

## IN THE ZONE

# Current Trends in Land Use Law

### A New Take On Takings?

By: [Kurt Asprooth](#)

Rose Mary Knick was not happy with her local township. The township passed an ordinance requiring the owners of private cemeteries to open them to the public during daylight hours. A township official inspected Knick's property, determined that certain stones were grave markers, and issued a violation for failing to hold open the cemetery to the public. Knick disputed that a cemetery existed on her property, and challenged the township's ordinance as an unconstitutional taking of private property. Knick initially sought an injunction against the township, but decided to file suit directly in federal court. Knick's federal lawsuit was dismissed on longstanding Supreme Court precedent, as she had not yet sought "just compensation" under Pennsylvania's eminent domain statute.

Under the Fifth Amendment, governments are prohibited from taking private property for public uses "without just compensation." In the land use world, takings under the Fifth Amendment are a concern whenever local governments physically occupy private property or enact laws that restrict how private property can be used.

The Supreme Court case of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985) has long governed how private property owners must bring Fifth Amendment takings claims. Now, the case brought by Knick may upend over 30 years of Supreme Court precedent, and make it much easier for property owners to bring takings claims in federal court.

In *Williamson County*, a developer of a subdivision challenged the local planning commission's application of zoning regulations as a taking. After the developer had obtained a preliminary plat for the subdivision, the county's zoning ordinance was changed to reduce density limits. After the amendments were adopted, the county began rejecting final plats for the development of the subdivision based on density. The developer filed suit in federal court, claiming that the county had taken its property without just compensation by denying the final plats.

The case eventually reached the Supreme Court, which held that the developer's claim was premature. The Supreme Court determined that the developer had not yet been denied "just compensation" for its property because it had not brought an inverse condemnation claim under state law. This requirement to exhaust state court remedies for compensation has governed federal takings claims since 1985.

That brings us back to Knick and her alleged cemetery. On appeal to the Third Circuit, the township argued that Knick failed to comply with *Williamson County* because she did not

file suit in state court to obtain just compensation. Knick argued that her facial takings claim was exempt from the exhaustion requirement, and, even if it wasn't, the court should overlook *Williamson County*.

Photograph of Rose Knick standing on her farmland in Scott Township Pennsylvania. Knick was forced to allow public access to a suspected gravesite by government agents in 2013. The Supreme Court will hear oral arguments on October 3, 2018.



The Third Circuit held that Knick's takings claim was not an underlying challenge to the validity of the township's ordinance, but only a claim for just compensation. Knick did not allege that the taking by the township was invalid (i.e., for lack of a public purpose). If she had, her takings claim would be exempt from the state law exhaustion requirement and she could file directly in federal court. Because her only claim was for "just compensation," and not a challenge to the validity of the taking, the Court held that Knick was required to exhaust her state court remedies to obtain just compensation.

The Court refused to overlook the *Williamson County* requirement to exhaust state law remedies, even in light of several other decisions where courts declined to enforce this requirement. The Court found that none of the same unique facts were present in Knick's case, and her only argument was that it would be more efficient to allow her claims to proceed in federal court than state court. The Court also found that state law inverse-condemnation mechanisms are better equipped to value what compensation Knick was owed.

Knick has now brought her dispute with her township to the highest court in the land. In March the Supreme Court agreed to take Knick's case, and Oral arguments are set for October of 2018. Knick has asked the Supreme Court to overrule the state law exhaustion requirement in *Williamson County*. She claims this requirement only functions to confuse and delay, and bars property owners from litigating takings claims in federal court all together.

While Knick's case turns on seemingly mundane procedural issues, the outcome could have a significant impact on local governments. If the Supreme Court sides with Knick and strikes down the exhaustion requirement in *Williamson County*, it will become much easier for property owners to challenge land use regulations as takings. A property owner could file suit directly in federal court, even when the government has not yet refused to pay just compensation. State law remedies (eminent domain and inverse-condemnation proceedings), already exist to ensure just compensation is paid. Allowing these claims to proceed in a second forum may result in a proliferation of takings lawsuits. It will all turn on Knick and her supposed cemetery.

If you have any questions about this case or would like assistance updating applicable ordinances, please contact your Ancel Glink attorney.

**Ancel Glink Attorneys Are Speaking at a Conference Near You Soon!**

## [Illinois Municipal League, Chicago Hilton](#)

Thursday, September 20

\* [Daniel Bolin](#) & [Greg Jones](#) present "Battling Billboard Bullies: Strategies for Controlling Outdoor Advertising"; 10:00 am *Continental B & C*

Friday, September 21

\* [Derke Price](#) presents "Festivals, Public demonstrations and Incident Preparedness"; 10:30 am *Stevens Salon A-3*

\* Daniel Bolin, [Keri-Lyn Krafthefer](#), Derke Price, [Julie Tappendorf](#) present "Using Your Powers for Good; Tips for Uniting your Board"; 12:45 pm, *Continental A*

## [Illinois American Planning Association, Wyndham Springfield City Centre](#)

Thursday, September 27

\* Plan Commissioner Training, Greg Jones & [David Silverman](#); 9:00 am - 12:00 pm  
For plan commissioners only

\* Plan Commissioner Training; Mock Hearing, Greg Jones & David Silverman; 1:30 - 4:00pm

\* APA-IL's Excellent Planning Law Adventure! Greg Jones, Dan Bolin & David Silverman; 4:15- 5:45 pm

### **Cases to Know**

[South Dakota v. Wayfair](#). Hailed as a landmark decision regarding states ability to tax interstate transactions, this Supreme Court case is not the final word on the authority for states to tax the sale of goods over the internet. The U.S. Constitution provides that only the federal government has the power to regulate interstate commerce. The Constitution therefore prohibits state laws which discriminate against or substantially burden interstate commerce. A state law must meet four criteria: (1) apply to an activity with a substantial nexus with the taxing State; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services the State provides. This is the first time that the Court has found that a physical presence is no longer required to satisfy the substantial nexus test. However, as the South Dakota courts did not have a chance to evaluate the other three factors, the case goes back to the lower courts to determine if the remaining tests are satisfied so that South Dakota can levy sales tax against out-of-state sales.

[County v. Wilhoit](#). Wilhoit owns and operates an adult entertainment facility in Douglas County, Illinois. In June of 2015, Douglas County discussed and enacted an ordinance that made it unlawful for the possession or consumption of alcoholic beverages on the premises of adult entertainment facilities. Wilhoit, who was not notified of the public meeting argued on appeal that she was entitled to additional notice because the ordinance took away from her preexisting business. In an unpublished opinion, the Illinois Appellate Court found that: (1) Wilhoit had no protected property interest in having patrons consume alcoholic beverages in her adult entertainment establishment; and (2) Wilhoit was not entitled to any special notice beyond what was provided to the general public.

[LMP Services Inc.v. City of Chicago](#). The Illinois Supreme Court granted an appeal in a case challenging the City of Chicago's food truck ordinance. Both the trial court and appellate court have ruled in favor of the City of Chicago, rejecting the plaintiff's claim that the food ordinance violated the food truck operators' equal protection rights because it treated food trucks differently than restaurants. It also rejected their argument that the 200 foot distance requirement from brick and mortar restaurants violated the food truck operators' due process rights, finding no protected property right to operate a food truck.



## Legislation to Love or Loathe

[Public Act 100-595](#). This law amends the Adjoining Landowner Act, making it clear that a property owner cannot bring a lawsuit under that statute against a county, municipality, or township or its officials for any act relating to zoning administration, enforcement, or implementation or any ordinance, resolution, or other zoning regulation, unless the county, municipality, or township is the owner of the property subject to the challenge. This act provides that an individual does not have a cause of action to sue the government to challenge zoning decisions under this statute unless the government is the owner of the property subject to the zoning challenge.

[Public Act 100-663](#). For decades, the Illinois Liquor Control Act contained restrictions against locating a new licensed establishment in proximity to a church or school. 235 ILCS 5/6-11. Despite this restriction, Section 6-11 of the Liquor Control Act also contained dozens of exceptions to this rule which were enacted by the General Assembly and approved by a sitting Governor. Each time a business which planned to sell beer, wine or liquor wanted to operate near a school or church, it took an act of legislature to grant permission. This bill allows a local liquor commissioner to grant an exemption to the prohibition if a local rule or ordinance authorizes the local liquor control commissioner to grant that exemption. If a community wants to exercise greater local control, it must adopt an ordinance that delegates authority to the Mayor or Village President (local liquor commissioner) to grant exceptions to the proximity rules described in Section 6-11.

[Public Act 100-735](#). The Illinois General Assembly passed a law preempting local government regulation of unmanned aircraft systems (aka drones). In this Act, the state declared that the regulation of drones is an "exclusive power and function of the State." The new law prohibits any unit of local government, including home rule units (except Chicago), from enacting any ordinance or resolution that regulates unmanned aircraft systems. The law became effective August 3, 2018. However, this law does not prohibit units of local government from controlling or regulating drones that fly over their own government-owned property, which would be more of an "ownership" exercise of authority rather than "regulatory" exercise. For more information on what actions your unit of local government can take, tune into the latest episode on our podcast Quorum Forum, titled [Drone On!](#)



## About Ancel Glink

Tune-in to Ancel Glink's podcast, [Quorum Forum](#), to hear Ancel Glink attorneys discuss current legal topics of interest to local government officials and employees. In recent episodes, we have highlighted land banking strategies, the regulation of small wireless facilities, and the use of drones. Send us your comments, questions, and show ideas at [podcast@ancelglink.com](mailto:podcast@ancelglink.com)!

Ancel Glink's Zoning and Land Use Group recently added [David Warner](#) as Of Counsel. David has extensive experience negotiating annexation and development agreements, drafting zoning and other development regulations, and working with clients on a wide range of projects including TIF and special service area financing transactions, telecommunications matters, and sign regulations. Welcome David!

For more information visit Ancel Glink's web-site at [www.ancelglink.com](http://www.ancelglink.com) or email us at [inthezone@ancelglink.com](mailto:inthezone@ancelglink.com). To stay up to date on pending legislation, recent cases, and

other topics of interest to local governments, you can also visit our blog [Municipal Minute](#), follow the Land Use Group on Twitter [@AncelGlinkLand](#), or like [Ancel Glink: Land Use](#) on Facebook.

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