

Current Developments and Hot Tips

**Mortgage Lending Institute of
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This paper is a collection of developments, cases and events which we think are relevant to lawyers who practice in the area of commercial real estate finance, transactions and development. Some are reports of new developments and some are reminders of law and practice that we think might be useful to you. We are certain that we have overlooked many developments that you would like to see covered, but we have picked those things to report which we think would be helpful to most of you and maybe even entertaining in some ways. We have tried not to step on the toes of the contributors to this seminar who so skillfully inform us of developments in Texas cases. The Supreme Court of the United States (“SCOTUS”) decided an unusually large number of cases this past term which had implications for real estate lawyers so we will focus first on those.

- I. **Knick v. Township of Scott, PA. – Takings Cases Against Local Governmental Entities May Now be Filed in Federal District Courts**
- II. **Weyerhaeuser Co. v. US Fish & Wildlife Service – The Dusky Gopher Frog Case Limits Critical Habitat Designations**
- III. **Obduskey v. McCarthy & Holthus, LLP – A Law Firm engaged to do no more than a nonjudicial foreclosure is not a “Debt Collector” under the Fair Debt Collection Practices Act.**
- IV. **Reefer Madness II – A Collection of Topics on Lending and Law Practice in the World of Legalized Cannabis Sales – Even in Texas**
 - A. Legalization (with conditions) of hemp and “CBD” in 2018 Farm Bill
 - B. Legalization (with conditions) of hemp and “CBD” in Texas
 - C. So What? Implications for real estate lawyers and owners
- V. **Changes to the EB-5 Program**
- VI. **We have to include some environmental law developments**
 - A. CERCLA “Common Elements” Guide
 - B. Fish & Wildlife Service – Withdrawal of “Net Conservation Gain” Policy
- VII. **An Ethics Moment Maybe – It is in New Jersey – Attorney Closing Officers and Closing Statements**
- VIII. **Opportunity Zones Discussed by Lawyers Who Do Not Understand the “Land of OZ”.**
- IX. **Landlord Liability for Trademark Violations by Tenant – Say What?**

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I. **Knick v. Township of Scott, PA. – Takings Cases Against Local Governmental Entities May Now be Filed Directly in Federal District Courts**

Claims by property owners harmed by takings by the federal government have been able to be filed directly in federal district courts for along time. The Tucker Act, 28 USC Section 1491. Not so lawsuits claiming Fifth Amendment protections from takings by local governments. That has now changed.

With respect to takings cases against local governments, quoting Chief Justice Roberts:

The Takings Clause of the Fifth Amendment states that ‘private property shall not be taken for public use, without just compensation’. In Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U. S. 172 (1985) we held that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights – and thus cannot bring a federal takings claim in federal court – until a state court has denied his claim for just compensation under state law.

The consequence of the Williamson County ruling was that a takings plaintiff who brought a compensation claim in state court, and did not win, would not be able to bring the claim in a federal court because the federal court would be required by law to give effect to the state court’s decision. Some commentators have called this procedural and substantive road block a “Catch-22”. In Knick v. Township of Scott, PA, 139 S.Ct. 2162 (2019) the U. S. Supreme Court over-ruled its own Williamson County case and held that the state litigation requirement (sometimes expressed as a “ripeness” matter or an “exhaustion” matter) is no longer in effect.

Rose Mary Knick owns a rural property in Pennsylvania. There is a small graveyard on her property where ancestors of Knick’s neighbors are allegedly buried. The local township passed an ordinance that required all cemeteries to be kept open and accessible to the general public during daylight hours. In other words, the township imposed a public access right on part of Knick’s property and created a right for code enforcement officers to enter her property. The enforcement officer notified Ms. Knick that she was in violation by failing to open the cemetery to the public during the day and threatened a penalty of a \$600 per day fine. Ms. Knick sued in federal court – the U. S. District Court for the Middle District of Pennsylvania -- using a statute that is normally used for civil rights violations, 42 U. S. C. section 1983. She did not sue in state court. The local federal district judge dismissed her lawsuit as required by Williamson County, and the Third Circuit affirmed.

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