions of prior panels, absent en banc consideration, generally bind us, that is not so when a "subsequent Supreme Court decision contradicts or invalidates our prior analysis."[12] *United States v.*

[11] To the extent the statements in any of these cases are dicta, we are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (quotations omitted).

[12] *Lucas* was decided before *Bateman*, but *Bateman* did not squarely address or consider the distinction between prudential and jurisdictional ripeness. Later Supreme

Salazar, 987 F.3d 1248, 1254 (10th Cir. 2021) (quotations omitted). We follow the Supreme Court decisions and hold that *Williamson County*'s ripeness test is prudential, not jurisdictional.

b. *Article III ripeness*

Unlike the district court, we conclude that NMS's allegations are sufficient to satisfy Article III ripeness requirements.

"If a threatened injury is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied." *Awad v. Ziriax*, 670 F.3d 1111, 1124 (10th Cir. 2012) (quotations and alteration omitted). "Article III standing requires the plaintiff to 'have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2020) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual and imminent, not conjectural or hypothetical." *Id.* (quotations omitted).

Whether or not the City's adoption of Ordinance 29 and denial of NMS's rezoning application caused a regulatory taking, NMS adequately alleged that it suffered economic injury that is fairly traceable to those decisions. Ordinance 29 places NMS at a

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Court cases—such as *Suitum* and *Horne*—clarified that the Supreme Court meant what it said in *Lucas*: *Williamson County* is prudential, not jurisdictional.

disadvantage compared to owners of other SCI-zoned properties that already have FMR development. NMS alleged that Ordinance 29's restrictions make it more difficult to find suitable tenants, resulting in a higher than average vacancy rate. And NMS cannot build FMR units—which it alleged is the only way to make MSP economically viable—unless it pursues a costly and time-consuming PD application. The Supreme Court has routinely recognized that a likelihood of economic injury resulting from governmental action that changes market conditions is sufficient to satisfy Article III justiciability requirements. *E.g.*, *Clinton v. City of New York*, 524 U.S. 417, 432-33 (1998). NMS's claims are therefore constitutionally ripe.

2. **Prudential Ripeness**

The district court erred by dismissing NMS's complaint for lack of jurisdiction under Rule 12(b)(1), but we otherwise agree with the court's ripeness analysis and affirm on the alternative ground that NMS's claims are prudentially unripe. *See VR Acquisitions, LLC v. Wasatch Cnty.*, 853 F.3d 1142, 1146 (10th Cir. 2017) ("[D]espite the district court's explicit reference to Article III standing, we conclude the district court actually dismissed based on a finding that VRA lacks prudential standing."); *Brumfiel v. U.S. Bank*, 618 F. App'x 933, 936 (10th Cir. 2015) (unpublished) (affirming Rule 12(b)(1) dismissal without prejudice on alternative ground that plaintiff lacked prudential standing) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)).

NMS's regulatory takings claim is not prudentially ripe. Although its rezoning application was denied, "avenues still remain for the government to clarify or change its decision." *Pakdel*, 141 S. Ct. at 2231. Specifically, NMS has not obtained a "final

decision" from the City because it has not yet submitted a development proposal for PD review.

a. *Rule 12(b)(6) and standard of review*

Prudential ripeness is properly analyzed under Rule 12(b)(6) rather than Rule 12(b)(1) because it does not implicate subject matter jurisdiction. *See VR Acquisitions*, 853 F.3d at 1146 n.4 (collecting cases); *Kerr v. Polis*, 930 F.3d 1190, 1194 (10th Cir. 2019) ("Plaintiffs argue that in light of the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the district court erred in examining these prudential concerns on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. We agree."), *vacated & reh'g en banc granted* 977 F.3d 1010 (2020); *Sherman v. Town of Chester*, 752 F.3d 554, 560-61 (2d Cir. 2014) (analyzing *Williamson County* ripeness under Rule 12(b)(6)); *Bowlby v. City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012) (same).

Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1118 (10th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). NMS bears the burden of showing that its claims are prudentially ripe for judicial review. *See Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1064 (10th Cir. 2012). We review the district court's order of dismissal premised on lack of prudential ripeness de novo. *See Alto Eldorado P'ship*, 634 F.3d at 1173.

b. *Futility and finality*

NMS urges us to adopt a "futility exception" to *Williamson County*'s finality requirement and thereby excuse its failure to pursue the PD process. We think, however, that futility is better viewed as part of the finality analysis rather than an exception to the finality requirement. *Williamson County* requires "nothing more than *de facto* finality." *Pakdel*, 141 S. Ct. at 2230. A plaintiff may demonstrate *de facto* finality by showing (1) "the agency lacks the discretion to permit any development," or (2) "the permissible uses of the property are known to a reasonable degree of certainty." *Palazzolo*, 533 U.S. at 620. The finality requirement does not require landowners to exhaust administrative procedures, or to "submit applications for their own sake." *Id.* at 621. Instead, a "final decision" has been reached and a regulatory takings claim becomes prudentially ripe for judicial resolution "[o]nce the government is committed to a position." *Pakdel*, 141 S. Ct. at 2230. So a showing that pursuit of further administrative relief would be futile would satisfy the finality requirement.[13]

c. *Application*

This case should be dismissed on prudential ripeness grounds because NMS has failed to adequately plead that "the agency lacks the discretion to permit any

[13] In practice, the futility analysis is largely the same whether it is cast as an "exception" to finality, as our sister circuits have held, or as part of the determination of finality itself. As the Sixth Circuit has explained, "[t]he 'futility exception' to the threshold requirement of finality developed by the Ninth Circuit is but another way of articulating [the final decision analysis]. . . . In these cases, 'futility' is tantamount to the requirement of finality." *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1363 (6th Cir. 1992) (citations omitted). We agree.

development, or the permissible uses of the property are known to a reasonable degree of certainty." *Palazzolo*, 533 U.S. at 620.

Drawing on *Palazzolo*, NMS argues that (i) pursuing PD would be futile because the City lacks discretion, as a matter of municipal law, to allow any FMR development at MSP; and (ii) the City's actions and statements make it reasonably certain that no FMR development will be allowed at MSP—that is, that the City has "dug in its heels." *See Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349 (2d Cir. 2005). Neither argument is persuasive.[14]

i. Discretion

In NMS's view, the City lacks discretion to approve FMR development through the PD process because (1) Ordinance 29 prohibits FMR development and (2) the City is bound by the findings it made in denying the rezoning application. We disagree.

1) Ordinance 29

The LUC, as amended by Ordinance 29, states, "No new Free-Market Residential units may be established" within the SCI zone. App., Vol. 1 at 110. NMS argues this language forecloses the City from approving any FMR development, including through the PD process. But nothing in Ordinance 29 eliminated or changed the PD process or standards for PD review, which are codified in a different section of the LUC. *See* LUC ch. 26.445.

[14] NMS's "finality" and "futility" arguments are largely duplicative, further demonstrating that the question of futility merges into the finality analysis. *Compare*, Aplt. Br. at 16-23, *with id.* at 29-34.

Before Ordinance 29, FMR development was allowed for MSP as a "conditional use" subject to City review and approval under Chapter 26.425 of the LUC. Ordinance 29 removed this avenue for potential FMR development at MSP. But it did not close the door altogether. The extent of FMR development that will ultimately be allowed on the property is an open question, notwithstanding Ordinance 29, because the City retains discretion to approve a use variation from the SCI zoning regulations through the PD process.[15]

2) Rezoning findings

The CDD Report and the P&Z Resolution included findings that FMR development at MSP is not compatible with the City's "community character" or surrounding land uses, and that such development would be inconsistent with the AACP and CCMP.[16] NMS contends these findings closely mirror two of the criteria for granting a variance in the PD process:

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[15] In its reply brief and at oral argument, NMS argued that it "cannot seek a variance from the permitted uses within the SCI district under the LUC's variance provisions." Aplt. Reply Br. at 4; Oral Arg. at 3:05-4:30. It relies on LUC § 26.314.030(B), which states that "variances" from permitted uses may be granted only for the temporary off-site location or storage of materials, structures, or construction equipment. But that has no bearing on the availability of a "use variation" through the PD process, which the LUC provides for in a separate section. *See* LUC § 26.445.060.

[16] When evaluating the sufficiency of a complaint under Rule 12(b)(6), we may consider "documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Wasatch Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (quotations omitted); *see also Brokers' Choice of Am. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 & n.22 (10th Cir. 2017).

- "The proposed use variation is compatible with the character of existing and planned land uses in the project and surrounding area," and
- "The proposed use variation complies with applicable adopted regulatory plans."

LUC § 26.445.060(a), (d). NMS therefore asserts the rezoning findings are fatal to any future PD application that includes FMR development at MSP. We disagree for two reasons.

First, nothing in the LUC prohibits the City from revisiting the findings and recommendations made by the CDD staff. NMS has not explained why staff findings made during the rezoning process would bind the City in the PD process. The purpose of PD review is to "encourage flexibility and innovation in the development of land" through holistic consideration of concrete development proposals. LUC § 26.445.010. Findings made in the context of a proposal to rezone MSP as Mixed Use—which would have allowed virtually unfettered FMR development as well as other commercial uses—were not addressed to a more narrow or concrete PD proposal. The CDD Report and the P&Z Resolution found that rezoning the property as Mixed Use would be incompatible with community character and applicable regulatory documents. They did not find that allowing *any* FMR housing would be incompatible.[17]

[17] NMS relies on a single statement in the CDD Report concerning the incompatibility of FMR development with the CCMP. The full-quoted sentence states: "Though the application does not include a development plan and is solely a request to rezone the subject properties, it should be noted that free market residential development is inconsistent with the direction of the Civic Center Master Plan." App., Vol. 2 at 31.

Second, even if the City were bound to defer to the earlier findings when reviewing a PD proposal, it would still have discretion to grant a use variation. The criteria for granting a use variation through PD review are non-mandatory guidelines. The City does not need to find every factor is satisfied before granting a variation. Section 26.445.060 provides that the City "shall consider" the applicable standards for deviating from permitted and conditional uses. The LUC does not make any one criterion or combination of criteria dispositive.

NMS argues the City must find that any PD application meets all four criteria we set forth above, and that failure to meet any is fatal to the application. It relies in part on Section 26.445.040, which details a three-step procedure for PD review before the P&Z Commission and the City Council. That section provides: "If use variations are proposed, the proposed development shall also comply with Section 26.445.060, Use Variation Standards." LUC § 26.445.040(b)(1)(c). NMS reads the term "shall also comply" to mean that compliance with all four criteria is mandatory. But this reasoning is circular. Section 26.445.060 requires the City only to *consider* the four criteria. To say that the City "shall also comply" with that section is simply to say that the City "shall consider" the criteria.

* * * *

NMS offers no reason why this staff report statement would require the City Council to reject all future development proposals that involve any amount of FMR development.

In sum, the City retains discretion to approve FMR development on the MSP property through the PD process.

ii. Reasonable Degree of Certainty

Even when a municipality retains some discretion to grant a rezoning request, the finality requirement may be satisfied if "the permissible uses of the property are known to a reasonable degree of certainty." *Palazzolo*, 533 U.S. at 620. For example, pursuing further administrative procedures may not be necessary when the agency "has dug in its heels and made clear that all such applications will be denied." *Murphy*, 402 F.3d at 349. NMS argues that the City's actions thus far—adopting Ordinance 29 and rejecting NMS's rezoning application—show it is reasonably certain the City will not approve any PD application that includes FMR development. We are unpersuaded.

As we observed in *Landmark*, "it is clear that the best support for a claim of futility is completion of the steps mandated by *Williamson County* and *Yolo County*: unsuccessful pursuit of either a variance or a proposal for less intense development." 874 F.2d at 722.[18] Put differently, the best way for NMS to demonstrate the City is likely

[18] Relying in part on this language, NMS argues that "the futility exception is available" when "a sufficient number of prior applications have been rejected by the applicable authority, which . . . is at least one." Aplt. Br. at 28. It points us to several other circuits that it claims have adopted this "rejected application test." But the cases it cites simply stand for the proposition that "the filing of one meaningful application will ordinarily be a necessary, although not alone sufficient, precondition for invoking the futility exception." *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991).

As we explained above, "futility" is an aspect of the finality requirement. The "unsuccessful pursuit of either a variance or a proposal for less intense development" is evidence of finality. *Landmark*, 874 F.2d at 722.

to reject any future PD proposals is to show the City has already rejected at least one such application. But NMS has not submitted one. It relies instead on Ordinance 29 and the request to rezone to Mixed Use.

1) Ordinance 29

The City's adoption of Ordinance 29 does not make it reasonably certain that NMS's PD proposal will be denied. Ordinance 29 changed the zoning laws to prohibit FMR development as a conditional use on all SCI-zoned properties, not just MSP.[19] Ordinance 29 reflects a general policy judgment that FMR should no longer be allowed within the SCI zone as a conditional use. It did not definitively determine the type or intensity of development that may be allowed at MSP specifically.

2) Rezoning application

The only application that NMS submitted was a request to rezone MSP as Mixed Use. The proposed rezoning would have had a far wider-reaching effect than just allowing limited FMR development following PD review. NMS alleged in its amended complaint that Mixed Use uses would have included "office, formula retail, services, both general and specialty retail uses; as well as free market residential and affordable housing, which could be combined on one parcel or within one building." App., Vol. 1 at 55-56. Rezoning the property as Mixed Use would have allowed "single family

[19] NMS alleges that, of the four SCI-zoned properties in Aspen, the one where MSP is located is the only one that does not already have FMR units. So, NMS argues, Ordinance 29 was necessarily targeted at prohibiting FMR development at MSP specifically. But Ordinance 29's scope extends beyond MSP. It also bars additional FMR development at any of the other three SCI-zoned properties.

residences, duplexes, and standalone multi-family units." App., Vol. 2 at 31. It also would have allowed "lodging, specialty retail uses, and restaurant/bar," none of which are allowed in the SCI zone. *Id.* at 29.

The City's rejection of such a sweeping request sheds little light on the amount and type of FMR development it might ultimately approve when faced with a more narrow, concrete PD proposal. That is why a final decision generally requires "an initial rejection of a *particular* development proposal," and a "definitive action by local authorities indicating with some specificity what level of development will be permitted on the property in question." *SK Fin.*, 126 F.3d at 1276 (quoting *Landmark*, 874 F.2d at 720.); *see Yolo Cnty.*, 477 U.S. at 353 n.9 ("Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.").

The standards for PD applications are more flexible than the standards for rezoning. *Compare* LUC § 26.445.10, *with id.* § 26.310.090. NMS is correct that there is some overlap between the PD and rezoning criteria. But the overlapping criteria may be weighed differently in the PD context. In short, NMS's rezoning application is not an adequate substitute for seeking an individualized final decision through the PD process.[20]

[20] Indeed, the minutes of the City Council meeting at which the Council rejected NMS's rezoning request indicate that the City was open to considering a more concrete proposal. One Council member stated: "I'm not sure the zoning can't be changed without a plan, but I think there should be a serious discussion about what types of uses should go there. It is too early to get rezoned." App., Vol. 3 at 25. Another member agreed "change is inevitable. I'm sure what you come up with will gain traction." *Id.* And the then-mayor did not "disagree with reconsidering the status quo." *Id.* The

* * * *

Neither the passage of Ordinance 29 nor the denial of NMS's rezoning application shows that the City has come to a "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson Cnty.*, 473 U.S. at 191. NMS has not carried its burden to demonstrate that "there is no question about how the regulations at issue apply to the particular land in question." *Pakdel*, 141 S. Ct. at 2230 (alterations omitted) (quoting *Suitum*, 520 U.S. at 739). It therefore has not met the final decision requirement or shown that this case is prudentially ripe.

3. **Non-Takings Claims**

NMS argues that, even if its takings claim is unripe, its declaratory judgment and "reverse spot zoning" claims should not have been dismissed because they rely in part on facts and law that are independent of the takings analysis.[21] We disagree.

a. *Declaratory judgment*

NMS's declaratory judgment claim rests on the same factual and legal bases as its other constitutional claims. It asserts the same constitutional violations, but seeks a different remedy. Specifically, Count One of the amended complaint seeks a declaration that Ordinance 29 is invalid and unenforceable because it runs afoul of the Substantive

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Council specifically expressed its openness to "discussions" with NMS and "community engagement." *Id.*

[21] NMS does not dispute that its substantive due process and equal protection claims fall with its takings claim. We have "repeatedly . . . held that the ripeness requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim." *Bateman*, 89 F.3d at 709.

Due Process, Equal Protection, and Takings Clauses. This mirrors the claims raised in Count Two (Substantive Due Process), Count Three (Equal Protection), and Count Four (Regulatory Taking). Count One is therefore prudentially unripe for the same reasons discussed above.

b. *Reverse spot zoning*

NMS has not articulated a legal basis for its "reverse spot zoning" claim or explained how it has an independent factual or legal basis. The district court understood this claim to be based at least in part on Colorado law. To the extent it is, the court properly declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367. *See Brooks v. Gaenzle*, 614 F.3d 1213, 1229-30 (10th Cir. 2010) (stating that district courts should generally decline to exercise jurisdiction over state claims if all federal claims are dismissed before trial), *abrogated on other grounds by Torres v. Madrid*, 141 S. Ct. 989 (2021). To the extent the claim is based on federal law, the district court correctly concluded that NMS "fail[ed] to identify any basis for the Court to construe this claim differently from its Takings Clause § 1983 claim." App., Vol. 3 at 36.

* * * *

Because NMS's regulatory takings claim is prudentially unripe, its remaining claims resting on the same facts also lack prudential ripeness.

III. CONCLUSION

We affirm the district court's dismissal without prejudice of NMS's amended complaint.[22]

[22] Although dismissal with prejudice is generally appropriate under Rule 12(b)(6) when amending the complaint would be futile, *see Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006), dismissal without prejudice is more appropriate when the court relies on prudential ripeness grounds, *see Wyoming v. Zinke*, 871 F.3d 1133, 1146 (10th Cir. 2017) (remanding to the district court to dismiss the action without prejudice on prudential ripeness grounds).