

## **“Update on Ripeness: Dying on the Vine?”**

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### **Introduction**

“Ripeness” for adjudication is a basic subject matter jurisdiction consideration for virtually any legal claim. But in the context of regulatory takings, the ripeness doctrine has taken on far more than routine proportions. Generally speaking, it takes *a lot* (of time and money) for an owner to ripen a takings claim. In a practical sense, the procedural requirements for ripeness often pose as high a barrier to compensation as the substantive rule requiring denial of substantially all beneficial use. For the practitioner, understanding the law on ripeness also presents a challenge, as it rivals the volume and complexity of substantive takings law. While perhaps simply stated, the doctrine is not so simply applied, and familiarity with the intricacies of ripeness case law is essential both to adequately guiding owners and to properly identifying defenses against takings claims for government agencies.

Ripeness holdings vary according to the type of claim (facial or as-applied), the type of regulatory issue (denial of a permit or requested zoning),<sup>1</sup> the type of agency involved (local, state or federal), the respective operating rules of agencies (appeals and variance procedures), the judicial forum (state, federal, or even among circuits) and sometimes, in unspoken terms, the type of plaintiff (big developers or small landowners). Despite numerous court decisions and commentaries on what it takes to ripen a takings claim, some uncertainty in applying the rules of ripeness persists, which has in turn spawned the need for ongoing judicial discussion. While not an attempt to review or reconcile the voluminous case law on the subject, the following discussion aims to update the reader on recent developments in Florida law concerning ripeness for regulatory takings claims.

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<sup>1</sup> Regarding the type of claim variable, see S.W. Moore, Chapter 13 - “Inverse Condemnation,” *Florida Eminent Domain Practice and Procedure*, 5<sup>th</sup> ed., 1996.

## **The Doctrine Defined**

The general definition of a regulatory taking is a helpful point of reference for defining the doctrine of regulatory taking ripeness:

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.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 670, 67 L.Ed. 322 (1922). With that preface, the ripeness doctrine may be simply stated as the requirement that an owner obtain a final determination from the regulating agency of what use will be permitted on his land before claiming compensation in court. See Williamson County Regulatory Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).

The policies underlying this ripeness principle are admittedly sound and fair. Common sense and judicial economy support the notion that an aggrieved owner should first attempt to resolve a land use dispute directly with the agency involved. A myriad of solutions might occur to the parties before resort to litigation because agencies usually have discretion to soften their general regulations in application to particular situations. The ripeness doctrine ensures that this flexibility is explored. See Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659, 1667 137 L.Ed.2d 980 (1997). The principle also serves orderly government and the separation of powers:

Judicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government.

Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153, 157 (Fla. 1982). Most of all, the doctrine ensures presentation of a concrete takings controversy capable of resolution, for without a final determination of allowable use, no court could intelligently determine whether any regulation “goes too far.”

The difficulty with the ripeness doctrine, however, centers around the question of when a sufficiently final determination has been reached and the method of obtaining the determination. Under current case law, an owner typically must not only submit a formal and detailed application for a proposed use and obtain an adverse decision on the application, but the owner might also need to appeal the decision on various administrative levels. Even after appeal, a takings claim might not be ripe if the owner could have proposed less intense uses. Thus, even a long sought after “final order” might be far from the final determination requisite for ripeness. Furthermore, the burden is often placed on the owner to “keep guessing” about what level of use an agency might approve. Matters may be further complicated by concurrent jurisdiction of multiple agencies. See Vatalaro v. DER, 601 So.2d 1223, 1224 (Fla. 5<sup>th</sup> DCA 1992), note 2.

This process-of-elimination approach to ripeness is extremely expensive and time consuming for owners, even when government acts in good faith. But, as illustrated below, the current common law on ripeness has also created a climate ideal for government gamesmanship. A principle intended to allow agencies flexibility in resolving land use disputes has frequently allowed them practical immunity. Exhaustion of administrative remedies has often proven to be nothing more than exhaustion of landowners and their resources, causing many bona fide takings claims to die on the ripeness "vine" long before reaching the courthouse steps.

While many takings ripeness cases, ingeniously or ingenuously, continue to foster the ability of agencies to wage administrative battles of attrition, there have recently been some notable decisions which have adopted a more pragmatic view in holding that owners' claims were ripe despite agency contentions that some economic use of the property yet lurked just around the administrative corner.

### **Ripeness Required for State Takings Claims**

In an "as applied" taking challenge, an owner must exhaust the administrative remedies available in the executive branch prior to commencing a taking challenge. Key Haven Ass'd Enter., Inc. v. Board of Trustees of Internal Improv. Trust Fund, 427 So. 2d 153 (Fla. 1982). Depending on the facts, administrative remedies may not be considered exhausted until an owner has not only been denied a meaningful development application, but has appealed the denial according to available procedures. In some circumstances, re-application for less intense uses might also be necessary to ripen a claim.

For instance, in Tinnerman v. Palm Beach County, 641 So.2d 523 (Fla. 4<sup>th</sup> DCA 1994), an owner applied for rezoning from agriculture to commercial use, consistent with the relevant comprehensive plan. The owner's application was granted subject to a condition that there be no actual construction until the fronting road was improved. The condition creating this effective moratorium on building permits was later modified to allow some of the commercial development before road improvement, after which the owner sued for temporary taking for the time that the moratorium had existed. The trial court dismissed the claim as unripe and was upheld on appeal because the owner had not submitted less intense proposal when comments by Board members indicated they would consider alternate uses. The Fourth District held similarly in Martin County v. Section 28 Partnership, 676 So.2d 532 (Fla. 4<sup>th</sup> DCA 1996), where the owner of square mile of land sought to develop a golf course community through PUD rezoning and a comp plan amendment to allow for urban services. The comp plan amendment was denied by the County Commission, and the rezoning application was never voted upon because it would have been inconsistent with the existing comp plan. The owner brought a takings claim (among others), but it was not ripe because, while the owner had been denied a comp plan amendment and associated PUD, it had not applied for less intense uses available under the existing zoning.

The legislature has altered the ripeness requirements for judicial review of agency permitting decisions involving state lands, § 253.763 Fla.Stat. (1995), water resources § 373.617 Fla.Stat. (1995), and environmental control §403.90 Fla.Stat. (1995). These statutes require "final action" by an agency before resorting to the circuit court. "Final agency action" is less a requirement than "exhaustion of administrative remedies" because it does not always require an appeal from the

agency action. Bowen v. Department of Env'tl. Reg., 448 So. 2d 566, 569 (Fla. 2d DCA 1984), *aff'd*, 472 So. 2d 460 (Fla. 1985). Upon a permit denial, an owner can contest the validity of the permit denial in the district court or file suit in the circuit court claiming that the denial was proper, but resulted in an unconstitutional taking of property. Bowen, 448 So. 2d 566. Compare, however, the facts of Key Haven Ass'd Enter., Inc. v. Board of Trustees of Internal Improv. Trust Fund, 427 So. 2d 153 (Fla. 1982) where an owner's claim was deemed unripe for failure to appeal DER's permit denial to the Board.

By electing to bring a taking challenge in the circuit court, "a party forgoes any opportunity to challenge the permit denial as improper and may not challenge the agency action as arbitrary or capricious or as failing to comply with the intent and purposes of the statute." Vatalaro v. Department of Env'tl. Reg., 601 So. 2d 1223, 1229 n.4 (Fla. 5th DCA 1992) (quoting Key Haven, 427 So. 2d at 160). While an owner is estopped from denying the propriety of the agency action once it chooses the circuit court forum, it is not necessarily estopped from bringing an inverse condemnation claim in circuit court once the owner chooses to litigate the propriety of the agency action through the district court. Albrecht v. State, 444 So. 2d 8, 13 (Fla. 1984) (neither res judicata nor estoppel by judgment applied to a circuit court claim of an uncompensated taking commenced after the district court's denial of a petition alleging facial unconstitutionality of a statute).

In contrast to as-applied takings claims, there is generally no exhaustion of remedies requirement in a facial claim because the takings inquiry focuses on the "mere enactment" of the statute and not how it is applied or administered. Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990). But, the distinction between ripeness requirements for facial and as-applied claims has recently become blurred in cases where variance procedures also appear on the face of a regulatory measure. In Estate of Tippet v. City of Miami, 645 So.2d 533 (Fla. 3d DCA 1994), *rev. dism.* 652 So.2d 819 (Fla. 1995), owners of property within a historic district proposed by local preservation board appealed the historic designation to the City Commission. After the Commission passed a resolution denying the appeal and affirming the designation, the owners appealed to the circuit court, appellate division, which in turn affirmed the commission's resolution. The owners then challenged the designation as a taking by certiorari to the district court of appeal. The Third District held the takings claim unripe. Though describing the claim as "facial," the court denied certiorari on the basis that the owners had not availed themselves of the permitting or hardship exemption provisions of the preservation ordinance. In Taylor v. Village of North Palm Beach, 659 So.2d 1167 (Fla. 4<sup>th</sup> DCA 1995), the Fourth District denied a facial takings claim based on adoption of a conservation land use designation because the plan also contained mechanisms to amend the plan, of which the owner had not availed herself. The court then held the owner's companion as-applied claim unripe for the same reason.

The practitioner should also note that the Florida Supreme Court distinguishes between a facial challenge to a statute as opposed to an agency rule. When challenging the unconstitutionality of an agency rule, there must be an exhaustion of administrative remedies in order to afford the agency an opportunity to remedy a constitutional problem. Lee County v. New Testament Baptist Church of Fort Myers, Fla. Inc., 507 So. 2d 626 (Fla. 2d DCA 1987).

### **Ripeness Required for Federal Takings Claims**

The prerequisite “final decision” for takings claims within the Eleventh Circuit is essentially the same as it is for actions in Florida State courts. Indeed, Florida courts have repeatedly adopted the holdings of federal cases on the subject. *See Taylor v. Village of North Palm Beach*, 659 So.2d 1167, 1173 (Fla. 4<sup>th</sup> DCA 1995). But federal ripeness additionally requires that owners exhaust state *judicial* remedies as well as administrative ones before bringing a takings claim in federal court. That is, after exhausting administrative remedies to reach a determination of allowable use, a would-be federal litigant must also have exhausted state remedies to seek compensation for an alleged taking, that is, any available state inverse condemnation actions. *See Reahard v. Lee County*, 30 F.3d 1412 (11<sup>th</sup> Cir. 1994) *cert den.* 115 S.Ct. 1693, 131 L.Ed.2d 557 (1995) (federal takings claim based on denial of zoning was not ripe because owner had not pursued state inverse remedy recognized by Florida Supreme Court by the time owner obtained final decision of agency) and *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11<sup>th</sup> Cir. 1996).

Regarding the “final decision” prong of federal ripeness, as in Florida case law, the Eleventh Circuit cases have mentioned varying ripeness requirements for different types of claims (just compensation takings claims, due process takings, substantive due process a.k.a. arbitrary and capricious takings, and equal protection claims). As-applied claims, such as just compensation takings claims, generally require exhaustion of remedies such as the pursuit of rezonings or variances sufficient to determine the extent of use remaining under the regulatory regime. Substantive due process claims have required less effort to ripen since the arbitrary and capricious inquiry focuses more on the enactment of a regulation and general applicability to property. *See Restigouche Inc. v. Town of Jupiter*, 59 F.3d 1208, (11<sup>th</sup> Cir 1995). However, the Eleventh Circuit’s recent opinion in *Villas of Lake Jackson v. Leon County*, 121 F.3d 610 (11<sup>th</sup> Cir. 1997) may alter this by its holding that there is no longer any such thing as an independent “substantive due process takings claim.”

Regarding the second prong of federal ripeness (the exhaustion of state compensation remedies), a litigant must take care not to preclude a takings claim in the process of ripening it. Because there is some overlap of issues between state and federal takings claims, litigating a takings claim in state court could create res judicata or issue preclusion problems for the unwary. The "prior state adjudication" requirement should not deny the landowner the entitlement of choosing to litigate a federal claim in a federal forum. *England v. Louisiana Medical Examiners*, 375 U.S. 411, 415 (U.S. 1964). Rather, the rule merely defers the litigant's election of forum as to the federal claim, and requires that the federal claim be adjudicated in federal court only after the litigant has been denied relief in the state court action. *Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5 Cir. 1976), *cert. den.*, 429 U.S. 897 (U.S. 1976). It is, however, necessary for the landowner to make a clear, formal and express reservation, at the earliest possible stage of the state court proceedings, of intent to bring the reserved federal claim in federal court should the state court, applying state law, find adversely to the landowner. *Jennings*, at 1332. Provided that the landowner makes a proper *England* or *Jennings* reservation, his reserved federal claim will survive a res judicata challenge against his entitlement to litigate subsequently in the federal forum. *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11 Cir. 1992).

### **Futility Exception**

Both Florida and Federal courts recognize a “futility exception” to final decision requirement. Upon allegation and proof that further pursuit of relief in the administrative process would have been futile, an owner may be allowed to proceed with a takings claim without having exhausted all remedies available in the administrative forum.

The exception should apply if past history shows that repeated submissions will be futile or if the agency effectively concedes that any other development would be impermissible. City of Riviera Beach v. Shillingburg, 659 So.2d 1174, 1181 (Fla. 4<sup>th</sup> DCA 1995) *citing* Eide v. Sarasota County, 908 F.2d 716, 726 (11<sup>th</sup> Cir. 1990); Alexander v. Town of Jupiter, 640 So.2d 79 (Fla. 4<sup>th</sup> DCA 1994). While at least one Florida case implies that a futility exception might be granted upon showing that “a reasonable development proposal would be doomed to failure *ab initio*,” Taylor v. Village of North Palm Beach, 659 So.2d 1167, 1171 (Fla. 4<sup>th</sup> DCA 1995), it is important to note that in most instances the futility exception cannot be successfully asserted without having engaged in some administrative formalities:

Although the final decision prerequisite may also be satisfied by proof that attempts to comply would be futile, futility is not established until at least one meaningful application has been filed. Glisson v. Alachua County, 558 So.2d 1030, 1036 (Fla. 1<sup>st</sup> DCA 1990), *rev. den.* 570 So.2d 1304 (Fla. 1990).

What courts may consider a “meaningful application” will vary from case to case. In circumstances where an agency has an extensive pattern of denying applications or has adopted a strict policy without providing for variances, owner’s counsel should thoroughly research case precedent on the futility exception and look for parallel shortcuts to ripeness. Where a decent chance of obtaining a favorable ruling on futility exists, it may be worthwhile to bring an action in circuit court before subjecting a client to the delay and expense associated with completely exhausting administrative remedies. Even if the court does not accept that futility exists, the case should be dismissed without prejudice to refile upon completing the administrative process.

- A trial court’s finding of futility was upheld in Monroe County v. Gonzalez, 593 So.2d 1143 (Fla. 3<sup>d</sup> DCA 1992). The landowner’s takings claim was deemed ripe after denial of a single request to rezone his .4 acre offshore island lot because all other possible administrative relief would have been futile. Density and open space limitations imposed by the existing zoning precluded any development of the lot, and no variance from the open space requirement was possible under the county code. Further administrative procedures to obtain a “beneficial use” exception would have restored, at most, 40% of the property’s value and thus would be futile under the 100% compensation standard of the state and federal constitutions. Thus, a request for rezoning to a category that would allow some development was the only meaningful remedy, and upon its denial, the takings claim became ripe.
- Though generally a doctrine affording relief to property owner, futility was used against an owner in City of Pompano Beach v. Yardarm Restaurant, 641 So.2d 1377 (Fla. 4<sup>th</sup> DCA 1994), *rev. den.* 651 So.2d 1197, *cert. den.* 115 S.Ct. 2583, 132 L.Ed.2d 832 to support the Fourth District’s holding that any takings claim was time barred. The plaintiff had contended that the claim accrued when the landowner finally “gave up”

fighting against the agency, but the court held that the claim ripened at an earlier point, observing that “[r]ipeness and persistence are not the same thing.” Notwithstanding its context, the following language is enlightening on the futility exception generally:

Ripeness does not require Yardarm to engage in years of litigation with the City. Once Yardarm had made a definite and meaningful effort to obtain City approval for its eighteen story hotel and Pompano Beach had evinced an intention not to give it, Yardarm’s claim was ripe. *Id.* at 1387.

- A landowner could not establish futility through the argument that a county would have to deny a desired rezoning because of its inconsistency with an existing comprehensive plan since a landowner is not the proper arbiter of consistency. Formal application to rezone would still must be made to ripen any claim. Eide v. Sarasota County, 908 F.2d 716 (11<sup>th</sup> Cir. 1990).

### **Dead on the Vine: Examples of Ripeness gone to Rot?**

- McKee v. City of Tallahassee, 664 So.2d 333 (Fla. 1<sup>st</sup> DCA 1995) - owner of property classified as “successional forest” sought a variance from development restrictions and was denied. The First District affirmed the trial court’s dismissal of the owner’s inverse case as unripe, finding that the denial of a variance was not a final decision regarding the development that would be permitted. The court did not deem the variance application “meaningful” because it did not include a specific development plan, despite its recognition that the cost of preparing a development plan might well exceed the value of the property in question. In concluding that there was no futility, the court relied heavily on agency “assurances” that a “properly drawn” application would be given favorable consideration and that the agency would work with the owner’s conceptual development plan to minimize regulatory expense.
- City of Riviera Beach v. Shillingburg, 659 So.2d 1174 (Fla. 4<sup>th</sup> DCA 1995) -Submerged lands in intracoastal waterway originally zoned for single family development were redesignated “special preservation” by city in comprehensive planning process. The express policy of this designation was to preclude any development of submerged lands, but plan also commissioned a study to determine what uses might be compatible with the preservation policy. Owners of adjacent lands brought takings claims which were later consolidated. One owner (Shillingburg, who also owned a house across AIA from the site) had applied for a mere viewing dock (having been informed that no guest house could be constructed). When the city denied his permit, Shillingburg sued alternatively for mandamus or takings compensation. Prior to trial, the city proposed an amendment to its plan which would allow non-motorized viewing docks such as the one requested. A stay was granted while the DCA considered the city’s amendment. The amendment was ultimately adopted, but the Shillingburg maintained his taking claim, arguing that he had applied for the viewing dock to illustrate how little use could be made of his property and that it did not provide an economically viable use. The other owner (Taylor) made no application, but after DCA approval of the viewing dock amendment, the trial court

deemed it futile for her to apply since the use of her adjacent property was clearly limited to a dock based on what had been approved for the adjacent submerged land. Held: because of the amendment provisions and future study provisions, the plan had built-in flexibility and therefore did not facially cause a taking. The as-applied claims were not ripe because no final determination had been obtained. Taylor made no application at all, and as to Shillingburg, he got what he asked for and never pursued approval of more intense uses.

### **Ripe for Picking: Examples of When Enough is Enough**

- The *Vatalaro* saga: a taking was determined in *Vatalaro v. DER*, 601 So.2d 1233 (Fla. 5<sup>th</sup> DCA 1992), so what was that PCA at 693 So.2d 41 (Fla. 1997) all about?
- *Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659, 137 L.Ed. 2d 980 (1997)

The Suitums bought a residential lot near the Nevada shore of Lake Tahoe, in 1972. The lot fell within the jurisdiction of the Tahoe Regional Planning Agency, an interstate regulatory agency created by a state compact between Nevada and California in 1969. Efforts to preserve the ecology of the lake proved insufficient, so a 1980 amendment to the compact required the agency to adopt a more stringent development plan. Pursuant to that mandate, the agency adopted a 1987 plan containing a parcel evaluation system which allowed development of residential lots within the basin based upon a point and lottery system. To develop a vacant parcel, an owner would have to both obtain a building allocation through the lottery system and a sufficient score under the parcel evaluation system. While it did not provide for variances, the development plan created transferable development rights (TDR's).

In 1987, Mrs. Suitum (by then a widow) received an allocation through the annual lottery, but was denied permission to construct a house on her lot because of its location within a "stream environment zone" (which rated a score of zero under the parcel evaluation system due to potential runoff into the lake). Her lot automatically had some TDR's which technically could be sold to owners of other eligible lots (one "residential development right" and a 1% land coverage right, equal to 183 square feet). Mrs. Suitum could also pursue bonus TDR's under provisions of the plan. Rather than attempting to increase or transfer any of her TDR's, Mrs. Suitum filed takings claims under 42 U.S.C. § 1983 in federal court.

The U.S. District Court held that her claim was not ripe because it was uncertain how the transfer of development rights might impact investment backed expectations, and the Ninth Circuit affirmed. The Supreme Court reversed, holding Suitum's claim was ripe because there had been a final determination by the agency that Suitums property fell entirely within a stream environmental zone upon which, according to the plan, there could be no additional "land coverage or other permanent land disturbance." Because the plan provided no procedure for a variance from this rule, there was no occasion for Suitum to take further steps to obtain a final decision about the development of her property.

While the majority and concurring opinions reach the same result, finding Suitum's claim ripe because there had been a final decision about the **use** of her property, the reasoning employed varied somewhat. Justice Souter, writing for the majority, reasoned that TDR's were relevant only for their potential value which could be weighed on remand in determining whether a taking had occurred (that is, whether there had been denial of all economically beneficial use). Justice Scalia, writing for the concurring minority, however, took the position that there had been a taking and the value of the TDR's was only relevant to whether there had been just compensation:

The focus of the 'final decision' inquiry is on ascertaining the extent of the governmental restriction on land use, not what the government has given in exchange for that restriction. . . . The latter pertains not to whether there has been a taking, but to the subsequent question of whether, if so, there has been just compensation. at 1671.

Both opinions were critical of the agency's position. The majority seemed concerned with the agency's use of the TDR's provisions to keep Suitum's claim "at bay." In response to the agency's argument that Suitum's case would not be ripe until the value potential of her TDR's was realized by going through the procedures for transfer (including the allocation lottery, marketing the rights, and then applying for agency approval of transfer to the receiver lot), the majority stated that "such a rule would allow any local authority to stultify the Fifth Amendment's guarantee." *Id.* at 1668.

The concurring justices were similarly troubled by the agency's use of takings jurisprudence to avoid paying compensation where it was due. To wit, this stinging rebuke:

Putting TDR's on the taking rather than the just compensation side of the equation (as the Circuit Court did below) is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings clause jurisprudence . . . . If money that the government regulator gives to the landowner can be counted on the question of whether there is a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here. *Id.* at 1671-2.

### **The Legislature Steps In**

In addition to some encouraging judicial pragmatism about the reality of obtaining a truly final decision, there has been some moderate legislative reform. Responding to the clamor of property rights advocates, the Florida legislature included significant ripeness provisions in the Bert J. Harris Private Property Rights Protection Act (§70.001, Florida Statutes) and the Land Use and Environmental Dispute Resolution Act (§70.051, Florida Statutes). While not discussed in depth

here because these Acts are the specific topic of other seminar presentations, it is worthy of note that these ripeness provisions require agencies to come forward with their determination(s) of allowable use within reasonable time frames, in refreshing contrast to the current common law method of protracted “hit and miss” efforts by owners to extract a final decision. These new statutory ripeness procedures not only reduce hardship on owners, but they further the policies of the ripeness doctrine by facilitating administrative resolution of disputes and clear delineation of use. The brilliance of this reform is moderated only by its prospective application to rules, regulations and ordinances enacted after May of 1995.

### **Conclusion**

The growing body of law on regulatory takings ripeness remains somewhat perplexing as to the precise lengths to which owners must go to ripen a takings claim. While most of the recent decisions focus on why a claim was not ripe enough, there is an encouraging trend toward a more pragmatic use of the doctrine to lessen hardship on citizens and/or government abuse while still assuring judicial review of thoughtful administrative decisions.