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## Kottschade Prevails in Long Fought Takings Case

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LANDS members Tim Hollister and Gary Van Cleve have obtained a decisive victory on behalf of NAHB member Frank Kottschade in *Kottschade v. City of Rochester*, 2009 WL 305077 (Minn. Ct. App 2009). After almost nine years of litigating jurisdictional aspects of his unlawful exaction claim, Mr. Kottschade finally may be able to litigate the merits of his takings claim.

In 2000, after proposing a townhome development, the city imposed nine conditions on development approval. Because these conditions made his project economically unfeasible, Kottschade objected and requested a variance. The city's Zoning Board of Adjustment considered the request, but ultimately denied it based on a lack of jurisdiction. Kottschade appealed this decision to the city council, which upheld the ZBA's decision in January of 2001.

Kottschade then brought suit in federal district court, but his unlawful exactions claim was dismissed under *Williamson County* because he had not first pursued his takings claim in state court. Kottschade appealed to the Eighth Circuit where he argued that *Williamson County's* state litigation requirement unlawfully prevented property owners from seeking redress for a violation of the Fifth Amendment. The Eighth Circuit upheld the district court's application of *Williamson County* and Kottschade petitioned the U.S. Supreme Court for certiorari.

After the U.S. Supreme Court denied certiorari, Kottschade attempted to resolve the issue short of further litigation, Kottschade brought suit in state trial court on December 22, 2006—confident that he was within the six year statute of limitations for his claims. The trial court, however, granted summary judgment for the city, holding that Kottschade's claim was barred by the six year statute of limitations. The trial court concluded that, because the ZBA lacked jurisdiction, it was futile for Kottschade to seek a variance. Thus, it found that Kottschade's state takings claim became immediately ripe in 2000, when the city first imposed the development conditions.

Now, the appeals court has sided squarely with Kottschade, explaining that he was required by *Williamson County* to "pursue all available local avenues for determining the scope of what the county will let him build before his claim is ripe." The court noted that the ZBA reviewed the merits of the variance request, and it should have simply refused to hear the request if it was without jurisdiction. Therefore Kottschade was right to pursue a variance in order to ripen his takings claim. The court remanded the case to the trial court to determine the merits of Kottschade's takings claim.

The court's rejection of the city's contention that Kottschade should have known that his variance application was futile is an extraordinarily positive result. If the court had accepted the city's argument, it would have turned futility on its head—requiring property owners to divine the likelihood of administrative relief—and eviscerate *Williamson County's* requirement that property owners pursue all available administrative remedies before bringing a takings claim in state court.