No. 15-631

In the Supreme Court of the United States

ARRIGONI ENTERPRISES, LLC,
Petitioner,

v.

TOWN OF DURHAM, DURHAM PLANNING AND ZONING COMMISSION, AND DURHAM ZONING BOARD OF APPEALS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Thomas R. Gerarde
Counsel of Record
Beatrice S. Jordan
HOWD & LUDORF, LLC
65 Wethersfield Avenue
Hartford, CT 06114
Ph: (860) 249-1361
Fax: (860) 249-7665
tgerarde@hl-law.com

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the Court should reconsider, overrule or modify the state litigation requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), where finality remains an open question which was not presented to, nor decided by, the District Court or Court of Appeals?

2. Whether the Court should reconsider *Williamson County*'s state litigation requirement where the Petitioner did not pursue the available inverse condemnation procedure in state court and has not, therefore, been adversely affected by any jurisdictional or preclusion rule?

3. Whether the Court should grant *certiorari* to review the prudential application of *Williamson County* where the Circuit Courts are largely in agreement as to the prudential nature of *Williamson*'s ripeness requirements, and the law is not otherwise sufficiently developed as to its application?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

STATEMENT OF THE CASE

Petitioner, Arrigoni Enterprises, LLC ("Arrigoni"), moves this Honorable Court, in part, to reconsider, and overrule or modify, the state litigation prong of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) on the basis that it purportedly deprives property owners of a judicial forum for Fifth Amendment takings claims, and is otherwise unnecessary. As is more fully set forth herein, Arrigoni's arguments are not only unsound, but rely upon mischaracterizations of the facts and record in this matter, all of which render the subject Petition an inappropriate case upon which to grant certiorari.

More particularly, contrary to Arrigoni's representations, neither the finality nor state litigation ripeness prongs have been satisfied in the instant matter. Rather, Arrigoni's claims are premised upon no more than a hypothetical set of facts and procedural posture, the correct characterization of which undermine the very theories upon which the Petitioner relies.

The Subject Property

Arrigoni Enterprises, LLC ("Arrigoni") is the owner of a parcel of land (the "subject property") located on the west side of Mountain Road in the Town of Durham, Connecticut. (Pet. App. at C-2.) The subject property is a heavily wooded and undeveloped parcel of land which is very steeply sloped and consists mainly of rock and ledge. (*Id.*) The subject property had been owned by the Arrigoni family since 1955. (*Id.*)

The subject property is located in the Town of Durham's Design Development District ("DDD"). (*Id.*) The DDD zone is one of three industrial zones in Durham, the other two being the Light Industrial District ("LID") and the Heavy Industrial District ("HID"). (*Id.*)

The subject property is located between the Tilcon Quarry property, a state regulated quarry which lies within the HID and DDD zones, and neighboring residential properties. (*Id.* at C-2 – C-3.) While the Petitioner notes that the Tilcon Quarry excavates an average of a million cubic yards of rock per year, it conveniently fails to mention that Tilcon operates its quarrying activities in the HID and not in the DDD where the subject property is located. (Resp. App. at 12-13.)

Prior to 1986, all of the parcels currently located in the DDD zone, including the subject property, were zoned Farm-Residential ("FR"). (Pet. App. at C-3.) In June of 1986, the Durham Planning and Zoning Commission ("PZC") changed the zoning of the subject property to the LID zone. (*Id.*) Thereafter, in 1988, the PZC modified the Durham Zoning Regulations ("Regulations"), and adopted the current DDD zone, after which the zoning of the subject property was changed from the LID zone to the DDD zone, which remains its current status. (*Id.*)

At the time that Arrigoni purchased the subject property in January of 2005, it was well aware that the crushing of stone was a prohibited activity in the DDD zone. (Resp. App. at 6.) Likewise, at all times prior to and at the time it made it's application for a special development permit in September of 2005, Arrigoni

was aware that the crushing of stone was prohibited in the DDD zone. (*Id.*)

Proceedings Before The Durham Planning And Zoning Commission

In early 2005, Arrigoni sought to have the zone for the subject property changed from DDD to HID in order to excavate, crush, and remove earth material thereon for construction of three light industrial buildings. (Pet. App. at C-3 – C-4.) Arrigoni represented to the PZC that the earth processing and rock crushing was necessary to prepare the site for development of the buildings, and that the HID is the only zone in Durham in which rock crushing is a permitted use under the Regulations. (*Id.* at C-4.) The PZC denied the request in May 2005. (*Id.*)

Thereafter, on September 13, 2005, Arrigoni applied to the PZC for a special development permit in order to develop the site and for the construction of three industrial buildings on the subject property. (*Id.*) The three buildings proposed were to be 8,750 square feet, 10,000 square feet, and 11,250 square feet. (*Id.*)

On October 5, 2005, the PZC informed Arrigoni that it was also required to apply for a second special permit for the proposed excavation of the subject property pursuant to § 12.05 of the Regulations. (*Id.*) Arrigoni applied for an excavation permit on October 14, 2005 for the excavation, crushing of rock and removal of earth materials. (*Id.*)

The PZC held public hearings on the special development permit and the excavation permit on November 16, 2005, December 7, 2005 and December 21, 2005. (*Id.*) At the public hearings, Arrigoni

represented to the PZC that there would be approximately 75,000 cubic yards of bedrock that would need to be excavated from the subject property, that it would take 90 to 120 days per year over a two to three year period to do the blasting and crushing of the bedrock, and that there would be anywhere from zero to 40 trucks per day for approximately three years to remove the earth materials and bedrock from the site. (Resp. App. at 7-11.) Thus, while Arrigoni contends that it submitted a site development plan which complied with all relevant zoning requirements, it glosses over the fact that its proposed plan contemplated the exorbitant crushing and processing of rock which was not permitted in the DDD zone.

During the public hearings, citizens and PZC members voiced opposition against the proposed excavation based upon the effects of the proposed development on the health, safety and public welfare of Arrigoni's residential neighbors. (Pet. App. at C-6.) Citizens further voiced concerns over the large scale of the proposed excavation, the permissibility of processing of earth materials in the DDD zone, and the possibility that Arrigoni planned to conduct a quarrying enterprise on the subject property given the extensive crushing, processing and removal of rock from the property. (*Id.*)

On December 21, 2005, the PZC closed the public hearings on the permit applications. (*Id.*) The PZC voted to deny both permit applications, with a member noting that "the three buildings necessitate site work exceeding any reasonable norms. Perhaps a revision could be developed that will not necessitate draconian methods of site preparation and enable the site to

conform to the zone." (*Id.* at C-7.) Arrigoni, however, admittedly never submitted an alternative plan to the PZC despite being invite to do so, and acknowledging that nothing prevented it from doing so. (Resp. App. at 2-5.) Moreover, Arrigoni elected not to propose an alternative, more modest, development plan despite the fact that the PZC had permitted the crushing of rock in zones outside the HID on other occasions. (Pet. App. at C-9.)

The State Court Administrative Appeal

On January 9, 2006, Arrigoni filed an administrative appeal in the Connecticut Superior Court, pursuant to the remedial remedy set forth in Conn. Gen. Stat. § 8-8, as to the PZC's denials of its site development and excavation special permit applications. (Resp. App. at 14-23.) In it's appeal, Arrigoni argued that the PZC had acted illegally and arbitrarily in denying both applications, had violated its constitutional rights to equal protection and due process, and had unlawfully restricted all use of the subject property in violation of the U.S. and Connecticut Constitutions. (*Id.*)

On February 15, 2007, the Connecticut Superior Court upheld the PZC's denial of both permit applications, finding that Arrigoni's proposed activity violated the Regulations and that there was ample evidence in the record that the excavation project would have had a negative impact on the public health, safety and welfare. (Resp. App. at 35-36.) The Court's ruling did not address Arrigoni's constitutional claims. (*Id.*) Arrigoni, thereafter, petitioned for certification to the Connecticut Appellate Court for review of the

Superior Court's decision dismissing its appeal, however, the certification to appeal was denied. (*Id.*)

Proceedings Before The Durham Zoning Board Of Appeals

Following dismissal of its administrative appeal, Arrigoni sought a variance from the Durham Zoning Board of Appeals ("ZBA") of § 12.05 of the Regulations, which prohibits the crushing of rock. (Pet. App. at C-7.) Therein, Arrigoni stated that, development of any portion of its property required the excavation, crushing and removal of the underlying rock. (*Id.*) The ZBA held a public hearing on Arrigoni's variance application on August 9, 2007. (*Id.*)

At the ZBA public hearing, numerous citizens voiced concerns about Arrigoni's proposed variance, including concerns with dust suppression from the excavation of the rock and excessive noise from blasting. (*Id.*) Citizens were also particularly concerned about the effects of Arrigoni's proposed activities in light of problems caused by a similar previous land excavation by Greenland Realty, LLC, located near the subject property. (*Id.*) At the conclusion of the hearing, the ZBA voted to deny the variance application. (*Id.*)

Procedural History Of The Subject Federal Action

Arrigoni filed the instant action in the United States District Court for the District of Connecticut on April 4, 2008. The Complaint was brought in four counts alleging 42 U.S.C. § 1983 claims for Equal Protection, substantive due process and inverse condemnation and regulatory taking, and a claim for declaratory judgment as to a provision of the Town of

Durham's Zoning Regulations on the basis that the regulation was vague, arbitrary and void.

On May 30, 2008, the defendants moved to dismiss Count Three of the Complaint, which alleged a claim for inverse condemnation and regulatory taking. Therein, the Respondents conceded, *solely for purposes of its motion*, that certain denials by the Respondents constituted a final decision under *Williamson County*'s finality prong. (Resp. App. at 42-43.) The Respondents went on to premise their motion for dismissal solely on the fact that the claim was not ripe for adjudication in light of the fact that Arrigoni had failed to utilize the adequate state procedure available for obtaining just compensation for any purported taking of its property. The District Court agreed, and granted the motion to dismiss on March 27, 2009, noting as follows:

> [Arrigoni] has not satisfied the second prong of the *Williamson* test for ripeness. The Connecticut Constitution contains a clause that may be used as the basis for an action by the plaintiff to recover just compensation for the taking of property. The plaintiff did not avail itself of the procedure provided by the state to seek just compensation before claiming a violation of the Just Compensation Clause. Therefore, its claim is not ripe for adjudication.

(Pet. App. at B-9.)

Arrigoni appealed, and on October 18, 2015, the Second Circuit Court of Appeals affirmed the decision of the District Court, "for the reasons relied upon by the District Court in its well-reasoned opinion." (Pet. App. at A-3.) The Second Circuit, citing *Williamson*

County, went on to hold that it agreed that "Arrigoni failed to seek compensation through the procedures the State has provided for doing so." (*Id.*) Finally, the Second Circuit noted that it was not convinced that the facts of this matter warranted a waiver of *Williamson County*'s requirements. (*Id.*)

REASONS FOR DENYING THE PETITION

This action is not an appropriate case upon which to challenge the state litigation requirement set forth in this Court's ruling in *Williamson County*. The factual and procedural posture of this action demonstrates that the issue of finality was not presented, nor decided by the District Court or the Court of Appeal. On the contrary, the Respondents conceded this prong *solely for purposes of their motion to dismiss*, and expressly predicated their motion upon the state litigation prong of *Williamson County*'s ripeness test. The issue of finality, thus, remains an open question as to the nature and extent of development which may be permitted on the subject property, especially given the fact that the Petitioner was invited by the PZC to submit a more modest plan for consideration yet the Petitioner elected not to do so, remaining steadfast to its grandiose development plan.

Moreover, the Petitioner cannot challenge *Williamson County*'s state litigation requirement in any meaningful manner as it has wholly failed to avail itself of the state's inverse condemnation procedure for redress of the alleged taking of its property. Petitioner cannot, therefore, claim to be prejudiced or otherwise harmed by any jurisdictional or preclusion rules. 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. Because the Petitioner has not sought just compensation, it has not suffered a constitutional violation. Petitioner's academic exercise on the theoretical implications of claim and issue preclusion or the removal statute simply have no merit under the facts or procedures in the instant action.

The heart of the Petition is primarily grounded upon the Petitioner's and Amici's preference for a federal forum for redress of their takings claims. However, it is well established that there exists no such absolute right to a federal forum for redress of takings claims brought pursuant to § 1983. On the contrary, the state courts have concurrent jurisdiction and are competent to review such claims. There exists no compelling reason to depart from this well established principle.

Finally, regarding the Petitioner's alternative ground for review, the Second Circuit ruling in this matter is in accord with this Court's pronouncement as to the prudential nature of *Williamson County*'s ripeness requirements. The majority of the Circuit Courts are in agreement. Any purported discord has not sufficiently developed, rendering this issue an inappropriate basis for *certiorari*.

I. THE FACTUAL AND PROCEDURAL POSTURE OF THIS MATTER RENDER IT A PARTICULARLY INAPPROPRIATE VEHICLE UPON WHICH TO RECONSIDER *WILLIAMSON COUNTY*

A. There Exists No Final Decision Denying Arrigoni Use Of Its Property

Arrigoni argues that this matter presents an appropriate vehicle for reconsidering *Williamson County* based upon its mischaracterization of the "finality" of the decisions regarding the subject property. In this regard, Arrigoni states that the Town has made final decisions which have denied the developmental use of it's property. (Pet. at 7.) However, Arrigoni conveniently attempts to evade the true nature of the proceedings as to a determination of the finality prong of *Williamson County* in this matter. Specifically, in moving to dismiss Arrigoni's claims as unripe, the Respondents expressly noted that they did not dispute, "***solely for purposes of their Motion to Dismiss***," that certain denials by the Respondents constituted "final decisions" under the first prong of W*illiamson County*'s ripeness test. (Resp. App. at 42-43.) The District Court, thus, acknowledged that the finality prong was not disputed for purposes of the motion to dismiss, and that the sole issue before the Court was the second prong of *Williamson County*. (Pet. App. at B-6.) The issue of finality was not, therefore, put before the District Court, nor addressed by it. Likewise, the issue of finality was not before the Second Circuit Court of Appeals, nor addressed during the course of Arrigoni's appeal of this matter.

Viewed in the foregoing, proper context, it becomes clear that Arrigoni's Petition is premature as finality remains a disputed and unresolved issue in this matter. The Respondents' concession of this prong was made solely for purposes of their motion to dismiss, a motion which was expressly predicated upon the second prong of *Williamson County*. The concession of the first prong for purposes of the motion was not final, binding or conclusive so as to constitute a definitive waiver of the final decision ripeness prong. *See e.g., Prepo Corp. v. Pressure Can Corp.*, 234 F.2d 700, 702 (7th Cir. 1956).

In fact, the question of finality of decisions as to the permissible development of Arrigoni's property was alluded to, but not decided, during the course of litigation of this matter. As noted by the District Court, during the public hearing on Arrigoni's permit applications a member of the Planning and Zoning Commission noted that, "the three buildings necessitate site work exceeding any reasonable norms. Perhaps a revision could be developed that will not necessitate draconian methods of site preparation and enable the site to conform to the zone." (Pet. App. at C-7.) Moreover, Arrigoni itself acknowledged that the PZC invited it to submit a smaller plan for review, however, Arrigoni elected not to do so and conceded that nothing prevented it from doing so. (Resp. App. at 3-5.)

Thus, contrary to Arrigoni's protestations, this matter does not present a straightforward opportunity to reconsider *Williamson County*. Simply put, Arrigoni's takings claim is not fit for review as numerous factual contingencies prevent its

adjudication, and have yet to be decided by any court. More specifically, a determination of whether a takings has occurred would require further factual development as to the purported deprivation of all uses of the property. A determination of this claim would require Arrigoni to establish that it has been denied all beneficial uses of its property, a showing which Arrigoni, not surprisingly, seeks to evade especially in light of the fact that Arrigoni was invited to submit an alternative plan and has elected not to do so. Instead, Arrigoni has engaged in a decades long campaign to champion it's preferred, grandiose plan of excavating and crushing approximately 75,000 cubic yards of bedrock, a process which would entail roughly 90 to 120 days of blasting and crushing of bedrock per year over a two to three year period, and anywhere from zero to 40 trucks per year for some three years to remove the material from its site, all past neighboring residential homes.

Arrigoni's all or nothing approach to the development of its property does not bring it's claim into the realm of finality for purposes of *Williamson County*'s ripeness standard. On the contrary, the Petitioner's stead fast refusal to submit an alternative, more modest plan effectively prevented the Respondents from exercising their discretion as to the extent of development to be permitted on the subject property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S. Ct. 2488, 150 L. Ed. 2d 592 (2001) (reaffirming that "*Williamson County*'s final decision requirements responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer.") Moreover, there simply exists no

evidence that the PZC would not permit an alternative developmental plan which contemplated a less intensive crushing, processing and removal of rock from the subject property. Nevertheless, Arrigoni elected not to propose an alternative, more modest, development plan despite the fact that the PZC expressly invited it to do so and had permitted the crushing of rock in zones outside the HID on other occasions. (Pet. App. at C-9.) As this Court has recognized, "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 353 n. 9, 106 S. Ct. 2561, 2567, 91 L. Ed. 2d 285 (1986).

Viewed in the proper procedural context, it becomes clear that the Arrigoni has not received a final and definitive "determination of the type and intensity of development legally permitted on the subject property." *MacDonald,* 477 U.S. at 348; *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 745-46, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997). Moreover, this Court has, "uniformly [reflected] an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 477 U.S. at 351; *Suitum*, 520 U.S. at 746. The Respondents' initial rejection of Arrigoni's grandiose development plan leaves open the question as to whether a more modest submission would be approved, especially given the invitation by the PZC that the Petition make such a proposal.

Arrigoni's Petition is, therefore, unsupported by the facts as to the claimed finality of decisions regarding the development of its property.

B. Arrigoni Has Not Availed Itself Of The Adequate State Procedure Available For Redress Of Its Takings Claim

This Petition is particularly unsuitable for review of the state litigation prong of *Williamson County* as Arrigoni has not utilized the inverse condemnation procedure available to it prior to bringing its premature § 1983 claim. The Petition is wholly predicated upon Arrigoni's hypothesis that its effort to obtain a declaration of just compensation is sufficient to ripen its claim for adjudication. Arrigoni's untenable position seeks to circumvent the inconvenient fact that it must have availed itself of the proper state procedure to *obtain just compensation* for the alleged taking and was denied such compensation.

Arrigoni does not dispute that the State of Connecticut provides an adequate procedure for redress of a property owner's takings claim by way of an inverse condemnation action, a remedy which it has undeniably failed to utilize. Specifically, a Connecticut property owner may pursue a common law inverse condemnation action for compensation arising out of the denial of zoning applications which amount to a taking of property. *See Cumberland Farms, Inc. v. Groton*, 247 Conn. 196, 207, 719 A.2d 465 (1998). Moreover, the Connecticut Constitution contains a straightforward takings clause. *See Villager Pond, Inc. v. Darien*, 56 F.3d 375, 380 (2d Cir. 1995). In this regard, the Connecticut Constitution provides that, "[t]he property of no person shall be taken for public

use, without just compensation therefor." *See* Conn. Const. Art. 1, § 11. This clause of the Connecticut Constitution "may be used as the basis of an inverse condemnation action to recover compensation for property taken from private individuals, even in the absence of a separate statutory remedy." *Villager Pond*, 56 F.3d at 380, *citing Laurel, Inc. v. State*, 169 Conn. 195, 200, 362 A.2d 1383 (1975).

Notwithstanding the availability of this adequate procedure for redress of its alleged takings claim, Arrigoni did not pursue relief pursuant to the same prior to instituting the instant federal action. (Pet. App. at B-9.) Instead, as Arrigoni concedes, it merely sought a declaration of just compensation via an administrative appeal challenging the Commission's actions, a procedure for which it is well established cannot award compensation.[1] (Pet. at 10.) More specifically, a property owner's

> administrative appeal serves the remedial purpose of reviewing the propriety of the board's decision . . . . ***An administrative appeal***

---

[1] Connecticut General Statutes § 8-8(b) provides for an administrative appeal of zoning decisions as a remedial measure, stating that: "any person aggrieved by any decision of a board, including a decision to approve or deny a site plan . . . or a special permit or special exception . . . may take an appeal to the superior court for the judicial district in which the municipality is located . . . ." Additionally, Connecticut General Statutes § 8-8(l) sets forth the parameters of a superior court's authority in conducting such an administrative review as follows: "The court . . . may reverse or affirm, wholly or partly, or may modify or revise the decision appealed from. If a particular board action is required by law, the court, on sustaining the appeal, may render a judgment that modifies the board decision or orders the particular board action."

> ***cannot provide a monetary remedy to the plaintiff***. By contrast, in an inverse condemnation action, a plaintiff alleges that a regulatory action constitutes a taking for constitutional purposes and seeks compensation for the alleged taking. An inverse condemnation action does not concern itself with the propriety of the board's action. The only inquiry is whether a taking has, in fact, occurred. If the board's action resulted in a taking, the inverse condemnation action will determine the amount of compensation due.

Cumberland Farms, Inc. v. Groton, 247 Conn. 196, 207, 719 A.2d 465 (1998); *Miller v Westport*, 268 Conn. 207, 216, 842 A.2d 558 (2004); *Cummings v. Tripp*, 204 Conn. 67, 80, 527 A.2d 230 (1987) (holding that even where a plaintiff is able to prove its right to recover ascertainable money damages, an administrative remedy would be inadequate because "administrative relief cannot encompass a monetary award."); *Fromer v. Tree Warden*, 26 Conn. App. 599, 600, 602 A.2d 1060 (1992) (holding that, "[a] plaintiff's claims for monetary relief are not cognizable in an administrative appeal.").

Arrigoni now seeks to salvage it's premature claim pursuant to the theory that its claim is otherwise ripe for review because it brought a claim for declaratory relief for the alleged taking. (Pet. at 21.) In so doing, Arrigoni attempts to equate the seeking of a declaration of just compensation to the denial of just compensation. Arrigoni's administrative appeal theory not only misses the point, but was expressly rejected by this Court in *Williamson County*.

It is clear that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Williamson County*, 473 U.S. at 195. A State's action does not, therefore, give rise to a constitutional injury until the State has failed to provide adequate compensation for the taking. *Id.* Consistent with the foregoing, this Honorable Court aptly noted that:

> it is necessary to contrast the procedures provided for review of the Commission's actions, such as those for obtaining declaratory judgment . . . with procedures that allow a property owner to obtain compensation for a taking. Exhaustion of review procedures is not required . . . . As we have explained, however, because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson County, 473 U.S. at 194, n. 13 (internal citations omitted; emphasis in original).

Consistent with the foregoing, the determination of ripeness hinges not on whether Arrigoni could raise a claim for inverse condemnation in the course of an administrative appeal, but whether Arrigoni could obtain an award of just compensation in the administrative appeal action. Arrigoni's Petition mischaracterizes the nature of the well established law

on this issue, resorting to a single cryptic sentence that its claim for declaratory relief was permissible within the context of an administrative appeal. (Pet. at 21.) However, it is clear, and Arrigoni does not and cannot dispute, that the remedial remedies permitted in its administrative appeal cannot provide a monetary remedy for any alleged taking. *Cumberland Farms*, 247 Conn. at 207; *Cummings*, 204 Conn. at 80; *Fromer*, 26 Conn. App. at 600. Arrigoni's administrative appeal seeking declaratory relief does not, therefore, satisfy the necessary predicate to bringing a takings claim, namely the unsuccessful utilization of the State's procedures for obtaining compensation for the alleged taking. *Williamson County*, 473 U.S. at 194, n. 13.

The tactical decision by Arrigoni in wholly failing to avail itself of the adequate state procedure available for obtaining just compensation undermines the very theories upon which it seeks to predicate the instant Petition. Arrigoni cannot now reasonably claim that *Williamson County* operates to deprive it of a forum for redress of its takings claim where it has made no effort to obtain compensation via the available and adequate procedure for doing so in the first instance and has not yet been denied just compensation. The Petition should, therefore, be denied.

II. *WILLIAMSON COUNTY* IS SOUND AND DOES NOT OPERATE TO DEPRIVE PROPERTY OWNERS OF A FORUM FOR REDRESS OF THEIR TAKINGS CLAIMS

The overriding theme of the Petition presupposes that property owners have an absolute right to a federal forum for redress of their takings claims, and

misconstrues the basic premise upon which *Williamson County*'s state litigation requirement rests.

A. There Exists No Absolute Right To A Federal Forum For Section 1983 Takings Actions, And The Absence Of A Federal Forum Is Not Contrary To The Congressional Mandate Of Section 1983

The primary underpinning of the Petition is the contention that a takings plaintiff has an absolute right to a federal forum for redress of its § 1983 takings claim. This Court, however, has made clear that § 1983 plaintiffs do not have an absolute right to a federal forum, nor does there exist any exception under § 1983 for takings plaintiffs.

In *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491, 163 L. Ed. 2d 315 (2005), this Court addressed the very issue of a property owner's right to a federal forum for redress of § 1983 takings claims. Therein, the petitioners argued that takings plaintiffs are forced to litigate their § 1983 takings claims in state court without any realistic opportunity to obtain review of their claims in a federal forum by virtue of *Williamson County*'s state litigation requirement. *Id.* at 327. This Court, with all justices in agreement, held that it has repeatedly rejected the assumption that a plaintiff has a right to vindicate federal claims in a federal forum, even when a plaintiff would have preferred not to litigate its claim in state court, but was required to do so by operation of statute or prudential rules. *Id.* at 342, *citing Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *Allen v. McCurry*, 449 U.S. 90, 103-104, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

This Court went on to note that it has emphatically rejected the notion that this posture somehow conflicts with the congressional mandate of § 1983, stating as follows:

> The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the ***authority for this principle*** is difficult to discern. It ***cannot lie in the Constitution, which makes no such guarantee***, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. ***And no such authority is to be found in § 1983 itself*** . . . . There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id. at 343, *quoting Allen*, 449 U.S. at 103-04 (emphasis added).

As in *San Remo*, it is entirely unclear why the Petitioner's and the Amici's preference for a federal forum should alter the analysis. As this Court noted, "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex, factual, technical and legal questions related to zoning and

land-use regulations." *Id.* at 347. Moreover, "[a]lthough § 1983 . . . was passed to interpose the federal courts between the Sates an the people, as guardians of the people's federal rights . . . state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law." *Haywood v. Drown*, 556 U.S. 729, 735, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009) (internal quotations and citations omitted).

Simply put, Petitioner's claim amounts to no more than its protestation that it is unfair for takings plaintiffs to be relegated to state court proceedings which it finds undesirable, but which are required in order to ripen its federal takings claims. Such protestations are insufficient to warrant the grant of *certiorari*. This Court has repeatedly and clearly held that there exists no absolute right to a federal forum for redress of § 1983 takings claims. There exists no compelling reason to depart from this well established rule of law.

B. The State Litigation Requirement Of *Williamson County* Is Well Grounded In The Very Language Of The Fifth Amendment

Contrary to the Petitioner's protestations, *Williamson County* does not destroy takings actions but, rather, makes plain a necessary predicate to the infliction of a constitutional injury. Petitioner's contention that the state litigation requirement destroys rather than ripens takings claims reflects a fundamental misunderstanding of the nature of the constitutional right at issue. Specifically, the

Petitioner presumes that the mere allegation that property has been taken is sufficient, in and of itself, to amount to a ripe constitutional deprivation. However, as this Court aptly noted, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. This Court went on to explain that,

> because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Id. at 194, n. 13. Thus, "the State's action is not complete in the sense of causing a constitutional injury unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Id.* at 195. Stated differently, "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Id.* at 194-95 (internal quotation marks omitted).

Subsequent to *Williamson County*, this Court has consistently adhered to the principle that the constitutional injury "stems from the Fifth Amendment's proviso that only takings without just compensation infringe that Amendment." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct.

2448, 150 L. Ed. 2d 592 (2001); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 715, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010); *Horne v. Dept. of Agriculture*, ___ U.S. ____, 135 S. Ct. 2419, 2431, 192 L. Ed. 2d 388 (2015). Stated differently,

> As [the] text [of the Fifth Amendment] makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . . In other words, it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-37, 125 S. Ct. 2074, 2080, 161 L. Ed. 2d 876 (2005), *quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-15, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

Consistent with the foregoing, it is not the taking itself that ripens a takings claim, but the failure to provide just compensation for the taking which results in a constitutionally cognizable injury. *See Williamson County*, 473 U.S. at 195, n. 13; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

Notwithstanding the dictate of the very language of the Fifth Amendment, Arrigoni argues that *Williamson County*'s state litigation requirement presents an unworkable hurdle to determination of its takings claim in this matter. Arrigoni, however, has suffered

no constitutional injury as it has not been denied just compensation as plainly required by the Fifth Amendment. Arrigoni's effort to save its premature claim on the theory of it's remedial administrative appeal does not alter the fact that Arrigoni has not been denied just compensation. On the contrary, Arrigoni has elected not to pursue the clear remedy available to it for vindication of the purported taking of its property and what, if any, compensation it may be due. Pursuant to *Williamson County* and its progeny, Arrigoni's claim, nor its Petition, are ripe for review.

C. The Hypothetical Preclusion Rules And Removal Scenario Do Not Support *Certiorari* In This Matter

The Petitioner devotes much of its Petition to the implication of issue and claim preclusion rules and the federal removal statute on *Williamson County*'s state litigation prong. These speculative arguments have absolutely no basis in the record in this matter and cannot, therefore, support a review of these issues.

First, with regard to Petitioner's academic exercise on the issue of preclusion, this Court has rejected the very notion that takings claims should be exempted from the full faith and credit statute, or that the failure to do so conflicts with § 1983 in its decision in *San Remo*. In so holding, this Court noted that, "[i]t is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in sate court." *San Remo*, 545 U.S. at 346. Moreover, "there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's Takings Clause."

Id. at 347. This principle is consistent with the fact that "State courts are fully competent to adjudicate constitutional challenges," and, indeed, play a central role in "resolving the complex, factual, technical and legal questions related to zoning and land-use regulations." *Id.*

The Petitioner advances no compelling reason to revisit *San Remo*, and simply cannot under the facts of the instant matter. Specifically, Arrigoni has yet to utilize the available inverse condemnation procedure for seeking a determination of whether its property has been taken, or whether it is entitled to just compensation. As a result of this failure, there has been no adjudication as to whether a final decision has been rendered regarding the development of the subject property, nor any determination that a taking has, in fact, occurred. Thus, there exists no prior determination of any claim or issue which may be subjected to preclusion in this matter. Instead, the Petitioner rests its arguments on issue and claim preclusion upon sheer speculation as to how the doctrines may impact some hypothetical case. Such hypothesis cannot support the Petitioner's claim under the facts and procedural posture of this matter simply because there exists no judgment from which a preclusive effect could arise. The Petitioner, therefore, has not suffered from any preclusion of its claims as bemoaned in the Petition which would support its claim for review by this Court.

Likewise, Petitioner expounds upon the inhibition of state court takings review in light of the potential impact of 28 U.S.C. § 1441, the federal removal statute. Notably, however, the Petitioner does not dispute that

this action made its foray into the federal courts by way of direct initiation of the action in the District Court by the Petitioner itself. Thus, the Petitioner has not suffered any actual or specific harm from a removal of its action as that simply did not occur in this matter. The hypothetical scenario of dismissal of a takings claim following removal of the same cannot, therefore, support the Petition in this matter.

Notwithstanding, at least two Circuits have addressed the implication of the removal statute upon the state litigation prong and have appropriately resolved any such negative impact by waiving strict application of the ripeness rule for prudential reasons in accord with *Stop the Beach* and *Horne*. For example, in *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014), the plaintiff initially brought his takings in federal court, however, he voluntarily dismissed his action upon the Town's argument that the claim was not ripe for review as he had failed to seek and be denied just compensation by an available state procedure. *Id.* at 563-64. The plaintiff then brought his takings claims in state court. *Id.* at 564. In response, the Town removed the action to federal court, where it argued once again that, pursuant to *Williamson County*, the claim was unripe for review. *Id.* The Second Circuit exercised its discretion under the prudential view to conclude that, "when a defendant removes a takings claim from state court to federal court, the second prong of *Williamson County* is satisfied." *Id.* In so ruling, the Second Circuit cited, with approval, the decision of the Fourth Circuit in *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013), which also held that, when a defendant removes a takings claim to federal court, the state

procedures prong of *Williamson County* are not applicable. In particular, the Court agreed with the Fourth Circuit's reasoning that "refusing to apply the state-litigation requirement in this instance ensures that a state or its political subdivision cannot manipulate litigation to deny a plaintiff a forum for his claim." *Id., quoting Sansotta*, 724 F.3d at 545. The decisions in *Sherman* and *Sansotta* demonstrate that the Petitioner's theory of unworkability arising out of the removal statue is unavailing and does not support its claim for relief as to this issue.

III. THE SECOND CIRCUIT'S RULING IS NOT IN CONFLICT WITH THIS COURT'S RECENT PRONOUNCEMENT AS TO THE PRUDENTIAL NATURE OF THE STATE LITIGATION REQUIREMENT, NOR HAS THE APPLICATION OF THE PRUDENTIAL DOCTRINE SUFFICIENTLY DEVELOPED IN THE LOWER COURTS

The Petitioner argues, in the alternative, that the instant action presents an important issue regarding the waiver of *Williamson County*'s state litigation rule for prudential reasons. Notably, however, the Petitioner concedes that the Second Circuit ruling in this matter held that the Court was not convinced that the facts presented warranted a waiver of *Williamson*'s requirements, a finding consistent with the prudential nature of the rule set forth in *Stop the Beach* and its progeny. (Pet. at 27.) Thus, there exists no conflict between the Second Circuit's ruling and this Courts pronouncements as to the prudential nature of the ripeness requirements in *Stop the Beach*, or it's recent clarification that *Williamson County*'s requirements

present considerations as to "prudential ripeness" which the Court has recognized "is not, strictly speaking, jurisdictional." *Horne*, 133 S. Ct. at 2602.

In any event, much of the Petitioner's claims as to the purported conflict and confusion surrounding the prudential nature of *Williamson County*'s requirements are premised upon Circuit rulings which pre-date this Court's most recent pronouncements clarifying the prudential nature of the ripeness doctrines in *Stop the Beach* and, most recently, in *Horne*. *See e.g., Snaza v. City of Saint Paul*, 548 F.3d 1178 (8th Cir. 2008); *Dahlen v. Shelter House*, 598 F.3d 1007 (8th Cir. 2010); *Busse v. Lee County*, 317 Fed. Appx. 968 (11th Cir. 2009); *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159 (3rd Cir. 2006); *Murphy v. New Milford Zoning Commission*, 402 F.3d 342 (2d Cir. 2005). Given that each of the foregoing rulings from the Second, Third, Eighth and Eleventh Circuits were issued prior to the recent clarification of the prudential nature of the *Williamson*'s requirements, it remains to be seen whether subsequent presentations of this issue would fail to be in accord with *Stop the Beach* and *Horne*.

Other rulings relied upon by the Petitioner are predicated upon intra-circuit conflicts within the Seventh and Tenth Circuits. With regard to the purported intra-circuit conflict within the Seventh Circuit, a review of the decisions relied upon demonstrates that the rulings are not actually in conflict with the Seventh Circuit's prior application of a prudential view in *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007). For example, in *Hendrix v. Plambeck*, 420 Fed. Appx. 589, 592 (7th Cir. 2011),

although the Court upheld the district court's ruling dismissing the plaintiff's action for the failure to exhaust state remedies, the Seventh Circuit made it a point to note that the plaintiff's claim would have failed in any event as no "taking" of the property occurred in light of the fact that the damage to the plaintiff's property resulted from the state's proper exercise of its police power in eliminating a public nuisance. Thus, the Court arguably was not presented with a factual scenario, let alone compelling reason, warranting waiver of *Williamson*'s requirements. Similarly, *Everson v. City of Weyauwega*, 573 Fed. Appx. 599 (7th Cir. 2014), did not present a question of whether the state litigation requirement should be waived. Rather, on appeal, the plaintiff's essentially argued that they did not have an available, adequate remedy for redress of their temporary takings claim. *Id.* at 600. In affirming the decision below, the Court held that the state did, in fact, provide an adequate remedy for redress of temporary taking claims. *Id.* Thus, the decisions in *Hendrix* and *Everson* are not in direct conflict with *Peters* as neither involved a determination or claim for waiver of *Williamson*'s requirements.

Likewise, a review of the Tenth Circuit decisions relied upon demonstrates that no intra-circuit conflict exists. In particular, the Petitioner argues that the Tenth Circuit's ruling in *Gose v. City of Douglas*, 561 Fed. Appx. 723 (10th Cir. 2014) concludes that the state litigation requirement presents a jurisdiction defect contrary to the Circuit's ruling in *Alto Eldorado Partnership v. County of Santa Fe*, 643 F.3d 1170 (10th Cir. 2011) which recognized the prudential nature of the requirement. The issue before the Court in *Gose*, however, was not a determination of whether

Williamson's state litigation requirement should be waived for prudential reasons, but rather, whether the district court properly concluded that the plaintiff's claims therein were barred by the applicability of issue and claim preclusion.

What the Petitioner's argument does demonstrate is that the majority of the decisions subsequent to *Stop the Beach* and *Horne*, have recognized the prudential view of *Williamson County*'s requirements, and have exercised their discretion as to whether the requirements should be waived. *See e.g., Sherman*, 752 F.3d at 561; *Sansotta*, 724 F.3d at 545; *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013); *Rosedale Missionary Baptist Church v. New Orleans*, 641 F.3d 86, 88-89 (5th Cir. 2011); *Wilkins v. Daniels*, 744 F.3d 409, 418 (6th Cir. 2014); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117-18 (9th Cir. 2010); *MHC Financing Ltd. Partnership v. City of San Rafael*, 714 F.3d 1118, 1130 (9th Cir. 2013).

Only two outlying decisions relied upon by the Petitioner, both arising out of the First Circuit, have applied the state litigation requirement as a strictly jurisdictional barrier. *See e.g., Marzek v. Rhode Island*, 702 F.3d 650 (1st Cir. 2012); *Downing/Salt Pond Partners v. Rhode Island & Providence Plantations*, 643 F.3d 16 (1st Cir. 2011). This hardly constitutes a significant conflict warranting the grant of *certiorari*. On the contrary, the majority of the Circuits are in harmony as to the clarification of the prudential nature of the *Williamson County*'s ripeness rules. Perhaps further development of the law in the Circuits subsequent to *Stop the Beach* and *Horne* may give rise to a conflict, but that is simply not the case at this

juncture as the application of the prudential view is still developing in the Circuit Courts. The Petition in this regard is, therefore, premature.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

Thomas R. Gerarde
Counsel of Record
Beatrice S. Jordan
HOWD & LUDORF, LLC
65 Wethersfield Avenue
Hartford, CT 06114
Ph: (860) 249-1361
Fax: (860) 249-7665
tgerarde@hl-law.com

Counsel for Respondents

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Case No. 3:08CV520(JGC)

[Dated January 7, 8, 9, 2013]

ARRIGONI ENTERPRISES LLC,
Plaintiff,

vs.

TOWN OF DURHAM, DURHAM PLANNING and ZONING COMMISSION, DURHAM ZONING BOARD OF APPEALS,
Defendants.

January 7, 2013
8:17 a.m.

Hartford, Connecticut

FIRST DAY OF TRIAL

BEFORE THE HONORABLE JAMES G. CARR
SENIOR UNITED STATES DISTRICT JUDGE
AND A JURY OF TWELVE

Appearances:

For the Plaintiff:

RICHARD D. CARELLA, ESQ.
BENJAMIN J. BERGER, ESQ.
Updike, Kelly & Spellacy PC
300 Plaza Middlesex
203 Main Street
Middletown CT 06457

For the Defendants:

THOMAS R. GERARDE, ESQ.
KATHERINE E. RULE, ESQ.
Howd & Ludorf
65 Wethersfield Avenue
Hartford CT 06114-1190

Court Reporter:

Thea Finkelstein RMR, CRR
TheaFinkelstein@aol.com

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[p.123]

wouldn't it? Whatever you want to do.

MR. GERARDE: Could I have you here? If I start going into what the site would accommodate, then we're going to get into need for the plan.

THE COURT: You may ask that question.

(In open court.)

THE COURT: I overruled the objection, if you want to re-ask the question.

Q Mr. Arrigoni, there was nothing stopping you from proposing one building on your land, correct?

A Correct.

Q You never proposed a one-building development to the zoning commission, correct?

A No, I did not.

Q Am I correct about that?

A Yes, you're correct.

Q You never proposed a two-building parcel to the zoning commission, is that correct?

A No, we did not.

Q I'm correct about that?

A Yes, you're correct.

Q I'm losing in the double negatives.

A Okay.

Q You could have done that, too, if you wanted to, correct? Propose a two-building development?

[p.124]

A There -- we --

Q Nothing stopped you from doing it, is the point?

A Correct.

Q All right. Now, Greenland Realty only has one building, correct?

A Correct.

Q 9600 square feet, compared to the 30,000 square foot of footprint you proposed, correct?

A Correct.

Q Nosal only has one building, correct?

A At present, yes.

Q All right. Now, you'll remember, I don't know if you followed the Nosal history. You said you did, didn't you?

A Not as close as the Greenland, but yes, I did follow up.

Q Nosal originally asked for two buildings in the neighborhood of 5,000 square feet each, but they modified that plan before they commenced construction to one building, 90 by 150. Correct?

MR. CARELLA: Objection.

THE COURT: Okay. Counsel approach.

(At the sidebar.)

THE COURT: Basis?

MR. CARELLA: It's not in evidence.

MR. GERARDE: It is. My exhibit.

MR. CARELLA: Then you haven't laid a proper

* * *

[p.126]

Q -- compared to the three you proposed?

A Correct.

Q All right. When your 30,000 square foot of buildings was denied, didn't Dick Eriksen, my client, come back to you and say: Why don't you come back with something smaller in scale?

A I believe -- there was something said, yes.

Q Along those lines?

A I believe there was something said, yes.

Q But you never came back with anything smaller in scale, did you?

A I did not.

Q And you instead came to federal court, and now we're in a lawsuit for constitutional violation?

MR. CARELLA: Objection. Argument.

MR. GERARDE: Withdrawn, your Honor. I can move on.

THE COURT: We can all take notice of that fact. We're here today, and that's what this is about.

MR. GERARDE: Yes.

Q Now, in terms of excavation, there's a concept of how much you cut out of the ground versus how much you use as fill. It's referred to as cuts versus fill. Are you familiar with that?

A I am.

Q We'll use your numbers. If you have 75,000 cubic yards of excavation and you can use 5,000 on the property and have

* * *

[p.129]

the street, fill up, 5500 back down the street, correct?

A Assuming that the 5500 number was correct, yes.

Q Okay. So with respect to crushing, your plan was to involve a rock crusher on-site to crush 75,000 cubic yards of rock into small stones, three-quarter inch process?

A Basically, yes.

Q All right. And the crushing of stone is actually prohibited, it's a prohibited activity, in the design development district, isn't it?

A It is.

Q And you knew that before you even made this application, didn't you?

A Yes.

Q You knew that when you bought the property, didn't you?

A Yes.

Q So you proposed to the Durham Planning & Zoning Commission a project that involved crushing 75,000 cubic yards of rock when you knew that crushing of rock was not allowed in that zone, correct?

A Correct.

Q The zoning commission never allowed Nosal to crush rock, isn't that correct?

A I've never been able -- I don't know of any permit that they were given.

Q All right. And are you aware that a cease and desist

* * *

[p.138]

Q Sound about right?

A It sounds about right.

Q All right. We're on page 12 of Exhibit 117, and we hear from Pat Benjamin, the professional engineer, addressing the commission, is that right?

A Correct.

Q So I'm just going to direct your attention to the part that I highlighted:

There will be about 75,000 cubic yards of bedrock that will need to be excavated to allow development on the site.

We know that, we heard that already, right?

A Yes.

Q Next one: It will take from 90 to 120 days per year to be able to do the blasting and the crushing over a two- to three-year period to remove it from the site.

Pat Benjamin represented that to the commission?

A Yes, he did.

Q The trucks on Mountain Road would be anywhere from zero to 40 trucks per day for the lifetime of the operation, about three years.

Pat Benjamin represented that to the commission on your behalf, correct?

A Correct.

Q All right. On to the next notebook, back this out.

* * *

January 8, 2013
8:23 a.m.

Hartford, Connecticut

SECOND DAY OF TRIAL

* * *

[p.277]

testimony?

A No.

Q I have Exhibit 135 on the screen. Letter to Nosal signed by Geoffrey Colegrove. You know Geoffrey Colegrove, don't you, sir?

A Yes.

Q Zoning enforcement officer?

A Yes.

Q It's pretty self-explanatory, isn't it? Complaint filed with the commission concerning the processing of stone, you are hereby ordered to cease and desist. Isn't that right?

A Yes.

Q All right. Now, you represented Arrigoni in connection with its permitting, correct?

A Yes.

Q All right. You testified on direct examination that Mr. Arrigoni told you three to four weeks of blasting and that was all? Did I get that right?

A Yes. Yes, I believe that when I discussed with him, that was the time frame, I believe, he was talking about, as I recall it.

Q All right. Now, I have Exhibit 117, which are the minutes of the November 16, 2005, meeting. And do you remember going to the November 16, 2005, meeting on behalf of Arrigoni? It was the first major meeting.

[p.278]

A I remember being at the meetings, but no, I don't specifically remember the meeting. No.

Q All right. Well, I'm going to show you page 12 from this exhibit, and direct you to the highlighted portions. Pat Benjamin, professional civil engineer -- that's you, correct?

A Correct.

Q All right. Will be about 75,000 cubic yards of bedrock that will need to be excavated to allow development on the site?

THE COURT: Very sorry to interrupt.

MR. GERARDE: I'm sorry, your Honor.

THE COURT: Thank you.

Q There will be about 75,000 cubic yards of bedrock that will need to be excavated to allow development on the site.

You represented that to the commission, correct?

A Yes.

Q The next highlighted portion: It will take from 90 to 120 days per year to be able to do the blasting and the crushing over a two- to three-year period to remove it from the site.

You represented that to the commission, didn't you?

A Yes, I believe I said that.

Q And next highlighted portion: The trucks on Mountain Road would be anywhere from zero trucks to 40 trucks per day for the lifetime of this operation, about three years.

[p.279]

You represented that to the commission, didn't you?

A I believe so. I don't remember saying that.

Q Are you saying that that's incorrect information?

A I just don't remember saying that.

Q All right. Greenland -- let me get the map -- do you have your bearings on this map, sir, that this is Route 68, Mountain Road comes in this way, Arrigoni's property is up here?

A Yes.

Q Greenland is over here, and this is a single-family home, the Tyrczek family, right here?

A I see the homes that are on there, yes.

Q Did you know that there was a single-family home, the Tyrczek family, on the right?

A I know there are single-family homes there.

Q Okay. As you head up the street a little farther, the Cruise, there was a single family home as well that says Cruise on this map?

A Yes.

Q Single-family home opposite the Arrigoni property, the Dingwells?

A Yes.

Q Now, Greenland was approved -- you weren't Greenland's representative in front of the commission, correct?

A I'm sorry, I didn't hear you.

* * *

App. 12

January 9, 2013
8:29 a.m.

Hartford, Connecticut

THIRD DAY OF TRIAL

* * *

[p.512]

Q And would it be fair to state that it was never proposed in any of the plans that you reviewed prior to its being approved ultimately in January of 2004 that Greenland would be crushing rock on site?

A Correct.

Q And when Greenland did come back to the commission about a year into development and asked for permission to have a temporary permit to crush rock, do you get involved at that stage or is that just the commission's decision?

A Just the commission.

Q And with respect to Nosal, I'll ask you the same questions. It was never proposed, during your review on the Nosal site development, that they would be crushing rock on that site?

A Correct.

Q Now, there was testimony about you having reviewed some plans for quarrying, and I just want to reiterate so everyone is clear. Tilcon is over in the heavy industrial zone, is that right?

A Yes.

Q What we're talking about in this case is Arrigoni being in design development district, correct?

A Yes.

Q Quarrying's prohibited there, correct?

A Yes, correct.

* * *

APPENDIX B

SUPERIOR COURT
JUDICIAL DISTRICT OF MIDDLESEX
AT MIDDLETOWN

[Dated January 9, 2006]

ARRIGONI ENTERPRISES, LLC	)
Plaintiff	)
	)
VS.	)
	)
THE PLANNING AND ZONING	)
COMMISSION OF THE TOWN	)
OF DURHAM	)
Defendant	)
	)

RETURN DATE: JANUARY 24, 2005

APPEAL FROM PLANNING AND ZONING COMMISSION

To the Superior Court for the Judicial District of Middlesex at Middletown, One Court Street, Middletown, Connecticut 06457 on January 24, 2005 comes Arrigoni Enterprises, LLC of 165 Madison Road, Durham, Connecticut 06422 appealing from the decision of the Planning and Zoning Commission of the Town of Durham denying its special permit application for the site development and construction of three (3) industrial buildings and complains and says:

1. The Plaintiff, Arrigoni Enterprises, LLC, is a limited liability company organized and existing under the laws of the State of Connecticut and is the owner of the real property located on Mountain Road, Durham, Connecticut designated as Assessor's Map 54, Lot 3 (the "subject property"). Said subject property is located in an industrial zone designated as "DDD" (Design Development District) in the Town of Durham, Connecticut.

2. The Defendant, Planning and Zoning Commission of the Town of Durham, (the "Commission") is the agency empowered under Chapter 124 of the Connecticut General Statutes to perform the function of a zoning commission. The Commission has the authority to approve special permits under the Durham Zoning Regulations (the "Regulations") and when acting on such applications, it acts in an administrative capacity.

3. On September 13, 2005, the Plaintiff applied to the Commission for a special permit for the site development and construction of three (3) industrial buildings on the subject property in conformity with Design Development District Regulations and pursuant to Section 07.04 of the Regulations (hereinafter the "07.04 Special Permit").

4. The initial meeting on the application was held on October 5, 2005 and public hearings were scheduled and held on November 16, 2005 and December 7, 2005.

5. The Plaintiff provided consent to the Commission to extend the deadline to complete the public hearings on December 21, 2005.

6. On December 21, 2005, the Commission closed to public hearing and denied the Plaintiff's application for the 07.04 Special Permit.

7. The Commission stated in its reasons for denying the Plaintiff's application that the site work necessary to develop the site was not appropriate in the district and not compatible with the surrounding neighborhood.

8. The Plaintiff is aggrieved from the decision of the Commission to deny the special permit application as it is the owner of the subject property.

9. In denying said special permit application, the Defendant Commission has acted illegally, arbitrarily and in abuse of the discretion vested in it by law as an administrative agency in that it:

a. has failed to approve the application which conforms to the agency's regulations;

b. has failed to assign proper reasons for the denial of the application rationally related to the application;

c. has based its denial of the application on factors not contained in the Regulations;

d. has improperly interpreted the Regulations; and

e. has unlawfully restricted all use of the subject property in violation of the Fifth Amendment to the United States Constitution and in violation of Article First, Section 11 of the Connecticut Constitution to the extent that the subject property is forced to remain in its undeveloped state and cannot be used for any reasonable purpose.

WHEREFORE, the Plaintiff appeals from the decision of the Planning and Zoning Commission of the Town of Durham denying said special permit and prays that

1. The appeal be sustained and the decision of the Commission declared to be null and void;

2. The Court order the Commission to approve the special permit; and

3. Such other relief as the Court may deem appropriate.

And in the alternative

1. A judgment declaring the denial of the application to be a confiscation and an inverse condemnation of the Plaintiff's property;

2. A determination of the amount of compensation due the Plaintiff for the confiscation of its property; and

3. Such other relief as the Court may deem appropriate.

Dated at Middletown, Connecticut this 9th day of January, 2006.

THE PLAINTIFF
ARRIGONI ENTERPRISES, LLC
BY /s/_____
Richard D. Carella, Its Attorney
203 Main Street
300 Plaza Middlesex
Middletown, Connecticut 06457
Juris No. 405928 Tele: (860) 346-3626

APPENDIX C

SUPERIOR COURT
JUDICIAL DISTRICT OF MIDDLESEX
AT MIDDLETOWN

[Dated January 9, 2006]

ARRIGONI ENTERPRISES, LLC	)
Plaintiff	)
	)
VS.	)
	)
THE PLANNING AND ZONING	)
COMMISSION OF THE TOWN	)
OF DURHAM	)
Defendant	)
	)

RETURN DATE: JANUARY 24, 2005

APPEAL FROM PLANNING AND ZONING COMMISSION

To the Superior Court for the Judicial District of Middlesex at Middletown, One Court Street, Middletown, Connecticut 06457 on January 24, 2005 comes Arrigoni Enterprises, LLC of 165 Madison Road, Durham, Connecticut 06422 appealing from the decision of the Planning and Zoning Commission of the Town of Durham denying its special permit application for earth excavation, crushing and removal and the re-grading of the subject property to construct three (3) industrial buildings and complains and says:

1. The Plaintiff, Arrigoni Enterprises, LLC, is a limited liability company organized and existing under the laws of the State of Connecticut and is the owner of the real property located on Mountain Road, Durham Connecticut designated as Assessor's Map 54, Lot 3 (the "subject property"). Said subject property is located in an industrial zone designated as "DDD" (Design Development District) in the Town of Durham, Connecticut.

2. The Defendant, Planning and Zoning Commission of the Town of Durham (the "Commission") is the agency empowered under Chapter 124 of the Connecticut General Statutes to perform the function of a zoning commission. The Commission has the authority to approve special permits under the Durham Zoning Regulations (the "Regulations") and when acting on such applications it acts in an administrative capacity.

3. On September 13, 2005, the Plaintiff applied to the Commission for a special permit for the site development and construction of three (3) industrial buildings on the subject property in conformity with Design Development District Regulations and pursuant to Section 07.04 of the Regulations (hereinafter the "07.04 Special Permit").

4. At the October 5, 2005 meeting, the Commission instructed the Plaintiff that it was required to apply for a second special permit pursuant to Section 12.05 of the Regulations (hereinafter the "12.05 Special Permit") for the earth excavation, crushing and removal associated with the site preparation for the construction of the three industrial

buildings and, on October 14, 2005, the Plaintiff applied for the 12.05 Special Permit.

5. Public hearings were held on November 16, 2005 and on December 7, 2005 for the 12.05 Special Permit as well as the 07.04 Special Permit.

6. The Plaintiff provided consent to the Commission to extend the deadline to complete the public hearings on December 21, 2005 for both the 12.05 Special Permit and the 07.04 Special Permit.

7. On December 21, 2005 the Commission closed to public hearing on the 12.05 Special Permit application and denied the Plaintiff's application for special permit for the earth excavation, crushing and removal associated with the site preparation for the construction for the three industrial buildings.

8. The Commission stated in its reasons for denying the Plaintiff's 12.05 Special Permit application that the excavation required for this site was an inappropriate use and that the crushing of rock was not permitted in any zone other than a Heavy Industrial Zone (designated as "HID" in the Regulations).

9. On May 4, 2005, the Plaintiff had applied for and was denied a request for the change of the zone on the subject property from DDD to HID in order to be allowed, as a permitted right, to crush the rock excavated from the subject property on site as part of its site development for the construction for the three industrial buildings.

10. Over the past several years, the Commission has approved other applications for the site development of other properties in the DDD located in

the same neighborhood and on the same street as the subject property which included earth excavation, crushing and removal of rock from those properties.

11. The Commission's denial of the Plaintiff's 12.05 Special Permit has resulted in the similar denial of the Plaintiff's 07.04 Special Permit application for the site development and construction of three buildings on the subject property which is a permitted use in said zone and the approval of which the Plaintiff is otherwise clearly entitled.

12. The Plaintiff is aggrieved from the decision of the Commission denying its 12.05 Special Permit application as it is the owner of the subject property.

13. In denying said 12.05 Special Permit application, the Defendant Commission has acted illegally, arbitrarily and in abuse of the discretion vested in it by law as an administrative agency in that it:

a. has failed to assign proper reasons for the denial of the 12.05 Special Permit application rationally related to said application;

b. has based its denial of the 12.05 Special Permit application on factors not contained in the regulations;

c. has improperly interpreted the regulations;

d. has unlawfully deprived the Plaintiff of its due process rights in violation of the Fourteenth Amendment of the United States Constitution and in violation of Article First, Section 8 of the Connecticut Constitution in that the Commission's enactment and implementation of Section 12.05 of the Regulations

unlawfully deprives the Plaintiff of its ability to obtain the approval of a special permit under Section 07.04 of the Regulations to which the Plaintiff is otherwise clearly entitled;

e. has unlawfully deprived the Plaintiff the equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution and in violation of Article First, Section 20 of the Connecticut Constitution in that the Commission has unlawfully treated and intended to injure the Plaintiff by holding the Plaintiff to a set of arbitrary standards more exacting and different to other similarly situated property owners within the same zone who are located in the same neighborhood and on the same street; and

f. has unlawfully restricted all use of the subject property in violation of the Fifth Amendment to the United States Constitution and in violation of Article First, Section 11 of the Connecticut Constitution to the extent that the subject property is forced to remain in its undeveloped state and cannot be used for any reasonable purpose.

WHEREFORE, the Plaintiff appeals from the decision of the Planning and Zoning Commission of the Town of Durham denying said special permit and prays that:

1. The appeal be sustained and the decision of the Commission declared to be null and void;

2. The Court order the Commission to approve the special permit;

3. A judgment declaring Section 12.05 of the Durham Zoning Regulations to be unconstitutional; and

4. Such other relief as the Court may deem appropriate.

And in the alternative:

1. A judgment declaring the application of Section 12.05 of the Durham Zoning Regulations to be a confiscation and an inverse condemnation of the Plaintiff's property;

2. A determination of the amount of compensation due the Plaintiff for the confiscation of its property; and

3. Such other relief as the Court may deem appropriate.

Dated at Middletown, Connecticut this 9th day of January, 2006.

THE PLAINTIFF
ARRIGONI ENTERPRISES, LLC
BY /s/_____
Richard D. Carella, Its Attorney
203 Main Street
300 Plaza Middlesex
Middletown, Connecticut 06457
Juris No. 405928 Tele: (860) 346-3626

APPENDIX D

SUPERIOR COURT
JUDICIAL DISTRICT OF MIDDLESEX

DOCKET NO. CV-06-4004729
DOCKET NO. CV-06-4004728

[Dated February 15, 2007]

ARRIGONI ENTERPRISES, LLC	)
	)
V.	)
	)
DURHAM PLANNING &	)
ZONING COMMISSION	)
	)

MEMORANDUM OF DECISION

These are two appeals by the plaintiff, Arrigoni Enterprises, LLC ("Arrigoni"), from the action of the defendant, Durham Planning & Zoning Commission (the "Commission"), denying Arrigoni's application for a Special Exception to construct three commercial buildings (Docket No. CV-06-4004729) and its application for a Special Exception for rock removal and crushing on the same property (Docket No. CV-06-4004728)

Facts

In October, 2005 Arrigoni filed an application seeking a Special Exception to construct three commercial/light industrial buildings on a 9.1 acre

parcel of land located in the Design Development District in Durham. The Commission received this application at its October 5, 2005 meeting. At that time the Commission advised Arrigoni that due to the "extensive earth work and gravel removal necessary" for its proposed development of the site, that an Excavation and Removal Permit would be necessary. Record # 13.

On October 14, 2005 Arrigoni submitted an application to the Commission seeking a Special exception for "Rock Removal and Crushing to regrade the site for three proposed buildings" (the "Excavation Permit"). Record # 1.

The Commission held separate public hearings on each of the Arrigoni applications on November 16, 2005, December 7, 2005 and December 21, 2005.

The Arrigoni site is located on the westerly side of Mountain Road, an unimproved road providing access to several singly-family houses located thereon. The status of Mountain Road is unclear, but it does not appear that it is a road maintained by the Town of Durham.

The Arrigoni site is extremely steep and Arrigoni claims it will require the excavation, crushing and removal of approximately 75,000 cubic yards of rock to make it suitable for the development which it proposes. The application submitted to the Commission seeks permission to crush rock on site prior to its removal therefrom.

At the public hearing on December 21, 2005, Arrigoni's engineer, Pat Benjamin, testified that there would be as many as 80 truck trips per day (40 each

way) during the excavation and crushing operation. He also stated that blasting would occur on the site 90 to 120 days per year during the three years of the excavation work.

At the same public hearing Attorney Joseph Milardo addressed the Commission on behalf of his clients, William and Diana Cruise, whose property abuts the Arrigoni site, Cindy Turcik, Sandy Novak, and Mr. Dingwell, who also live on Mountain Road. He expressed his clients' concern about the effects of the excavation and crushing operation on Mountain Road and on the neighborhood. The minutes of that hearing provide, in part:

> [Attorney Milardo stated] the district in which the Arrigoni's property is located was not designed for blasting, extracting, crushing, and removal of materials (heavy industrial activities). He also urged the Commission to consider whether the proposed activities were in harmony with the orderly development of the area. Certainly, the proposed actions will impair adjacent lots' value.
>
> Attorney Milardo them discussed the traffic along Route 68 and the impact of adding a truck to the congestion every 10 minutes or so throughout the day. If approved, it would be detrimental to the neighborhood and adjacent lots; a quarrying operation would create havoc in the neighborhood . . . . .
>
> Attorney Milardo stated that anything more than four or five trucks a day would overburden the neighborhood. There are many issues with

> the application – from the status of a town road to compatibility with the neighborhood as far as uses are concerned to whether or not the activity as proposed is really a quarrying operation disguised as preparation for development.

Record # 16, p.9.

At the public hearing Evan Noglow, a licensed real estate appraiser, testified that approval of Arrigoni's Special Exceptions would have a significant negative impact on the value of houses in the surrounding area.

At the same public hearing Terry Peters of 670 Wallingford Road discussed her belief that quarry truckers are paid by the truck load and not by the hour, which will cause them to travel as fast as possible to increase the number of truckloads they can carry per day. She stated that when she purchased her home she was aware of the nearby quarrying operation of the Tilcon Company, but she had not bargained for another quarry on the other side of her. She thought that between the two operations blasting would probably occur every day.

Jan Melnik, a Commission member, asked the hypothetical question of what would happen if the Commission were to approve the application, the applicant were to undertake the blasting and removal of 70,000 cubic yards of material over the next three years, and then at that time economic indicators did not support the buildout of the site plan as proposed (i.e., it ended up being simply an earth quarrying and removal operation). Attorney Carella, who represented Arrigoni, responded that there was nothing that bound

Arrigoni to actually build the buildings when it had completed its blasting and excavation. Record #22, p. 9.

At the public hearing on December 7, 2005, Dave Dingwell testified, in pertinent part:

> Why do you have to crush and screen on there? Why can't you just drag it out of there and leave us alone without all that noise? I don't know if you guys have ever heard a crusher? We did, with Greenland, right in our front yard. And it's the worse thing in the world. I'd like to see you people sit though it five, six, seven days a week and listen to that. Not only the dust and all the danger and all these big trucks.. I mean, come one, people, this is a mining operation. It's getting out of control. Pretty soon, if you let these go through, the entire town of Durham is going to be able to do whatever they want on any hill, any ridge top, any place in Durham.

Discussion of the Law and Ruling

Aggrievement

> Section 8-8(b) of the General Statutes provides, in relevant part, as follows:
>
> Any person aggrieved by any decision of a. . .combined planning and zoning commission. . .may take an appeal to the Superior Court for the Judicial District in which the municipality is located. . ."

Section 8-8 of the General Statutes provides as follows:

(a) As used in this section:

> (1) 'Aggrieved person' means a person aggrieved by a decision of a board and includes any officer, department, board or bureau of the municipality charged with the enforcement of any order, requirement or decision of the board. In the case of a decision by a combined planning and zoning commission... 'aggrieved person' includes any person owning land that abuts or is within a radius of 100 feet of any portion of the land involved in the decision of the board.
>
> (2) 'Board' means a municipal. . . . .combined planning and zoning commission. . .the decision of which may be appealed pursuant to this section.

There is no constitutional right to judicial review of the action of a planning and zoning commission. Such review exists only under statutory authority. *Schwartz v. Hamden*, 168 Conn. 8, 10, 357 A.2d 488 (1975); *Tazza v. Planning & Zoning Commission*, 164 Conn. 187, 191, 319 A.2d 393 (1972). Before the court is able to entertain the merits of the plaintiff's case, the issue of aggrievement which is a prerequisite to the court's exercise of jurisdiction in this or in any other administrative appeal must be met and satisfied. *Walls v. Planning & Zoning Commission*, 176 Conn. 475, 479, 408 A.2d 252 (1979); *Fletcher v. Planning & Zoning Commission*, 158 Conn. 497, 501, 264 A.2d 566 (1969).

In situations where appellants are not statutorily aggrieved, they must, of necessity, establish classical aggrievement. Our courts have declared a two-fold test to establish classical aggrievement. "First, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject

matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific, personal and legal interest has been specially and injuriously affected by the decision." *Walls v. Planning & Zoning Commission*, 176 Conn. 475, 477-478, 408 A.2d 352 (1979).

On appeal, the appellant must establish his aggrievement and the court must decide whether he has sustained the burden of proving that fact. *I.R. Stich Associates Inc. v. Town Council*, 155 Conn. 1, 3, 229 A.2d 545 (1967).

Arrigoni has satisfied the two pronged test for aggrievement. It has established that it owns the property in question and that the decision of the Commission will affect its ability to use that property.

Review of Commission's Actions

> A special exception or special permit allows a property owner to use his property in a manner expressly permitted by the local zoning regulations. . . . The proposed use, however, must satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values. . . . An application for a special permit seeks permission to vary the use of a particular piece of property from that for which it is zoned, without offending the uses permitted as of right in the particular zoning district. . . . When ruling upon an application for a special permit, a planning

> and zoning board acts in an administrative capacity. . . . [Its] function. . . [is] to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply." (Citations omitted; internal quotation marks omitted.)

Heithaus v. Planning & Zoning Commission, 258 Conn. 205, 215-17, 779 A.2d 750 (2001).

> The parameters of the review of a special permit application are well established. When considering an application for a special permit, the commission "acts in an administrative capacity and its function is to determine whether the applicant's proposed use is one that satisfies the standards set forth in existing regulations and statutes. . . . Review of zoning commission decisions by the Superior Court is limited to a determination of whether the commission acted arbitrarily, illegally or unreasonably. . . . In appeals from administrative zoning decisions, the commission's conclusions will be invalidated only if they are not supported by substantial evidence in the record. . . . The substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. It must be enough to justify, if the trial were to a jury, a

> refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . The settled standard of review of questions of fact determined by a zoning authority is that a court may not substitute its judgment for that of the zoning authority as long as it reflects an honest judgment reasonably exercised." (Citations omitted; internal quotation marks omitted.) *Cybulski* v. *Planning & Zoning Commission*, 43 Conn. App. 105, 110-11, 682 A.2d 1073, *cert. denied*, 239 Conn. 949, 686 A.2d 123 (1996).

Gevers v. Planning & Zoning Commission, 94 Conn. App. 478, 482-483, 892 A.2d 979 (2006).

The plaintiff shoulders the burden of demonstrating that the commission acted improperly. *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 206, 658 A.2d 559 (1995).

The purpose of the Design Development District as stated in Section 07.04.01 of the Durham Zoning Regulations is:

> The Design Development District is established to allow for coordinated, well-planned office industrial park and commercial development. The regulations for this district are intended to encourage development which is compatible with surrounding or abutting residential, institutional or public uses and to ensure suitable open space, parking, and sound site planning. Such district shall consist of not less than thirty acres.

In order to achieve the purpose of the Design Development District, the Commission provided in Section 07.04.04 of the zoning regulations that all of the uses of land permitted in the district are subject to the acquisition of a special exception. As such all uses must meet the general standards set forth in Section 13.05.04 of the zoning regulations:

> The Commission shall approve an application to permit establishment of a use for which a special exception is required if it shall find that the proposed use and the proposed buildings and structures will conform to the following standards in addition to such special standards for particular uses as may be imposed:
>
> 1. The location, type, character and size of the use and of any building or other structure in connection therewith shall be in harmony with and conform to the appropriate and orderly development of the town and the neighborhood and will not hinder or discourage the appropriate development and use of adjacent lots or impair the value thereof;
>
> 2. The nature and location of the use and of any building or other structure in connection therewith shall be such that there will be adequate access to it for fire protection purposes;
>
> 3. The streets serving the proposed use are adequate to carry prospective traffic, that provision is made for entering and leaving

> the property in such a manner that no undue traffic hazard or congestion will be created;
>
> 8. The special exception use shall not constitute a hazard to public health and safety either on or off the subject property.

The excavation and earth removal of rock is a permitted used of land in a Design Development District upon the acquisition of a special exception from the Commission subject to compliance with all the standards set forth in Section 12.05.02.01 of the zoning regulations. The rushing of rock is not a permitted use in the Design Development District. Durham Zoning Regulations, § 12.05.03.01.03.

Following the final public hearing on the Arrigoni applications the Commission voted 1) to deny the Arrigoni application for a special permit to excavate and crush 75,000 cubic yards of earth material at the Mountain Road site and 2) to deny the Arrigoni application for a special permit to construct three buildings at the site. Each vote was unanimous with one abstention. The Commission did not state its reasons for its denial on the record.

Connecticut General Statutes § 8-3c(b) provides, in pertinent part, "Whenever a commission grants or denies a special permit or a special exception, it shall state upon its records the reason for its decision." This statute is directory only. The Commission's failure to state its reasons is not fatal. However, such failure requires the court to search the entire record to find a basis for the decision. *Protect Hamden/North Haven From Excessive Traffic & Pollution. Inc. V. Planning & Zoning Commission*, 220 Conn. 527, 544-45, 600 A.2d

757 (1991); *Harris v. New Milford Zoning Commission*, 259 Conn. 402, 423, 788 A.2d 1239 (2002).

In this case there is ample evidence in the record to support the Commission's denial of the applications. The proposed activity violated a specific zoning regulation. At the meeting of the Commission which occurred on December 21, 2005, Brian Ameche, a Commission member, stated that under the purview of the special permit process, the Commission can deny applications for inappropriate uses and, when considering removal of earth products under section 12.05.03 of the regulations, must be satisfied that all of the conditions spelled out are complied with. Mr. Ameche stated that the Commission was clearly not satisfied because a 75,000 cubic yard excavation operation is an inappropriate operation and use for the site and, further, because crushing is not permitted in the zone in question. Record # 16 . Dave Foley, another Commission member added that in the regulations under section 12.05.03.01.03(b), it specifically states that "no washing, crushing or other forms of processing of earth products shall be conducted upon the premises unless located within a Heavy Industrial zone and then it must not be located within 100 feet of any property or street line. *Id.*

In addition to constituting a violation of 12.05.03.01.03(b), there is ample evidence in the record that the massive excavation project would have had a negative impact on the public safety, health and welfare. Moreover, the Commission could well have concluded that Arrigoni was using the site plan process to carry on a quarrying operation, which was not

allowed in the zoning district in which the property was located.

Arrigoni also argues that the view expressed by various members of the Commission that the excavation of 75,000 cubic yards of material was "excessive" was unfounded because there were no reasonable alternatives to the proposed excavation. The record reflects that the Commission invited Arrigoni on several occasions to consider a smaller project which would require a smaller amount of excavation. At the public hearing of November 16, 2005 when Arrigoni's engineer was asked about building one 10,000 square foot building, he responded, "We looked- I wouldn't even hazard a guess like that, because the applicant comes to the engineer with a requirement of designing a study and we look at parameters such as storm water and how many buildings they think they need based on the market they're looking at, to be able to rent- you know, in the future - and make some return on their investment." Record # 31, p.45

The foregoing response could reasonably have been interpreted by the Commission to indicate that Arrigoni had not looked at alternatives to its only proposed plan, which Mr. Eames, the Commission chairman, described as "a mining operation." Record # 31, p. 29. At the same public hearing Attorney Carella indicated that any alternatives to the plan proposed were not economically.

The Commission correctly argues that the maximum possible enrichment of a landowner is not a controlling purpose of zoning. *DeForest & Hotchkiss Commission v. Planning & Zoning Commission*, 152 Conn. 262, 272, 205 A.2d 774 (1964); *Senior v. Zoning*

Commission, 146 Conn. 531, 535, 153 A.2d 415(1959). While Arrigoni attempts to argue that there are no feasible alternatives to its plan, the record indicates that it did not seriously consider any alternatives and, essentially, presented the Commission with a "take it or leave it" proposal. As stated above, the Commission's decision to "leave it" was supported by valid reasons.

Arrigoni also argues that "The Commission's reason for denial that crushing of earth material is not permitted in the DDD Zone is not supported by substantial evidence and is not a reasonable interpretation of this Regulation and is, therefore, arbitrary." Plaintiff's Brief, p.16. Arrigoni further argues that "to interpret the regulations to absolutely prohibit the crushing of rock associated with site preparation is unreasonable and arbitrary." *Id.* at p. 18.

Zoning regulations my be permissive or prohibitory in character. Regulations which are prohibitory in character allow all uses except those expressly prohibited. *Park Regional Corp. v. Town Plan & Zoning Commission*, 144 Conn. 677, 682, 136 A.2d 785 (1957). Regulations which are permissive in character affirmatively list uses permissible in various zones. Any use which is not specifically permitted is automatically excluded. *Gada v. Zoning Board of Appeals*, 151 Conn. 46, 48, 193 A.2d 502(1963); *Bradley v. Zoning Board of Appeals*, 165 Conn. 389, 394, 334 A.2d 914 (1973).

The zoning regulations of the town of Durham are permissive in character. Any use of land which is not specifically listed as a permitted use is automatically

prohibited. *Graff v. Zoning Board of Appeals*, 277 Conn. 645, 653-654, 894 A.2d 285 (2006).

> Zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes . . . Thus, in construing zoning regulations, our function is to determine the expressed legislative intent. . . Moreover, zoning regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . . and the words employed therein are to be given their commonly approved meaning.

Enfield v. Enfield Shade Tobacco, LLC, 265 Conn. 376, 380-81, 828 A.2d 596 (2003).

> The role of the courts in statutory interpretation is well established. "A court must interpret a statute as written . . . and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation." (Internal quotation marks omitted.) *Vivian v. Zoning Board of Appeals*, 77 Conn. App. 340, 345, 823 A.2d 374 (2003). "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra textual evidence of the meaning of the statute shall not be considered." (Internal quotation

> marks omitted.) *Urbanowicz v. Planning & Zoning Commission*, 87 Conn. App. 277, 287, 865 A.2d 474 (2005); *see also* General Statutes § 1-2z.

Dipietro v. Zoning Board of Appeals, 93 Conn. App. 314, 318, 889 A.2d 269 (2006).

Section 12.05.03.01.03 of the Durham zoning regulations provides, in pertinent part:

> A. The commission may permit the screening and sifting of sand, sand and gravel or topsoil in the Farm-Residential (FR), Commercial (C-1, C-2) or Design Development District (DDD) districts subject to the issuance of a Special Exception in accordance with Section 13.05 of these regulations. The screening and sifting of sand and gravel or topsoil may be permitted in the Light Industrial (LI) or Heavy Industrial (HID) districts subject to approval by site plan review.
>
> B. No washing, crushing or other form of processing earth products shall be conducted upon the premises unless located within a heavy industrial (HID) zone and then it must not be located within 100' of any property or street line.

Connecticut General Statutes § 1-2z provides:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not

> yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

The above-referenced provisions of the zoning regulations are plain and unambiguous. No interpretation of their meaning is required. The regulation prohibits crushing of earth material in a Design Development District. This prohibition alone was sufficient to permit the Commission to deny Arrigoni's applications.

For the foregoing reasons, the Commission did not act illegally, arbitrarily or abuse its discretion when it denied Arrigoni's applications for special exceptions. The appeals are hereby dismissed.

By the court,

/s/_____
Aurigemma, J.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NO.: 3:08CV00520(AWT)

[Dated May 30, 2008]

ARRIGONI ENTERPRISES LLC,	)
	)
v.	)
	)
TOWN OF DURHAM, DURHAM PLANNING & ZONING COMMISSION, DURHAM ZONING BOARD OF APPEALS,	)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The Defendants respectfully submit this memorandum of law in support of their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1).

I. FACTS.

The Defendants contest many of the facts recited in the Plaintiff's Complaint and summarized herein, but for purposes of its Motion to Dismiss the facts alleged are taken as true. Shipping Financial Serv. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998).

The Defendants set out below the facts from the Plaintiff's Complaint that they believe are relevant to

their Motion to Dismiss the Plaintiff's inverse condemnation claim (Count Three). However, the Defendants do not set forth all the facts recited in the Plaintiff's Complaint. But as noted above, for purposes of their Motion to Dismiss, the facts of the Plaintiff's Complaint, even those not recited herein, are taken as true. Id.

The Plaintiff is a Connecticut limited liability company ("Arrigoni"). (Complaint, at ¶ 1).

* * *

procedure and been denied just compensation." Williamson, 473 U.S. at 195, 105 S.Ct. 3108.

1. Several of the Defendants' Denials Satisfy the First Prong of the Williamson Ripeness Test.

The Plaintiff's inverse condemnation claim is brought pursuant to 42 U.S.C. § 1983. The statute of limitations for Section 1983 claims is three years. See, Lounsbury v. Jeffries, 25 F.3d 131, 134 (2d Cir. 1994)(holding that, in Connecticut, the general three-year personal injury statute of limitations period set forth in Connecticut General Statutes § 52-577 is the appropriate limitations period for civil rights actions asserted under 42 U.S.C. § 1983). Therefore, only those actions by the Defendants that occurred after April 8, 2005 are potentially actionable. The following actions fall within Section 1983's three year statute of limitations: (1) the Zoning Commission's May 4, 2005 denial of the Plaintiff's application to have the zone its property is located in rezoned ("Rezoning Application"), (2) the Zoning Commission's December 21, 2005 denial of the Plaintiff's Development Permit and Excavation

Permit, and (3) the Board of Appeal's August 9, 2007 denial of the Plaintiff's application for a variance ("Variance Application").

Solely for purposes of their Motion to Dismiss, the Defendants concede that the denials set forth in the preceding paragraph constitute "final decisions" for purposes of the first prong of the Williamson ripeness test.

* * *