BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JERRY C. REEVES,	)	
	)	
Petitioner,	)	LUBA No. 94-213
vs.	)	
	)	FINAL OPINION
CITY OF TUALATIN,	)	AND ORDER
	)	
Respondent.	)	

Appeal from City of Tualatin.

David B. Smith, Tigard filed the petition for review and argued on behalf of petitioner.

Brenda L. Braden, City Attorney, Tualatin, filed the response brief and argued on behalf of respondent.

HANNA, Referee; LIVINGSTON, Chief Referee; GUSTAFSON, Referee, participated in the decision.

DISMISSED 03/12/96

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Hanna.

NATURE OF THE DECISION

Petitioner appeals the city's limited land use decision approving petitioner's subdivision application for 63 single-family dwellings, subject to conditions.

FACTS

On May 9, 1994, petitioner applied for a 55-unit subdivision on an 18.82 acre parcel in the city's low density residential (RL) planning district.[1] The proposed subdivision is located along a minor collector street, SW 108th Avenue. On October 10, 1994, the city approved the application subject to several conditions. Two of the conditions are the subject of this appeal. The first of those conditions requires petitioner to dedicate a 10-foot right of way; construct a half-street improvement on the west side of the centerline of the street and pave eight feet of the street on the east side of the centerline; and construct a 6-foot bicycle path on the dedicated right-of-way along the west side of SW 108th Avenue. The second condition requires petitioner to extend a twelve-inch water line from 108th Avenue to an intersection that ends in a tee fitting, allowing the line to be continued south as a sixteen inch line.

[1]The application was later expanded to include 63 units.

MOTION TO DISMISS

The basis for petitioner's appeal is his contention that the challenged decision is a "taking" in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[2] That provision states that "[n]o person shall be deprived of life, liberty or property without due process, nor shall private property be taken for public use without just compensation." The city moves to dismiss on the basis that this appeal is not ripe for LUBA's review because petitioner has failed to seek available variances which, if granted, could relieve petitioner from the contested provisions.

Generally, "ripeness" requires a "'final, definitive' decision from the government regarding the application of its land use regulations to a specific development proposal, including a request for a variance; a 'final and authoritative' determination of the type and intensity of

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[2]Petitioner challenges the decision only under the United States Constitution claiming that the conditions imposed on his application violate the Fifth and Fourteenth Amendments. Petition for Review 8. He does not challenge compliance with Article 1, section 18 of the Oregon Constitution, which is Oregon's "takings" provision and contains language similar to that of the Fifth Amendment to the United States Constitution. If we decide issues wholly on federal grounds we are directed to point that fact out so as to not foreclose resolution of similar state law issues in the future. See State v. Kennedy, 295 Or 260, 268 (1983). It is unlikely that the analysis would greatly differ between the two provisions, as the Court of Appeals has held that "[t]he basic thrust of [Article 1, section 18] is generally the same as the 'takings' provision of the Fifth Amendment to the federal constitution." Ferguson v. City of Mill City, 120 Or App 210, 213 (1993). See also, Department of Transportation v. Lundberg, 312 Or 568, 572 (1992)(assuming without deciding that state takings claims would not be analyzed any different under the state constitution).

development that will be allowed[.] Kassouni, The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights, 29 Case W. Res. 1, 24 (1992).

Petitioner argues that the ripeness requirement does not apply to takings claims which allege imposition of "unconstitutional conditions." Petitioner argues that

> "[w]ith the exception of this Board's opinion in Dolan I, there is no opinion by the US Supreme Court, the Federal Circuit Courts of Appeal, the Oregon Supreme Court, or the Oregon Court of Appeals, that applies the 'ripeness' standard * * * to federal takings claims other than those alleging a deprivation of all, or partial, economically viable use." Petitioner's Reply Brief 2.

The city contends that petitioner's constitutional claims are "not ripe for review because the variance process in the Tualatin Development Code (TDC) Chapter 33.010 is an available administrative means for petitioner to seek relief from the disputed conditions of approval." Respondent's Brief 5. The city's contention calls into question both the jurisdiction of this Board under ORS 197.825(2)(a) and the "ripeness" doctrine.

A. Jurisdiction under ORS 197.825(2)(a)

Jurisdiction of this Board is limited "to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review." ORS 197.825(2)(a). In Lyke v. Lane County, 70 Or App 82, 688 P2d 411 (1984), the Court of Appeals discussed the exhaustion requirement of ORS 197.825(2)(b), stating:

> "The exhaustion requirement, as interpreted, requires that the petitioners use all available local remedies before invoking state jurisdiction, furthering the legislative goal of resolving land use issues at the local level whenever possible." 70 Or App at 86.

The court focused its inquiry in Lyke upon whether or not there was an additional procedure available for review at the local level. Thus, exhaustion in this context required a petitioner to utilize all available levels of local review. The court did not address whether a petitioner would be required to seek variances in order to satisfy the jurisdiction requirement. The Lyke holding was refined in Portland Audubon Society v. Clackamas County, 77 Or App 277, 712 P2d 839 (1986). At issue in that case was whether the exhaustion requirement in ORS 197.825(2)(a) required an applicant to seek a rehearing of a county decision before LUBA had jurisdiction. Acknowledging that the phrase "all remedies available by right" was "inherently ambiguous", the court indicated that it should be read to mean "all remedies from a higher decision-making level for which there is a right to ask." Id. at 280. Consequently both the statutory requirement and the state policy are satisfied if a petitioner is required "to go once to the highest local decision-maker" for determination of the issue. The court reasoned that review both moves a case to a higher authority and closer to an ultimate decision, while rehearing keeps the case at the same decision making level which has already

considered it. Id. at 281.

In Colwell v. Washington County, 79 Or App 82, 91, 718 P2d 747, rev den 301 Or 338 (1986), the Court of Appeals further explored the exhaustion requirement and held that the doctrine does not require an applicant to seek a rehearing or pursue local remedies which are unlikely to serve any purpose except redundancy.

In Dolan v. City of Tigard, 20 Or LUBA 411 (1991) (Dolan I) this Board examined the jurisdiction issue and held that the exhaustion requirement of ORS 197.825(2)(a) is satisfied when "petitioners appeal a decision on their application made by the highest possible level of local decision maker."[3] Id. at 420. Petitioner in the case before us has appealed a decision on his application to the highest decision maker at the local level. Accordingly, we find that LUBA has jurisdiction to hear the appeal because petitioner has satisfied the exhaustion requirement of ORS 197.825(2)(a).

B. Ripeness

In Dolan I we acknowledged that LUBA had jurisdiction to hear the appeal, but indicated that a finding of jurisdiction does not necessarily end the inquiry. In addition to the jurisdiction requirement, we held in Dolan I

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[3]Our decision in Dolan I was not appealed. The petitioners in Dolan I applied for and were denied a variance required by our decion in Dolan I. The denial of the variance gave rise to the United States Supreme Court decision in Dolan v. City of Tigard, 512 US ___, 114 S Ct 2309 (1994).

that we would not entertain a takings claim until it was ripe for adjudication.

Even though this Board has jurisdiction to hear the present appeal, respondent contends that petitioner's federal takings claims are not ripe for review because the petitioner has failed to seek administrative relief through a variance procedure pursuant to TDC 36.060. Respondent contends that "in order for a federal takings claim to be ripe for review, the property owner must obtain the local government's final determination as to how the local regulations will be applied to his property." Respondent's Brief at 5-6. Respondent argues that absent a request for a variance, it is impossible to determine how the local regulation would finally and determinatively be applied to petitioner's property.

Petitioner responds that "the question of whether the conditions imposed by the city are unconstitutional is readily susceptible to adjudication by this Board, and are so without the applicant ever seeking a variance." Memorandum in Opposition to Motion to Dismiss at 6. Petitioner contends that ripeness is "irrelevant" where the government action fails to "substantially advance a legitimate state interest." Id. at 5. In other words, when a government imposes "unconstitutional conditions," ripeness is never an issue.

Petitioner cites the Oregon Court of Appeals decision

in Nelson v. City of Lake Oswego, 126 Or App 416 (1994) as support for his contention that ripeness is irrelevant in "unconstitutional condition" cases. In Nelson the appellants sought permission to construct a house. As a condition of the permit, the city required the applicant to convey a drainage easement. Appellants claimed that such a condition was unconstitutional because it did not bear an "essential nexus" to the proposed development under the reasoning of Nollan v. California Coastal Commission, 483 US 825, 107 S Ct 3141 (1987). 126 Or App at 423. The city argued that such resolution was not ripe for review because the appellants did not appeal to the city council the city manager's decision that they convey the easement as a condition of development. 126 Or App at 420. The court held that ripeness is not a prerequisite to bringing an inverse condemnation claim in circuit court. Id.[4]

The majority in Nelson distinguished between "regulatory takings" and "unconstitutional conditions." The court reasoned that in "regulatory takings" cases, a single denial at the local level cannot determine whether all economically viable use of the property has been "taken," because other options could be available which would provide

[4]Inverse condemnation is the label used for a proceeding brought by a property owner to remedy an alleged taking which results from government actions. For example, in Nelson the city acquired an easement over the landowner's property without providing compensation. Such an action is not appropriate in the present case because nothing has yet been acquired by the city. 126 Or App at 416 n2.

economically viable uses of the property. Until the other options are explored by an applicant, a review would be premature.

The Nelson court held that where a condition was imposed and the easement was acquired by the city, there was "nothing left to happen at the local or administrative level in order for the claim to be susceptible to adjudication." Id. at 422. All that was left to be determined was whether what had occurred was a taking.

This case differs in two important respects from Nelson. First is the nature of the conditions imposed. In Nelson the applicant could not have anticipated that dedication of an easement would be required. It was simply imposed as part of the approval. Consequently, the applicant could not have sought an administrative remedy at the beginning of the process. Even if a variance process had been available, the first time the applicant would have known of the need to request a variance was after the approval was granted. The only available recourse was a post decision appeal. Conversely, the variance process in the present case was available to petitioner at the outset of the application process.

Second, the Nelson court also stressed the fact that the easement had been acquired by the city at the time of the action. As a consequence, the court indicated that there was "nothing left to happen at the local level in

order for a claim to be susceptible for adjudication[.]" In the instant case, the proposed easement has not been acquired by the city. Accordingly, there are additional steps to be taken by the city and petitioner before this Board may determine whether "what has occurred is a taking."[5] Id. at 422. Until we may ascertain how and to what extent the conditions will be imposed on the petitioner's property, we have no way of determining whether the conditions bear an "essential nexus" to the impacts of the development and whether any exactions are roughly proportional to the impacts of petitioner's proposed development. See Nollan v. California Coastal Commission, 483 US 825; Dolan v. City of Tigard, 114 S Ct 2309.

[5]At first glance it may appear that there is nothing left to happen at the local level prior to our review because a final decision, as defined by ORS 197.015(10), has been made. The negative consequences of such a holding where a variance is available are numerous. First, in allowing a party to bypass the variance process and seek immediate LUBA review, the state policy of decision making at the local level is harmed in that local decision makers are unable render a final decision as to how their code will be applied. Secondly, the policy of judicial economy is served by requiring local resolution of issues rather than burdening the courts with additional cases which properly should be decided elsewhere. Finally, allowing parties to bypass the variance process can only encourage parties to submit applications which, while technically "complete," do not address all the relevant issues. In essence a remand by this Board on the merits in the present case would serve the same purpose as a variance would. That is, if we were to reach the merits of the case and find the conditions unconstitutional, remand would instruct the respondent to alter the literal application of the ordinance to reflect the undue burden it places on an applicant. Our remand then would be the functional equivalent of a variance. Where local decision-makers initially have the authority to alter the literal application of an ordinance, they, and not this Board, should decide whether to exercise that authority.

1. Ripeness of Federal Takings Claims

This Board explored ripeness in the context of administrative variances in Dolan I. In that case the petitioners challenged the imposition of several conditions to their development permit arguing that the conditions constituted a taking under both the state and federal constitutions. Similar to the present case, the city in Dolan I argued that the takings issue was not ripe for review because the petitioners had failed to seek an administrative variance which could have alleviated the impacts of the contested conditions.

In Dolan I we held that the petitioners' takings claims were not ripe for review under the federal constitution because the petitioners failed to attempt to gain administrative relief through an available variance procedure. Absent the local decision maker's final determination as to how the city would apply local standards to the petitioners' property, it was impossible to determine whether the decision constituted a taking. In Dolan I we stated:

> "The United States Supreme Court has held that in order for a federal taking claim to be ripe for review, the property owner must obtain the local government's final determination as to how local regulations will be applied to his property. Agins v. Tiburon, 447 US 255, 100 S Ct 2138, 65 L Ed2d 106 (1980). In MacDonald, Sommer & Frates v. Yolo County, 477 US 340, 348, 106 S Ct 2561, 91 L Ed2d 285 (1986), the Supreme Court stated that ripeness is a requirement for judicial review of taking claims because a court 'cannot determine

> whether a regulation has gone 'too far' unless it knows how far the regulation goes.' Furthermore, the United States Supreme Court and other federal courts have held that taking claims are not ripe for review where property owners have failed to seek variances from applicable regulations which could have allowed them to develop their property as they wished." (Additional citations and footnote omitted; emphasis in original) Dolan I, supra at 421.

In Dolan I LUBA also concluded that we could not uphold the petitioners' takings claim under the state constitution if a variance process was available and had not been used.

As explained in Dolan I, the underlying reason for requiring an applicant to seek relief through administrative channels prior to resolution by LUBA is twofold. First, until we can determine how code provisions will be applied to a specific application, we have no way of knowing whether such a regulation goes too far. See also, Williamson Planning Commission v. Hamilton Bank, 473 US 172, 105 S Ct 3108 (1985)(holding that application for variance to the initial decision-maker was necessary prerequisite of ripeness). Second, if a variance procedure is available which could relieve petitioner of all or part of the disputed condition, a "mutually acceptable resolution" may be reached by the parties which would negate the need for a determination by this Board. See Hodel v. Virginia Surface Mining & Reclamation Association, 452 US 264, 297, 101 S Ct 2352, 2371 (1981). Nonetheless, petitioner in this case urges this Board to overrule Dolan I and hold that federal

takings claims predicated on "unconstitutional conditions" are ripe for review irrespective of whether an available variance is sought. For the following reasons, we decline petitioner's offer to overrule our holding in Dolan I.

The United States Supreme Court has identified two possible instances where a government regulation may effect a taking. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land." Agins v. Tiburon, 447 US 255, 260 (1980). This challenge to the conditions imposed in this case falls under the former branch of the Agins test. Petitioner argues that ripeness is "irrelevant" to claims brought under this branch. In support of this argument, petitioner claims that because all the federal ripeness cases cited by respondent in this case and this Board in Dolan I were brought under the "economically viable" branch of Agins, ripeness is only an issue in cases brought under that branch. Petitioner cites no federal or state cases to support this proposition.

Petitioner may be correct that none of the cases upon which this Board has relied have applied the ripeness doctrine to "unconstitutional condition" cases, but it does not necessarily follow that the reasoning behind Hamilton Bank, Hodel and MacDonald Sommer & Frates is inapplicable to

the present case.[6]

Furthermore, the policy considerations of the ripeness doctrine are applicable to both branches of the Agins test. As noted above, the policy is two-fold: first, it requires final determination at the local level in order for a reviewing body to determine "how far" the regulation goes, and second, administrative relief may lead to mutually acceptable solutions which would obviate the need for adjudication of constitutional questions. See Hodel, supra, 452 US at 297 (takings issue not ripe if potential administrative solutions exist and not utilized.) See also Suess Builders v. City of Beaverton, 294 Or 254, 656 P2d 306 (1982)(a landowner cannot simply rest on the apparent preclusive effect of a comprehensive plan or other regulation when administrative procedures exist by which the landowner might obtain at least temporary or partial relief; if such procedures for seeking relief exist, they must be pursued.)

Both policy considerations are applicable in this case. If there is an available administrative remedy, until it is sought, this Board has no way of knowing if or how

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[6]Petitioner appears to argue that because the Supreme Court has not explicitly held that ripeness is applicable to "unconstitutional condition" cases, it must not be applicable. It is just as plausible that the "unconstitutional condition" cases were ripe for consideration and that is why ripeness is not discussed in those cases. For example, in the leading case of Dolan v. City of Tigard, 512 US ___, 114 S Ct 2309 (1994) prior to Supreme Court review, appellants were required to seek a variance before the issue was ripe.

petitioner's property will be impacted. Indeed, if a variance is sought, it is possible that both parties to this dispute could come to an agreement which would negate the need for this Board to decide the constitutional issues.

The distinction petitioner attempts to make between "unconstitutional condition" cases and "economically viable use" cases vanishes where, as here, the conditions objected to are simply restatements of code provisions. When confronted for the first time with petitioner's application, respondent could have denied the application on the grounds that it did not comply with the standards set forth in the TDC. If the denial were challenged, it would be brought under the "economically viable use" prong of the Agins test.[7] Under Hamilton Bank and its progeny, a takings claim would not be ripe until petitioner sought and was denied a variance, because it would be impossible for the reviewing board to know how far the regulation went. See also Joyce v. Multnomah County, 114 Or App 244, 835 P2d 127 (1992)(a claim is not ripe for adjudication if a landowner has simply unsuccessfully filed one application for the approval of a particular use and has pursued no alternative approaches to achieve permission for that or any other use.)

In the present case, instead of denying the application the city approved it, but with the qualification, in the

[7]It is assumed that the potential challenge would not be a facial challenge to the constitutionality of the ordinance.

form of conditions, that the requirements of the TDC would have to be complied with or a variance sought. Petitioner would face the same dilemma whether the application was denied or approved with conditions: either comply with the ordinance or seek a variance from it. In such an instance, we find it difficult to distinguish the two positions in finding one ripe and the other unripe.

Respondent's approval of petitioner's application with conditions prevented petitioner from developing the subdivision in the manner originally proposed. In Hamilton Bank the appellants were denied final plat approval, which prevented them from developing their property as originally envisioned. The appellants in Hamilton Bank and the petitioners in this case are in a similar situation: neither could develop their property as originally envisioned and variance procedures were available to both. In discussing the appellant's position in Hamilton Bank the Supreme Court stated:

> "[R]esort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner the respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances." 473 US at 193-194, 105 S Ct 3120.

Until a variance is denied, this Board has no way of knowing

whether petitioner will be able to develop the proposed subdivision in the manner originally envisioned. When viewing the procedural posture of the petitioner in this case and the respondent in Hamilton Bank, this Board sees no meaningful distinction between the two which would render petitioner's claim ripe for review. Accordingly, if an administrative procedure is available to petitioner which could relieve him of the contested conditions, petitioner's claim is not ripe for review.

2. Availability of Relief under TDC 36.060

While we may insist that prior to review by this Board a petitioner first seek local administrative remedies, such remedies must be both available and adequate to meet an applicant's needs. See Fifth Avenue Corporation v. Washington County, 282 Or 591, 581 P2d 50 (1978). The first inquiry is to determine whether an administrative remedy was available at the time the application was submitted. TDC Chapter 36 provides subdivision approval criteria. TDC 36.060 directs subdivision applicants to the availability of variances. It provides in part:

> "(1) When necessary, variances to the requirements set forth in this chapter shall be in accordance with TDC Chapter 33, Variances.
>
> "(2) For subdivisions, the variance shall be considered as part of the subdivision plan approval process." (Emphasis added.)

TDC 33.010 authorizes the city council to grant or deny variance requests. TDC 33.020 sets forth five conditions

that must exist for the city to grant a variance. It provides:

> "No variance shall be granted by the City Council unless it can be shown that the following conditions exist:
>
> "(1) Exceptional or extraordinary conditions applying to the property that do not apply generally to other properties in the same planning district or vicinity, which conditions are a result of lot size or shape, topography, or other physical circumstances applying to the property over which the applicant has no control.
>
> "(2) The hardship does not result from actions of the applicant, owner or previous owner, or from personal circumstances such as age or financial situation of the applicant, or from regional economic conditions.
>
> "(3) The variance is necessary for the preservation of the property right of the applicant substantially the same as is possessed by owner of other property in the same planning district or vicinity.
>
> "(4) The authorization of the variances shall not be materially detrimental to the purpose and goals of the Tualatin Community Plan, be injurious to property in the planning district or vicinity in which the property is located, or otherwise detrimental to the purposes and goals of the Tualatin Community Plan.
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> "(5) The variance requested is the minimum variance from the provisions and standards of the planning district that will alleviate the hardship."

Both TDC 33.020 and TDC 33.060 indicate that variances were available to petitioner at the time the initial application was made to the city. Indeed, petitioner "acknowledges

variances are available under provisions of the city's code * * * and that the applicant has not sought any variance." Petitioner's Reply Brief 1. The availability prong is thus satisfied.

The second inquiry is to determine whether an available administrative remedy is adequate to meet petitioner's needs. To resolve this inquiry we must determine if petitioner could have known to request a variance and if the variance process could have yielded a positive result.

The TDC sets forth several requirements pertaining to petitioner's application. TDC 36.080(1) provides, in relevant part:

> "The subdivision or partition plat shall provide for the dedication of all public rights-of-way, reserve strips, easements, tracts and accessways, together with public improvements therein approved and accepted for public use.
>
> "(a) The applicant shall comply with the requirements of TDC Chapter 74, Public Improvement Requirements.
>
> "(b) The applicant shall comply with the design and construction standards set forth in the Public Works Construction Code.
>
> "* * * * *"

The code is even more specific for bikeways. It states:

> "Where proposed development abuts or contains an existing or proposed bikeway, as set forth in TDC Chapter 11, Transportation Plan, the bikeway shall be constructed, and an easement or dedication provided to the City." TDC 74.450(1).

In this manner, the code alerts an applicant to the

requirement for dedication and improvement of property for a bikeway. In the same manner, the code alerts an applicant that additional right-of-way may be required. TDC 74.210(1) provides, in relevant part:

> "For subdivision and partition applications, wherever existing or future streets adjacent to property proposed for development are of inadequate right-of-way width the additional right-of-way necessary to comply with the transportation Element of the Tualatin Community Plan shall be shown on the final subdivision or partition plat prior to approval of the plat by the City. This right-of way dedication shall be for the full width of the property abutting the roadway * * *."

The code elaborates on the details of the required street and bikeway construction standards in TDC chapter 11, Transportation. It describes the level of improvements for minor collector streets including the subject portion of 108th Avenue. TDC 11.060(8)(c) describes that improvement level as "Cb," and it is graphically illustrated at TDC Map 11-2.

TDC 74.610 sets forth water service requirements. TDC 74.610(2) provides that "[t]he lines shall be sized to provide service to future development, in accordance with the City's Water System Master Plan, TDC Chapter 12." TDC 12.130 requires a 16' water line on this segment of 108th Avenue.[8]

[8]There is no explanation in the record of why the city only imposed a requirement for a 12 inch water line.

All the conditions imposed by the city and appealed by the applicant are found in the city ordinances. By reviewing the ordinances, the applicant should have anticipated that the city would apply the TDC either by denying the application outright or through imposition of conditions. Not only was the variance procedure available to the petitioner at the beginning of the application process, the same TDC chapter providing subdivision criteria specifies that the variance procedure "shall be considered" as part of the subdivision process. Because all the conditions objected to are specified in the TDC as approval criteria and petitioner was aware of the availability of the variance procedure, petitioner should have known that a variance would be necessary to avoid the strict application of the contested code provisions.

Finally, we must now determine whether the variance procedure was adequate to meet petitioner's needs. Petitioner has not claimed that the available variance procedure is inadequate. At oral argument before this Board petitioner alluded to the futility of seeking a variance based on comments made by city council members, but failed to directly challenge the adequacy of the variance procedure. It also must be noted that the comments alluded to are not reflected in the order granting approval.

Because the petitioner did not pursue a variance which was available, known by petitioner to be required and

arguably adequate to meet petitioner's objections, petitioner's constitutional claims are not ripe for review.

The motion to dismiss is granted.