

June 27, 2019



Author:



Timothy S. Hollister\*  
(860) 251-5601  
thollister@goodwin.com

## U.S. Supreme Court Reopens the Federal Courthouse Door to Property Owners' Takings Claims

In a June 21 opinion, the U.S. Supreme Court finally reversed a 1985 ruling that has prevented property owners across the country from challenging land use regulations and permit conditions in federal court under federal constitutional standards. In *Knick v. Township of Scott* [[https://www.supremecourt.gov/opinions/18pdf/17-647\\_m648.pdf](https://www.supremecourt.gov/opinions/18pdf/17-647_m648.pdf)], the Court restored the right of property owners to bring claims that government has “taken” their property without paying “just compensation” directly in federal court. The new decision promises a substantial change in how and when property owners may challenge the impacts of land use regulation.

### A Shift In Property Rights

The Takings Clause of the Fifth Amendment to the U.S. Constitution prohibits government from “taking” real property except for public use, and only if it pays “just compensation” – generally, the fair market value of the property, or property interest, that government appropriates to itself. When government uses eminent domain to take private property for a public use – a public school or highway, for example – the issue is whether the government has fairly compensated the property owner for the land taken.

But sometimes the government does not take property for its own use; instead it issues regulations that substantially reduce the value of property (called a “regulatory taking”), or imposes on a development permit a condition that a property owner convey part of its land, or pay money, or both, to the government, out of proportion to the development’s impact (called an “exaction”). In such cases, the property owner has a claim that government has violated its Fifth Amendment Takings Clause rights.

A property owner’s ability to avail itself of the full measure of the Takings Clause’s protections rests on three pillars: The first is that the federal Fifth Amendment, as part of the Bill of Rights, is the “floor” of protection – state laws can be more protective of property rights than federal law or regulation, but not less. Second, generally speaking, the federal courts have been more protective of property rights – more willing to hold that a regulation or condition has gone too far – than the state courts. Third, federal constitutional claims are generally brought under 42 U.S.C. § 1983, the principal federal statute used for federal civil rights claims, which allows a successful plaintiff to recover attorneys’ fees. Thus, a property owner’s ability to gain the full protection of rights promised by the federal Takings Clause depends on being able to sue in federal court, having the court apply federal constitutional standards, and being able to seek attorneys’ fees.

In its *Knick* opinion, the U.S. Supreme Court finally corrected a 1985 decision that has had the unintended consequence of preventing litigation of federal takings claims in federal court.



## **Williamson County**

In 1985, in a case called *Williamson County Regional Planning Commission, et al. v. Hamilton Bank*, 473 U.S. 172 (1985), the Commission revoked permits that had been issued to a developer of a residential subdivision, after construction had started. The developer went bankrupt; the bank took over the development, and sued the Commission for a taking without just compensation. During this time (the mid-1980s), the federal courts were trying to reduce a stream of property rights cases stemming from the tension between developers trying to capitalize on the booming economy and governments imposing limits on land development, to control growth and protect environmental resources. (One judge famously pronounced that “the federal courts are not the Grand Mufti of local land use disputes,” and another complained that “the disgruntled developer seeking relief under [42 U.S.C.] Section 1983 is fast becoming a familiar figure in this court”).

In *Williamson County*, the Supreme Court established two procedural requirements for takings claims. The first was “finality” – before a takings claim could be brought, the property owner had to present the government with enough development alternatives so that the court would know with some precision what the government was allowing and prohibiting; in other words, the developer couldn’t simply present one pie-in-the-sky plan, have it denied, and then be off to court, claiming that the denial was a taking without compensation. Second, the Court said that before a property owner could litigate a federal takings claim in federal court under the standards of the federal Fifth Amendment, it must first go to state court, seeking remedies available under state law – and lose. Only then was the federal claim “ripe” for adjudication. The Supreme Court’s apparent expectation was that if the property owner lost in state court, it could then pursue its federal claim in federal court.

But over the next decade, it became clear that this so-called “state court first” requirement was having two unintended consequences. First, property owners began to follow the new rule by bringing their takings claims in state court, and losing, but when they tried to proceed to federal court, the federal court dismissed the federal claim, under court rules that prohibit the same case or issue from being litigated twice, as well as under the “full faith and credit” provision of the federal Constitution, which requires federal courts to honor state court judgments. In addition, in many cases, it took several years to obtain a state court final ruling, and thus *Williamson County* was not only delaying but extinguishing federal claims, because it was a rare plaintiff who could afford to litigate through the state court first, with the only reward being to ripen its federal claim.

This procedural Never-Never-Land spawned other mischief. Local governments filed motions to transfer takings cases brought in state court to federal court – and then asked the federal court to dismiss the entire case. Federal courts sometimes refused to allow plaintiffs to use the practice of “reserving” their federal claims for later litigation. Some federal courts began to apply the *Williamson County* rule, which was devised under the Takings Clause, to federal due process and equal protection claims, even though such claims arise under a different part of the Constitution. And local governments eventually began to argue that *Williamson County* should be considered as established precedent because the U.S. Supreme Court was repeatedly rejecting petitions to reconsider *Williamson County*. So, it became the rule in takings cases that when a state court denied a claim, the property owner became barred from ever litigating its federal claim. Commentators began to refer to this phenomenon as “the *Williamson* Trap.”

### **A 20-Year Effort**

Our firm, Shipman & Goodwin, has been working with the National Association of Home Builders (NAHB) and its legal team for more than 20 years to get a case in front of the U.S.



Supreme Court to reverse the state-court-first rule of *Williamson County*. In the 1990s, we represented Connecticut builder Eric Santini when a state agency designated his under-construction subdivision in Ellington, Connecticut as a finalist for a nuclear waste depository, thereby halting the development and freezing Santini's investment for more than two years. It took six years before the Connecticut Supreme Court, applying state standards, held that Santini's property had not been "taken" – the state agency had merely engaged in "planning" necessary to deal with the important public issue of radioactive waste disposal.

Believing that a federal court would see his claim differently (and encouraged by NAHB), Santini then sued in federal court under the federal Fifth Amendment. In 2003, the federal Second Circuit court became the first federal appeals court to hold that *Williamson County* was wrong and Santini should be permitted to proceed in federal court. *Santini, et al. v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2003). This decision put the federal Second Circuit in conflict with other federal courts. But in 2005, the U.S. Supreme Court, in *San Remo Hotel, L.P., et al. v. City and County of San Francisco*, 545 U.S. 323 (2005), resolved the conflict by reaffirming the *Williamson County* state-court-first requirement – with Chief Justice Rehnquist and several other justices, in dissent, recognizing the unfairness, but not overruling it. Our firm also handled a case in the federal First Circuit called *Torromeo, et al. v. Town of Fremont, New Hampshire*, 438 F.3d 113 (2006), in which the court declined to overrule *Williamson County*.

### **The Knick Case**

Enter Rose Mary Knick (pictured with her lawyers at the U.S. Supreme Court on October 3, 2018). She owns a farm in Scott Township, Pennsylvania. Her farm contains a very old cemetery. The Township, by ordinance, declared her cemetery to be a public park, without any payment. The Pacific Legal Foundation, a property rights law firm in Sacramento that also has had *Williamson County* in its sights for these many years, took her case. She lost in state court, and in the federal Third Circuit, due to *Williamson County*. When it became clear in 2017 that President Trump would nominate a fifth conservative justice, four justices voted to grant review of Mrs. Knick's petition for review. Based on our long involvement with the issue, our firm was asked by the Chairs of two subcommittees of the U.S. House Judiciary Committee to file a friend-of-the-court brief in support of Mrs. Knick.



The case was scheduled for oral argument on the third day (October 3) of the Supreme Court's 2018-19 term. As readers will recall, Justice Kavanaugh's nomination to replace Justice Kennedy encountered a bit of a delay. As a result, the case was argued to eight justices. Those eight figured out that they were equally split, 4-4. So, after Justice Kavanaugh took his seat a week later, the case was scheduled for an almost-unheard-of second oral argument, which occurred on January 16, 2019.

On June 21, 2019, in a 5-4 decision, in which Justice Kavanaugh was the long-missing fifth vote, the Court overruled the *Williamson County* state-court-first requirement. Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh, wrote the majority opinion. Justice Kagan wrote the dissent – and cited to our firm's friend-of-the-court brief,



making the point that Congress should address the *Williamson County* ripeness issue, not the Court.

The decision itself is straightforward: It explains why *Williamson County* was wrong in forcing property owners to go to state court under state law first. The decision points out repeatedly that the Takings Clause of the federal Fifth Amendment is part of the Bill of Rights, and that takings claims should be allowed to be brought in federal court in the same manner as claims raising freedom of speech, protection against unreasonable search and seizure, and other cornerstone constitutional protections. The Court affirmed that the property owner's claim arises when the government takes action that impinges on development rights, not when (or because) it fails to pay compensation. The majority opinion states clearly that in overruling *Williamson County*, it is "restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the [Takings] Clause among the other protections of the Bill of Rights."

The dissenting opinion focuses mainly on the fact that the majority had overruled a decision issued 34 years ago, citing the principle of stare decisis ("let what is decided stand"). In any event, the majority opinion explains how over 20-plus years after *Williamson County*, the unfairness and flawed reasoning of the state-court-first requirement had become apparent. The dissent also bemoans the federal courts being besieged with takings claims, with the majority responding that the Takings Clause is part of the Bill of Rights, and that *Williamson County* imposed a bar on such claims that has not been imposed on any other federal civil right.

### **The Implications**

To understand how this new decision will affect property rights and land development, a brief review of takings law will help. Government "takes" property either by eminent domain (a/k/a "direct condemnation") or by regulating its use so severely as to eliminate or at least substantially reduce its value, but claiming to do so for the public good, and not paying compensation (called "inverse condemnation" or a "regulatory," as opposed to physical, taking). If the issue is an onerous regulation, to prove a taking and entitlement to just compensation, the property owner must demonstrate the adverse impact on value (which must be substantial, if not total); interference with "reasonable investment-backed expectations"; and the "character" of the government's action. A court then balances these factors (called the "Penn Central" test) to determine whether the government, by its regulation, is effectively imposing on the property owner a burden of lost value for which, in fairness, the government/public should pay. Exactions – permit conditions – must have a logical connection to the development's impact, and the condition must be "roughly proportional" to that impact. The outcome of takings cases, of course, depends on the facts, but at this point the standards have been reasonably defined by federal courts.

The *Knick* decision, then, will make a big difference going forward in property rights cases in several ways. Overall, when state agencies and regulators regulate the use of land so severely as to substantially reduce or extinguish its value, or impose a condition that is not logical or proportional, asserting that the public interest allows them to do so without payment of just compensation, the standard for litigating such claims will now tilt decidedly back toward property owners, at least to where it was prior to *Williamson County*. State and local governments will now have to defend against these claims in federal court. The standards of the federal Constitution's Takings Clause, if more stringent than state law, are more likely to be applied. Property owners will bring more claims for takings, because it will be faster and less expensive to proceed directly in federal court. And the property owner will now have the ability to recover attorneys' fees if it prevails.



All of this said, perhaps the most substantial, yet at this point hard to predict, change will be the impact of the Supreme Court's now clearly established conservative majority, which at least in theory should be even more protective of private property and development rights than the Supreme Court has ever been before. The *Knick* decision reopens the federal courthouse door to property owners, but the five-member conservative majority promises to solidify protections of private property rights in ways we cannot at the moment predict. No doubt, federal and state wetlands regulation, floodplain regulation, mining rights, climate change, sea-level rise regulation, coastal regulation, and resiliency planning, among other programs, will all be tested, in the sense that government regulation in these areas, if it severely impacts private property use, will be challenged as an uncompensated taking. Governments will need to decide whether to defend, back down, revise, pay compensation, or reach some other accommodation between public and private interests.

It is hard to understand why it took 34 years for the U.S. Supreme Court to own up to an error, but at least the Court has now hit the Reset button so that more takings claims will be heard and decided on their merits, and in the appropriate court.

### **Questions or Information:**

For further information, please contact: Tim Hollister at (860) 251-5601 or [thollister@goodwin.com](mailto:thollister@goodwin.com).\*

---

\* *Thanks to John Rutherford, a law student at Howard University and a 2019 Summer Associate at Shipman & Goodwin, for his assistance with this article.*

These materials have been prepared by Shipman & Goodwin LLP for informational purposes only. They are not intended as advertising and should not be considered legal advice. This information is not intended to create, and receipt of it does not create, a lawyer-client relationship. Viewers should not act upon this information without seeking professional counsel. © 2019 Shipman & Goodwin LLP. One Constitution Plaza, Hartford, CT 06103.

---

289 Greenwich Avenue  
Greenwich, CT 06830-6595  
203-869-5600

---

One Constitution Plaza  
Hartford, CT 06103-1919  
860-251-5000

---

265 Church Street - Suite 1207  
New Haven, CT 06510-7013  
203-836-2801

---

400 Park Avenue - Fifth Floor  
New York, NY 10022-4406  
212-376-3010

---

300 Atlantic Street  
Stamford, CT 06901-3522  
203-324-8100

---

1875 K St., NW - Suite 600  
Washington, DC 20006-1251  
202-469-7750

---

[www.shipmangoodwin.com](http://www.shipmangoodwin.com)