Lessons from Luminaries of Land law: Latest and Greatest Decisions (Yawn)

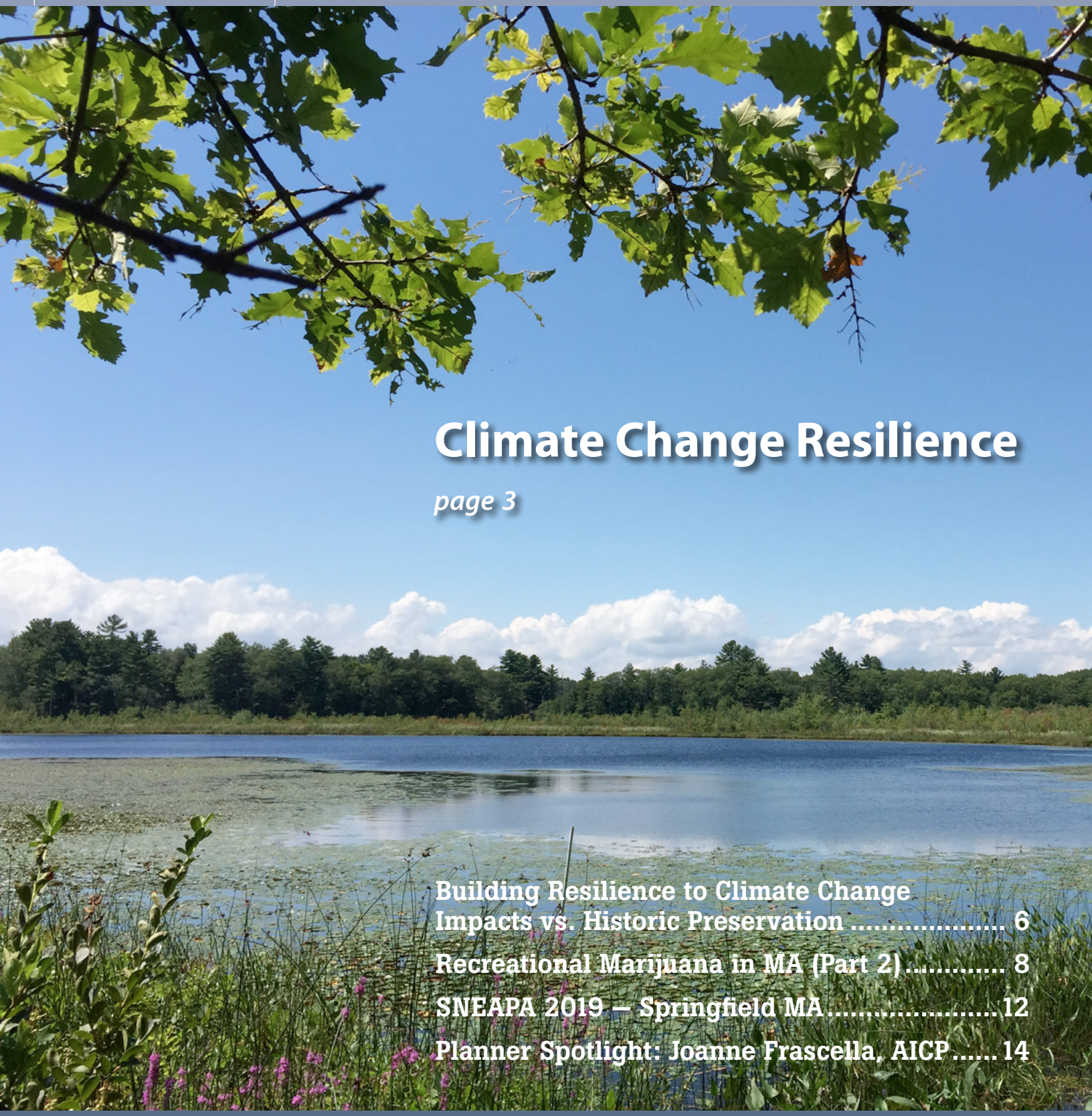
Donald L. Elliott, Esq., FAICP, *Director, Clarion Associates, LLC*
Dwight H. Merriam, Esq., FAICP, *Attorney at Law*
John R. Nolon, Esq., *Counsel, Land Use Law Center & Professor of Law, Elisabeth Haub School of Law*
Michael Allan Wolf, Esq., *Professor of Law & Richard E. Nelson Chair in Local Government Law, University of Florida Levin College of Law*
Michael D. Zarin, Esq., *Partner, Zarin & Steinmetz*

MASSACHUSETTS PLANNING

American Planning Association
Massachusetts Chapter
Making Great Communities Happen

A Publication of the Massachusetts Chapter of the American Planning Association

Summer 2019



Climate Change Resilience

page 3

Knick v. Township of Scott: The Supreme Court Opens the Courthouse Door

by Dwight Merriam, Esq.

On June 21st, the U.S Supreme Court in *Knick v. Township of Scott* overruled the 34-year-old precedent of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, eliminating the second prong of the "ripeness test," the requirement that those claiming a taking must first pursue compensation in the state courts before their claim is ripe for consideration by the federal court. This is a significant procedural change that will likely result in more claims of inverse condemnation covering a wider field of regulation.

However, the tests for a taking remain unchanged, and the first prong of Williamson County, requiring a final determination by the government before a property owner can claim a taking, remains intact. That means in most cases a developer will still have to reapply for something less or seek variances or even a zoning amendment to be able to demonstrate that the government has reached a final decision. Without that, no court can determine if there was a taking in the first instance (the planning board denied 20 lots, but later approved a profitable 10 lots) and what the damages are, if there was a taking (the number of lots approved rendered the property valueless).

> "Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed."
>
> *— Chief Justice Roberts, writing for the majority*

Distilled to its essence, *Knick* decided that the point in time at which a taking occurs is when the government's action takes effect, not some later time when state courts have acted on a claim for compensation as *Williamson* County had held. It was as simple and remarkably impactful as that. It puts takings cases in the same position as all the other constitutional claims, like free speech sign cases, that have always been able to go directly into federal court with no requirement to seek relief in the state courts first.

Rose Mary Knick lives in her single-family home in Scott Township, Pennsylvania on a 90-acre farm, where she keeps horses and other farm animals. There is a small graveyard on her farm where it is believed that the ancestors of some of Knick's neighbors may be buried. Such family cemeteries are fairly common in Pennsylvania, where "backyard burials" have long been permitted.

Scott Township enacted a local law in December 2012, directing that "[a]ll cemeteries…be kept open and accessible to the general public during daylight hours." The ordinance defined a "cemetery" as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." The Township's "code enforcement" officers were authorized under the law to go on private properties to determine if they had cemeteries.

A code enforcement officer identified graves on Knick's property and told her she was violating the ordinance by not having her property open to the pubic during the day. Knick sued in state court for a taking and lost and then the federal courts wouldn't hear her case because she hadn't fully pursued her claim for compensation in the state courts. The U.S. Supreme Court agreed to hear her appeal.

The decision was 5-4, with Chief Justice Roberts writing for the majority, which included Thomas, Alito, Gorsuch, and Kavanaugh.

The Court held that a takings claim is "ripe" at the very moment government takes it by overregulation or physical invasion:

> We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.

Justice Kagan in her dissenting opinion, joined in by Ginsburg, Breyer, and Sotomayor, argues against the majority's decision, saying it should not overrule precedent and that the federal courts will now be flooded with local zoning problems.

continued on page 11

Beyond an increase in the number of takings claims brought, the range of governmental activities claimed to effect a taking, and the difficulty federal courts may have as to pendant jurisdiction and abstention with regard to resolving state and local issues, the practical effect of *Knick* is hard to figure at this early date. Because the tests for a taking remain unchanged, the somewhat glib, but perhaps accurate, guess is that all *Knick* will prove to be is an opportunity for property owners to lose their takings cases more quickly in federal court. And, of course, *Knick* does not require going to federal court. Indeed, many plaintiffs may choose the state court forum regardless, with the hope that they will get better treatment there.

A plus for government is the *Knick* Court's view that the availability of compensation preludes an injunction to invalidate a regulation: "Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed."

Knick will encourage the greater use of 42 U.S.C. §1983 and the threat of successful plaintiffs recovering their attorney's fees under §1988. This threat may have a chilling effect on local government initiatives at the cutting edge where the defensibility of public regulation has been untested.

When sued for a taking, local governments will want to consider moving quickly to mediation to settle the claims to avoid the running up of legal expenses by the plaintiffs who will later claim them if they win.

When sued for a taking, local governments will want to consider moving quickly to mediation to settle the claims to avoid the running up of legal expenses by the plaintiffs who will later claim them if they win.

A simple solution in the *Knick* case would have been for the town to buy the easement or take it by eminent domain. The cost would have been miniscule compared to the litigation.

Another alternative is to incentivize the voluntary dedication, in this case, of an access easement, by providing some type of relief from development restrictions, such as a density bonus, or by providing tax relief.

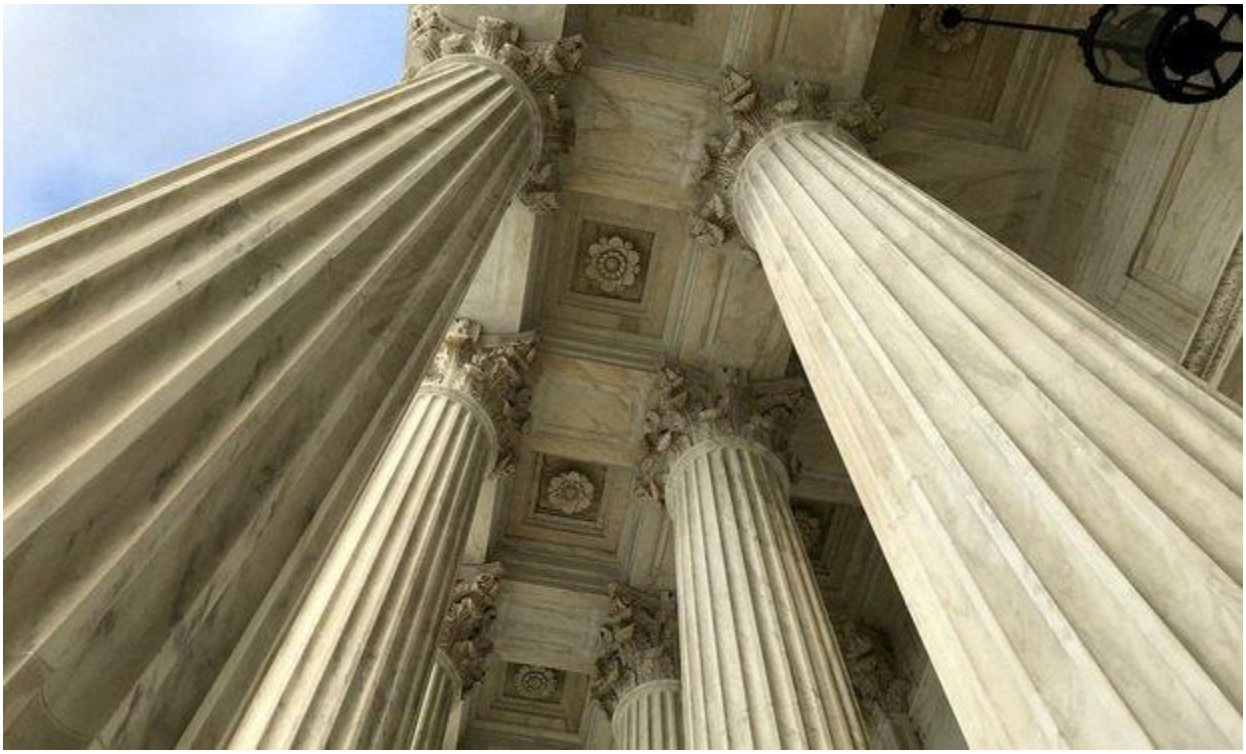
— Dwight Merriam, FAICP, is Past President of AICP and a lawyer in Simsbury, Connecticut, also admitted in Massachusetts. See www.dwightmerriam.com.

ConnecticutLawTribune

More than a 'Knick'—SCOTUS Overrules 'Williamson County' in Stunning Victory for Property Owners

The U.S. Supreme Court’s important decision in "Knick v. Township of Scott" will increase the number and range of takings cases brought by property owners. The 5-4 decision pulls no punches.

By **Dwight Merriam** | June 24, 2019 at 05:41 AM



U.S. Supreme Court

The U.S. Supreme Court's important decision in ***Knick v. Township of Scott***, 2019 WL 2552486, on June 21 will increase the number and range of takings cases brought by property owners now that the court has bulldozed open the direct path to the federal courts. The 5-4 decision, written as some predicted by the chief justice, overrules the 34-year-old precedent in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and pulls no punches in doing so: "Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights. … *Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence."

Under *Williamson County*, takings plaintiffs have been subject to what has been pejoratively labeled the "**ripeness shuffle**," and blocked from

proceeding in federal court until the state courts have considered compensation. Effectively, this process has barred most claimants from ever having their day in federal court. *Williamson County* 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.”

In its decision in *Knick* overruling *Williamson County*, the court holds that a “property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under §1983 at that time.” Period. Full stop. The federal courthouse door has been opened full wide.

The case of Rose Mary Knick was procedurally typical. Her complaint brought under 42 U.S.C. §1983 in federal court alleged a taking arising from the town enacting an ordinance requiring that she and other property owners with small private cemeteries on their land allow the public to come onto their property during the day. The district court dismissed her claim under *Williamson County* and the Third Circuit affirmed.

The chief justice was joined by Justices Clarence Thomas, Samuel Alito Jr., Neil Gorsuch and Brett Kavanaugh. Property rights pundits had been waiting to see where Kavanaugh would line up, many predicting he would join with the other conservative justices. Justice Elena Kagan filed a dissenting opinion in which Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor joined. The dissent argues that there is no taking until the government denies compensation in a subsequent proceeding. The dissent also expresses the fear that federal courts will be burdened with local and state law issues, and that the majority decision transgresses the principles of stare decisis.

Property rights advocates are ecstatic. Robert Thomas is a partner with Damon Key Leong Kupchak Hastert in Honolulu, the author of the popular blog **inversecondemnation.com**, and a leader in Owners' Counsel of America, an organization devoted to protecting private property rights. He observes:

"The federal judiciary's unnecessary thirty-year abandonment of property and takings cases is at long last over. The court today rightly relegated to history's dustbin a judicially-created doctrine that deprived property owners of a federal court forum to resolve federal constitutional claims. The decades of damage that *Williamson's County*'s ripeness doctrine wrought on property owners cannot be retroactively undone of course, but by putting property rights on equal footing with other constitutional rights, today's ruling is a step in the right direction. The court rectified a mistake it never should have made, and rightly restored property owners' rights to the 'full-fledged constitutional status' they should enjoy."

Jim Burling, who is vice president for legal affairs for the Pacific Legal Foundation, which represented Knick before the court, was especially pleased with the result because his nonprofit legal organization had been fighting for decades to get *Williamson County* overruled:

"Property rights are no longer poor relations to other constitutional rights. For too long, property rights have been the only constitutional right that Americans have not been able to litigate in federal court; now property rights are on an equal footing. *Knick* will give property owners the same choice of forum for federal takings claims that state and local governments have always had in defending those claims: state or federal court.

“While today’s decision doesn’t change the substantive law of takings, it will put more teeth into that law by making it possible for property owners to avoid some decidedly unfriendly local and state courts.

“Now that Scott Township will face a serious takings claim when the case is remanded to federal district court, we hope it will come to its senses and pay Ms. Knick for the taking of an easement across her property, up to the present, and then rescind the ordinance. Ms. Knick simply wants peace, quiet, and security on her farmland—not a potential parade of trespassers at all hours of the day.”

Michael M. Berger of Manatt, Phelps & Phillips in Los Angeles has argued four takings cases before the court and authored an amicus curiae brief in *Knick* for the Institute for Justice, Owners’ Counsel of America and Professor Daniel R. Mandelker, supporting petitioner. Berger has a unique perspective from which to assess *Knick*:

“For 34 years, American property owners have been prevented from seeking constitutional justice in federal courts. For reasons that were never clear, the Supreme Court concluded that such federal issues had to be “ripened” by trying—and losing—them in state courts. No other American litigant was blocked from the federal courthouse in this way. No more. Apparently, 34 years of nonsense was enough for a majority of the Court, which clearly and decisively put an end to the practice. So one is tempted to chant “ding dong, the witch is dead” while dancing on the grave of *Williamson County Reg. Planning Agency v. Hamilton Bank*, the case that inflicted this unfair rule on American citizens. Many of us knew the rule was wrong 34 years ago, and have repeatedly said so ever since. Reading the majority opinion in *Knick v. Township of Scott*, one is only left to wonder how the clarity of its analysis escaped everyone for decades. This is an issue on which conservatives and

liberals should be able to join: conservatives because it provides the promise of real protection for property rights, and liberals because it protects the rights of individuals against the power of the collective state. All in all, a good day for the Constitution."

Property owners who believe they have been wronged by the government will be encouraged by *Knick* to bring their cases to federal court under 42 U.S.C. §1983, and lawyers who might represent them will more readily step up with the path ahead now cleared and the possibility of recovering their attorney fees under §1988. There will be more cases brought and more issues will be raised, further challenging the limits of public regulation.

The court assured governments that overruling *Williamson County* need not impede government regulation: "Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years— injunctive relief will be foreclosed."

This is the dawn of a new era in takings litigation.

*Attorney **Dwight Merriam***, www.dwightmerriam.com, *is a member of the Connecticut Law Tribune's editorial board.*

ConnecticutLawTribune
POWERED BY LAW.COM

Commentary

Viewpoint: Senator is Wrong About 'Knick' Ruling

This is not a conservative or liberal issue. It is a question of Constitutional interpretation.

By **Dwight Merriam** | July 02, 2019 at 12:59 PM

Dwight Merriam

Sen. Sheldon Whitehouse in his recent National Law Journal broadside, "'Knick'-Picking: Why a Recent SCOTUS Ruling Signals a New Day," goes off the rails in claiming the U.S. Supreme Court's decision in *Knick v. Township of Scott* is the product of five conservative justices ganging up to ignore legal precedent so as to impose their agenda and of "dark money" funding a shadowy coalition of groups bent on remaking the court and influencing it to their ends.

The plain fact is that *Williamson County v. Hamilton Bank* (1985), the decision the court overruled in *Knick*, was wrongly decided in the first instance and has proved utterly unworkable. This is not a conservative or liberal issue. It is a question of Constitutional interpretation. The Fifth Amendment to the U.S. Constitution provides that no one should have their “private property be taken for public use, without just compensation.” What *Knick*does is protect that right by opening the door to the federal courts.

The legal construct that *Williamson County* created was that a person’s property could not be deemed “taken” by the government and a claim for compensation justiciable in federal court until they had subjected themselves to a long process in state court to see if the government b forced to pay something for the rights it invaded.

In the case of Rose Mary Knick, what her town did was pass a law that said anyone during daylight hours could enter her private farmland where she lives alone to access an old, hardly recognizable small private gravesite 300 yards into her property. Under the doctrine of *Williamson County* Mrs. Knick hadn’t lost anything, at least not yet, even though strangers might wander across her property for years while she sought relief in a state court. Until she was done in state court, her case was not “ripe” for federal court.

What *Knick* does is make clear that the taking of Mrs. Knick’s property interest occurred the moment the town ordered her to open her private property to the public and on that day she ought to have the right to go to federal court to get relief from the violation of her rights under the federal Constitution. Where else should a property owner be able to get relief under the Bill of Rights than in federal court?

The court made a mistake in 1985 in *Williamson County*. The court corrected it in *Knick,*plain and simple. Instead of maligning the majority, we ought to commend them for stepping up and admitting there was error and, that as a practical matter, *Williamson County* had created a procedural nightmare.

Yes, this was a big victory for property rights advocates, but it is not an issue of political and social philosophy, and right versus left. Prof. Daniel R. Mandelker, Washington University School of Law, has taught land use law for seven decades and is revered by government lawyers and planners. He is, in his own words, a “police power hawk.” He believes in comprehensive government planning and tough regulation to promote the public good, including affordable housing, historic preservation, and environmental protection. He has argued for reversal of the *Williamson County* ripeness rule for more than three decades and he joined in an amicus brief in *Knick* urging the court to overrule it. Prof. Mandelker lent his voice and reputation to the cause, uninfluenced by “dark money.”

No doubt property owners will be emboldened by this decision and more takings cases will be filed in federal court encompassing a wider range of infringement of private property rights. But the *Knick* situation, as so many others like it, was entirely avoidable. The town could have negotiated to acquire an easement from Mrs. Knick and paid fair value for it. If she would not agree, and the town felt strongly enough about it and could prove in court that having the access was a public use, it could have used its eminent domain power to take the easement, paying just compensation at the time of the taking.

Finally, no one need fear that federal courts will be deciding garden variety, local zoning disputes for two reasons. First, the federal courts are courts of limited jurisdiction and generally have no right to decide issues of state law,

unless they elect do so under the doctrine of pendant jurisdiction. Second, many takings claims going to federal court are going to be free of state claims because the property owners will not challenge the legality of the offending local regulation or decision, instead suing only to get paid for what has been taken.

Let's move on.

*Attorney **Dwight Merriam** is a member of the Connecticut Law Tribune's editorial board.*

Originally published in the Connecticut Law Tribune.

ConnecticutLawTribune

Analysis

Minneapolis Miracle: What We Can Learn from the 'State of Nice' About Building Affordable Housing

Minneapolis is upfront about its land use pattern of racial segregation and has forcefully traced its origins back to the express racial discrimination embodied in racially restrictive covenants supported by zoning and public infrastructure decisions.

By **Dwight Merriam** | October 17, 2019 at 04:07 PM

Lessons for Connecticut were on display recently in Minneapolis.

They call it “Minnesota Nice” with varied explanations, mostly positive. Minnesotans are proud of their much-deserved reputation. I was there on Oct. 11, meeting with Minneapolis Mayor Jacob Frey, talking with him about **Minneapolis 2040**, the bold plan to break the back of the city’s deeply rooted racial segregation.

We in the “Land of Steady Habits” can learn a great lesson from the dramatic and truly unprecedented action taken by Minneapolis in its plan recently approved by the Metro Council.

The city is upfront about its land use pattern of racial segregation and has forcefully traced its origins back to the express racial discrimination embodied

in racially restrictive covenants supported by zoning and public infrastructure decisions. In February, MinnPost published an **article** detailing the history.

At a presentation by a member of the city's planning staff, I heard the most frank and open acknowledgment of the failure of public policy I have ever heard. They pull no punches on this issue of racial land use patterns in Minneapolis. Everyone I spoke with is totally focused on making it right. Frey is a strong leader, and his great leadership has been critically important.

The very first goal of the 1,100-page comprehensive plan is this:

"1. Eliminate disparities: In 2040, Minneapolis will see all communities fully thrive regardless of race, ethnicity, gender, country of origin, religion or zip code having eliminated deep-rooted disparities in wealth, opportunity, housing, safety and health."

The Brookings Institution described the plan in an article titled "**Minneapolis 2040: The most wonderful plan of the year**." The plan will build more housing by allowing as-of-right in-fill development in existing neighborhoods built out under current zoning, build housing that is less expensive by enabling large houses to be subdivided into multiple units, and build that less expensive housing in the better neighborhoods.

What is the key? What could one city, totally committed to making access to housing open and equal for all, possibly do in one fell swoop?

Minneapolis takes a three-part approach: 1. Increase building heights and densities for residential development near transit and employment centers. 2. Abolish parking requirements, as Hartford has so appropriately done.

And 3? The first book I wrote was in 1984, "Inclusionary Zoning Moves Downtown." In my more than four decades as a student-teacher and advocate

of affordable housing, I never thought I would see this day. I never imagined government would have the foresight, political will and commitment to social justice to mandate, as Minneapolis has, that as-of-right in all single-family zones a property may be developed with duplexes or triplexes. This allows tripling the density in areas already developed, piggybacking on the sunk cost of the infrastructure. It's like getting free land and free utility hook-ups and no cost for streets, sidewalks and other infrastructure. It's all right there already. And when existing buildings are carved up, say a 3,000-square-foot house converted to three 1,000-square-foot apartments, there is no cost for the foundation and building envelope.

Connecticut's Affordable Housing Land Use Appeals Statute, Section 8-30g, enables the override of local zoning for affordable housing. It's been on the books for three decades, and a recent **article** reports the tally to date to be "about 5,000 affordable homes and more than 10,000 additional modestly priced, market rate apartments and homes as part of mixed-income developments." These are typically larger developments because they need the staying power for long, expensive legal battles that can go on for more than a decade. In **Westport**, an 8-30g battle has been fought since 2005—14 years without a final decision.

The late professor Terry J. Tondro of the University of Connecticut School of Law was co-chairman of the **Blue Ribbon Commission on Housing**, with Anita Baxter, the First Selectwoman of New Hartford. He has acknowledged that the Affordable Housing Land Use Appeals Statute was Fairfield County-centric and that one of its three purposes was to provide executive housing there: "Many large corporations have offices there, and were finding it difficult to lure executives to their headquarters because of the high cost of living in the county." Two other purposes he cited were providing more affordable

housing generally and ensuring that children when they grew up could afford to live in the towns where they were raised.

The Affordable Housing Land Use Appeals Statute should continue, and could be strengthened in many ways, but it's not getting us far. It's almost a tokenism and if we rely on it alone, we won't get where we need to be. We think we're doing good with 8-30g. We're not, because we are hardly putting a dent in the problem. It makes some of us feel good, but that's not enough.

According to the **U.S. Census**, there are 892,621 single, detached housing units in Connecticut, out of a total 1,507,711 units. Let's say the governor and the General Assembly actually had the gumption to do what Minneapolis did and amend the state zoning enabling law to allow up to three units as-of-right. By the way, Oregon recently did essentially just that with **House Bill 2001** enabling duplexes in many cases and even triplexes, fourplexes, attached townhomes, and cottage clusters on some lots. We need to ask ourselves: "So why don't we do the same?"

Back to those 892,621 Connecticut lots. If just 5% of those lot owners added a single unit and another 5% decided to add two units, we would have 44,631 and 89,262 units for a total of about 134,000 new housing units, most of them better sized and more affordable for the smaller households of today. The tremendous increase in supply would drive down housing prices across the board.

The Affordable Housing Land Use Appeals Statute has produced 5,000 units in 30 years; that's 167 units per year. Sure, we had a slow start and it takes years to get results, so generously triple that meager 167 to 500 units per year. With 8-30g it will take us, even at 500 units per year, 268 years to

replicate what the Minneapolis plan would give us with a very laid back 5% and 10% participation.

What Minneapolis offers is something akin to the gig economy of affordable housing, like Airbnb is to short-term rentals and Uber is to ride hailing. Each and every homeowner can be a mini-developer. New housing will spring up everywhere. No litigation required. No deep-pocket developers required. No lawyers. No infrastructure costs. No land cost.

And a whole lot of happy homebuilders; but most importantly, a new era of diversity and inclusion all across our land.

*Attorney **Dwight Merriam** practices in Simsbury and is a member of the Connecticut Law Tribune's editorial board.*

Neighbor News

The Great "Yes in My Back Yard" (YIMBY) Revolution

Dwight Merriam describes the important role accessory dwelling units can play in providing affordable housing.

By Tammy Campbell, Neighbor

Oct 31, 2019 12:42 pm ET

Dwight Merriam, a nationally-recognized land use planner and lawyer, describes the important role accessory dwelling units can play in providing affordable housing.

You have probably heard of the term NIMBY, which is the acronym for "Not in My Back Yard." It is the attitude of some people who are resistant to change and will oppose new developments that they fear will adversely affect them. Most of the NIMBY challenges arise out of attempts to increase residential density and to provide more affordable housing. The fear is that the loss of single-family zoning or the development of a more inclusive housing stock will change the character of existing neighborhoods. The NIMBY opposition is often couched in terms of adverse impacts on the value of existing properties, but the not-so-hidden agenda in many cases is one of class and racial exclusion. Single-family zoning is inherently exclusionary, as is redlining and racially-restrictive covenants (no longer enforceable, but other private restrictions requiring large, expensive homes are still with us).

In recent years, in addition to acknowledging the economic class and racist effects of planning and zoning, there has been an increasing realization that the households excluded through NIMBY opposition are often not all that different than those households who were able to purchase or rent homes in the past, but cannot now because of the lack of affordable housing and the increased cost of housing, both owner-occupied and rental.

Indeed, some of those who have been excluded include the children of families in those neighborhoods, children who are now grown up and want to live in those neighborhoods but can't find affordable housing. Some of the excluded households include single-parents with their children. Among the excluded are empty-nesters, retirees, widows, and widowers.

Five years ago, households of single people in this country came to outnumber those with married couples. With the changing demographics in this country, including smaller and smaller household size, such that not too long from now, the predominant household type will be the single person, attitudes are changing. People are beginning to realize that something must be done to open up opportunities for all types of households and people in a wide range of economic means.

The fact is, in many of our developed communities with the housing stock dating back decades, that housing is now physically, functionally, and economically obsolescent. The single-family

detached home in a large lot, designed and built many decades ago for the typical American household of the "Ozzie and Harriet" and "Father Knows Best" era, simply don't fit the households of today.

This country is beginning to question what is called "single-family zoning." There is a move afoot to allow denser, smaller units of housing, to be retrofitted in those neighborhoods of old.

This is the YIMBY movement, evidenced by the increasing acceptance of accessory dwelling units. They are sometimes called mother-in-law apartments or granny flats, but they are all accessory dwelling units (ADUs)

The American Planning Association describes the ADU as "a smaller, independent residential dwelling unit located on the same lot as a standalone (i.e., detached) single-family home." They may be attached to the existing home, they might be developed within the existing home by carving up some of the space, or they may be part of a separate building, such as over the garage or as a freestanding unit placed in the rear yard.

The advantage of ADUs is that they capitalize on the existing infrastructure. No new land is required, and the utilities are readily accessible. The benefits include creating a smaller and more affordable unit for households that otherwise couldn't find or afford housing. They provide an additional income stream for the owner of the existing house, and often they allow an older person to age in place by giving them an additional income stream and needed companionship and social interaction.

Some states, such as California and Vermont, have state laws that expressly enable the development of ADU's. Vermont's law provides: "Except for flood hazard and fluvial erosion area bylaws …, no bylaw shall have the effect of excluding as a permitted use one accessory dwelling unit that is located within or appurtenant to an owner-occupied single-family dwelling. An accessory dwelling unit means an efficiency or one-bedroom apartment that is clearly subordinate to a single-family dwelling, and has facilities and provisions for independent living,

including sleeping, food preparation, and sanitation, provided there is compliance with [certain criteria]."

But the most astonishing and breakthrough developments in the YIMBY movement have come from Minneapolis and the state of Oregon.

The Minneapolis City Council late last year voted to amend its land-use plan to provide that every single-family lot may be developed as a matter of right, with up to three dwelling units. The effect of this change could be dramatic. It will likely bring into production a large number of new units, many of them affordable, and many of them sized for the households of today.

Bloomington, Indiana, is considering something similar, to allow up to four units on single-family lots.

Oregon is the first, and so far, the only state in the country, to similarly mandate as a matter of state law that lots in many areas may be developed as of right with two, three, and even four units, and in some instances, with "cottage clusters."

Will these two landmark initiatives in Minneapolis and Oregon end single-family zoning as we know it? No. There will remain many exclusively single-family neighborhoods. But they will enable a denser and more appropriate housing stock to be developed and, presumably, make our neighborhoods more diverse and inclusive.

About Dwight Merriam:

Dwight H. Merriam has practiced law for four decades. He represents land owners, developers, governments, and individuals in land use matters. Dwight is a Fellow and Past President and of the American Institute of Certified Planners, a former Director of the American Planning Association, a former chair of APA's Planning and Law Division, a former chair of the American Bar Association's national Section of State and Local Government Law, the Connecticut member of Owners' Counsel of America, a former Fellow of the Royal Institution of Chartered

Surveyors, a Fellow of the American Bar Foundation, a member of the Rocky Mountain Land Use Institute National Advisory Board, a Fellow of the Connecticut Bar Foundation, a Counselor of Real Estate, a member of the AARPI, and a Fellow of the American College of Real Estate Lawyers.

42 N.E.3d 146
Court of Appeals of Indiana.

John COUNCELLER, Appellant–Petitioner,
v.
CITY OF COLUMBUS PLAN COMMISSION, Appellee–Respondent.

No. 03A05–1503–PL–127.
|
Aug. 19, 2015.

Synopsis

Background: Property owner sought judicial review of decision of city planning commission denying his application to resubdivide property. The Circuit Court, Bartholomew County, No. 03C01–1408–PL–3420, James D. Worton, Special Judge, denied petition. Owner appealed.

Holdings: The Court of Appeals, Bradford, J., held that:

[1] planning commission was not estopped from enforcing ordinance requiring 75% of property owners in subdivision to approve a further subdivision, and

[2] ordinance, providing for waiver of 75% requirement, did not improperly delegate planning commission's authority to neighbors.

Affirmed.

West Headnotes (8)

[1] **Estoppel**
Essential elements

Doctrine of equitable estoppel requires three elements: (1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially.

Cases that cite this headnote

[2] **Estoppel**
Estoppel Against Public, Government, or Public Officers

The general rule is that a governmental entity cannot be estopped by the unlawful acts of public officials; however, equitable estoppel can be applied against a governmental entity when "the public interest" will be threatened.

Cases that cite this headnote

[3] **Estoppel**
Knowledge of facts

Estoppel cannot be applied when the facts are equally known or accessible to both parties.

Cases that cite this headnote

[4] **Zoning and Planning**
Ignorance of the law

Property owners are charged with knowledge of the applicable subdivision ordinance.

Cases that cite this headnote

[5] **Zoning and Planning**
Estoppel or inducement

City planning commission was not estopped from enforcing ordinance requiring 75% of property owners in a subdivision to approve a further subdivision of one of the lots on grounds that nobody told property owner of the ordinance's requirements and that as a result, he

allowed prior resubdivision applications to lapse to his detriment; owner was charged with knowledge of ordinance affecting his property, no representation was made that the 75% requirement would not be enforced in his case, owner's prior applications had never reached a point of development where the 75% requirement became an issue, and prior applications were not identical to the most recent application.

Cases that cite this headnote

[6] **Municipal Corporations**
Use of property in general

Property owners are charged with knowledge of ordinances that affect their property.

Cases that cite this headnote

[7] **Estoppel**
State government, officers, and agencies in general

The State will not be estopped in the absence of clear evidence that its agents made representations upon which the party asserting estoppel relied; however, estoppel may be appropriate where the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak.

Cases that cite this headnote

[8] **Zoning and Planning**
Maps, plats, and plans; subdivisions

Ordinance requiring 75% of property owners in a subdivision to approve a further subdivision of one of the lots did not impermissibly give unrestricted power to neighbors and result in improper abdication of planning commission's authority to approve or disapprove of plats; ordinance contained provision permitting planning commission to waive 75% requirement upon a finding that the proposed change would not have a significant impact on the existing subdivision.

Cases that cite this headnote

Attorneys and Law Firms

***147** Michael L. Carmin, Gregory A. Bullman, CarminParker, PC, Bloomington, IN, Attorneys for Appellant.

John A. Stroh, Sharpnack Bigley Stroh & Washburn LLP, Columbus, IN, Attorney for Appellee.

BRADFORD, Judge.

Case Summary

[1] In 1999, Appellant–Petitioner John Counceller submitted the first of four applications to subdivide his lot in the Indian Hills Estates ("the Lot") in Columbus. The first two were withdrawn prior to action by Appellee–Respondent City of Columbus Plan Commission ("the Commission"). In 2013, Counceller again requested to subdivide the Lot, and the Columbus Plat Committee ("the Plat Committee") granted primary approval to the application. Although no objection was filed to this approval, Counceller never acted on it, and it expired. The first three applications were to subdivide the Lot into two lots.

[2] In 2014, Counceller again submitted an application that he be allowed to subdivide the Lot, this time into three lots, and the Plat Committee again granted primary approval to the request. When notified of the Plat Committee's approval, all or almost all of the other property owners in Indian Hills Estates objected. Citing a Columbus ordinance that requires 75% of property owners in a subdivision to approve a further subdivision

of one of the lots, the Commission ultimately rejected Counceller's application. Counceller argues that the Commission should be estopped from relying on the 75% requirement and that it improperly abdicated its responsibility to exercise exclusive control of the subdivision of land to Counceller's neighbors. We affirm.

Facts and Procedural History

[3] Columbus has had three subdivision control ordinances, the first in effect from 1949 to 1968, the second from 1968 to 1982, and the third from 1982 to the present. Indian Hills Estates was platted in 1962 and, although not within Columbus city limits at the time, was subject to Columbus's subdivision control ordinance and has since been annexed in any event. Section 16.24.225 of the current subdivision control ordinance ("Section 225"), governing the resubdivision of land, provides as follows:

Section 16.24.225 Resubdivision of land

A. Procedure for Resubdivision. Whenever a land owner desires to resubdivide an already approved major subdivision plat, the land owner shall apply for the resubdivision using the same procedure prescribed for the subdivision of land.

B. For any resubdivision where the proposed changes may have an impact on the existing subdivision, the application shall include the signed consent of 75% of the owners of property in the existing subdivision. Such changes include the following:

1. Any change in street circulation pattern or other significant change in a public improvement;

***148** 2. The addition of one or more buildable lots;

3. Any change in the amount of land reserved for public use or the common use by lot owners;

4. Any other change which would have an adverse effect on the use and enjoyment of property in the existing subdivision.

C. The staff shall make a determination as to whether a proposed change will have a significant impact as defined in Subsection B. The staff decision may be appealed to the Commission.

D. Waiver. A property owner may request a waiver from the requirements of Subsection B. The Commission may waive the requirement for the consent of 75% of the property owners in the subdivision if it finds that the proposed change will not have a significant impact on the existing subdivision. The Commission, after receiving an application for resubdivision that includes an express request for waiver, shall consider the request after a public hearing. Notice of the hearing shall be given to interested parties as defined in the Rules of Procedure.

E. Covenants. Any new lots created by a resubdivision shall be subject to any covenants and restrictions that applied to the original subdivision plat.

F. This section shall not apply to land or parcels shown and clearly labeled on the preliminary or final plat as reserved or intended for future development. (Ord. No. 24, 1999, § 3, 9–7–99)

COLUMBUS, IND., SUBDIVISION CONTROL ORDINANCE 16.24.225 (1999).

[4] Counceller owns the Lot in Indian Hills Estates. The Lot consists of approximately 3.26 acres, while the average lot size in Indian Hills Estates is approximately 2.26 acres. In 1999 and 2010, Counceller submitted applications to the Commission to subdivide the Lot into two lots. In 2013, Counceller again submitted an application to subdivide the lot in two, which request was approved by the Plat Committee on October 24, 2013. Counceller did not execute the approval and it expired in January of 2014.

[5] On March 10, 2014, Counceller filed a fourth application to resubdivide the Lot, this time into three lots, with proposed areas of approximately 1 acre, 1.06 acres, and 1.26 acres. On March 20, 2014, the Plat Committee approved Counceller's application. Public notice of the Plat Committee's approval was provided on May 23, 2014. On May 30, 2014, the Columbus Planning Department received an appeal of the Plat Committee's approval, which appeal was filed by Counceller's neighbors Mark Elwood and Angie May and approved by all or almost all of the other property owners of Indian Hills Estates.

[6] On July 9, 2014, the Commission met, conducted a hearing, and voted to deny Counceller's request to resubdivide on the basis that it did not receive the consent of 75% of the other property owners in Indian Hills Estates. On August 1, 2014, Counceller petitioned for

judicial review of the Commission's decision in Bartholomew Circuit Court, arguing that the Commission should be estopped from enforcing the 75% requirement of Section 225 and that the Commission improperly abdicated its authority to Counceller's neighbors. On February 26, 2015, the trial court denied Counceller's petition.

Discussion and Decision

I. Estoppel

[1] [2] [3] [4] [7] Counceller contends that the Commission should be estopped from denying his request to resubdivide the Lot.

> ***149** The doctrine of equitable estoppel requires three elements: "(1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially." *Hannon v. Metropolitan Development Comm'n,* 685 N.E.2d 1075, 1080–81 (Ind.Ct.App.1997). [T]he general rule [is] that a governmental entity cannot be estopped by the unlawful acts of public officials. *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 354 (Ind.Ct.App.1981). However, this prohibition is not absolute. *Id.* at 356. This court has recognized equitable estoppel can be applied against a governmental entity when "the public interest" will be threatened. *Advisory Board of Zoning Appeals of Hammond v. Foundation for Comprehensive Mental Health, Inc.*, 497 N.E.2d 1089, 1092 (Ind.Ct.App.1986); *see also Cablevision of Chicago*, 417 N.E.2d at 357....
>
> "Estoppel cannot be applied when the facts are equally known or accessible to both parties." *Comprehensive Mental Health,* 497 N.E.2d at 1093. [P]roperty owners [are] charged with knowledge of the applicable subdivision ordinance[.] *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1030 (Ind.1998)[.]

Johnson Cnty. Plan Comm'n v. Tinkle, 748 N.E.2d 417, 419–20 (Ind.Ct.App.2001).

[5] [8] Counceller argues essentially that the Commission should be estopped from enforcing because nobody with the Plat Committee or planning staff told him that he was required to have consent of 75% of the other property owners in Indian Hills Estates. Consequently, Counceller's argument continues, his ignorance of the 75% requirement caused him to allow his third resubdivision application to lapse to his detriment.

[6] [7] [9] At the very least, however, Counceller has failed to establish the first element of his estoppel claim: a lack of knowledge of the provisions of Section 225 or the means to acquire that knowledge. To the extent that Counceller argues that he was unaware of the 75% requirement and that the Commission was under some obligation to inform him of it, it is well-settled that "[p]roperty owners are charged with knowledge of ordinances that affect their property." *Story Bed & Breakfast, LLP v. Brown Cnty. Area Plan Comm'n,* 819 N.E.2d 55, 64 (Ind.2004).

> As a general rule, equitable estoppel will not be applied against governmental authorities. *Id.* Our courts have been "hesitant to allow an estoppel in those cases where the party claiming to have been ignorant of the facts had access to the correct information." [*Cablevision of Chicago*, 417 N.E.2d at 355]. The State will not be estopped in the absence of clear evidence that its agents made representations upon which the party asserting estoppel relied. *Indiana Dep't of Envtl. Mgmt. v. Conard*, 614 N.E.2d 916, 921 (Ind.1993). However, "estoppel may be appropriate where the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak." *Equicor Dev. v. Westfield–Washington Township*, 758 N.E.2d 34, 39 (Ind.2001).

Id. at 67.

[10] Simply put, pursuant to *Story Bed & Breakfast*, Counceller is charged with knowledge of the provisions of Section 225, and Counceller makes no claim that the Commission or any related entity made any representations that they would not be enforced in his case. In the absence of any evidence of an affirmative assertion ***150** (or silence when there was a duty to speak), Counceller's estoppel claim must fail.

[11] Counceller is essentially arguing that the Commission's alleged failure to enforce Section 225's 75% requirement in his previous three resubdivision applications should be taken as an assertion that it would not be enforced in his fourth.[1] As the Commission points out, however, the previous three applications apparently never got to the point where the 75% requirement became

an issue. In 1999 and 2010, Counceller withdrew the applications before the Commission took any action on them. In 2013, the 75% requirement did not arise because none of the other property owners in Indian Hills Estates objected when given notice of the Plat Committee's approval of Counceller's application. Indeed, according to Columbus Planning Director Jeff Bergman, Section 225's 75% requirement had never been an issue because, to the best of his knowledge, no resubdivision request had ever been objected to. (Appellant's App. 138). We conclude that a more accurate way of characterizing the record would be to say that Section 225's 75% requirement simply never arose in Counceller's previous three applications. In our view, this cannot be taken as an assertion that Section 225 would not be enforced in the fourth.

[12] Additionally, Counceller's request that we draw parallels between all four of his resubdivision requests is misguided because he did not request the same thing in all four. As previously mentioned, Counceller requested the first three times to resubdivide the Lot into two, but the fourth time requested to resubdivide it into *three* lots. Even assuming, *arguendo,* that Counceller had a right to expect that a fourth, identical request for resubdivision would be treated the same as the previous three by the Commission, the fourth request was not, in fact, identical. Because Counceller failed to establish that was denied the means to gain knowledge of the 75% requirement, the trial court did not err in concluding that the Commission was estopped from denying Counceller's application.

II. Abdication

[8] [13] Counceller also argues that the Commission impermissibly abdicated its authority to approve or disapprove of plats within Columbus to his neighbors. Counceller maintains that Section 225 is an impermissible "neighborhood veto" ordinance that grants unrestricted power to his neighbors to withhold their consent to his resubdivision, even for selfish, arbitrary, or discriminatory reasons. Counceller is correct that such provisions have been held to be unconstitutional. *See, e.g., State of Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 49 S.Ct. 50, 52, 73 L.Ed. 210 (1928) ("The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee ***151** from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.") (citation omitted).

[14] Section 225 is easily distinguished from provisions such as that at issue in *Roberge.* Section 225 does not give unrestricted power to Counceller's neighbors, in that it provides an applicant with a means to obtain a waiver to the 75% requirement. Subsection D of Section 225 provides as follows:

> Waiver. A property owner may request a waiver from the requirements of Subsection B. The Commission may waive the requirement for the consent of 75% of the property owners in the subdivision if it finds that the proposed change will not have a significant impact on the existing subdivision. The Commission, after receiving an application for resubdivision that includes an express request for waiver, shall consider the request after a public hearing. Notice of the hearing shall be given to interested parties as defined in the Rules of Procedure.

[15] So long as a person seeking to resubdivide can establish to the Commission's satisfaction that the proposed change will not have a significant impact on the subdivision, a waiver may be obtained, thus taking the neighbors completely out of the equation. Section 225 did not confer unrestricted power to Counceller's neighbors.

[16] While Counceller acknowledges the waiver provision, he argues that he had "*zero* opportunity to request a waiver" pursuant to Subsection 225(D). Appellant's Br. p. 39. The record does not support this contention. As previously mentioned, Counceller is charged with knowledge of the ordinances that affect the Lot, *see Story Bed & Breakfast,* 819 N.E.2d at 64, and Subsection 225(D) specifically contemplates that a waiver request be submitted with the resubdivision application. Counceller, however, did not request a waiver with his

application. Additionally, Counceller had many other reasonable opportunities to request a waiver, even if one assumes that he was unaware initially that he could do so. Counceller does not deny that he received notice of his neighbors' appeal, which was filed on May 30, 2014, over one month before the Commission meeting at which the appeal was heard. The appeal identifies its basis as the failure of Counceller to obtain the consent of 75% of property owners in Indian Hills Estates and contains the waiver language of Subsection D. Despite this notice, Counceller did not request a waiver prior to or during the hearing on the appeal. A more reasonable interpretation of the record is that, for whatever reason, Counceller chose not to request a waiver, which is not the same thing as being denied the opportunity. We conclude that Section 225 does not impermissibly abdicate the Commission's authority to Counceller's neighbors.

[17] The judgment of the trial court is affirmed.

MAY, J., and CRONE, J., concur.

All Citations

42 N.E.3d 146

Footnotes

1 Counceller did not submit any written consent with his resubdivision application, as required by the plain language of Section 225, and yet the Commission did not reject his application and the Plat Committee gave it primary approval. Counceller suggests that this should be taken as an admission that the consent of the other property owners would not be required. We disagree. Columbus Planning Director Jeff Bergman testified that "[t]he way the Plat Committee is set up is the notification happens after the [primary] approval." Appellant's App. p. 94. We do not believe that the Commission's and Plat Committee's willingness to allow Counceller's application to proceed despite its noncompliance with Section 225 falls short of an affirmative indication that the 75% requirement would not be enforced.

End of Document

William A. Dabbs, Jr., et al. v. Anne Arundel County, No. 23, September Term, 2017. Opinion by Harrell, J.

TAKINGS – RATIONAL NEXUS / ROUGH PROPORTIONALITY SCRUTINY *NOLLAN* AND *DOLAN* – APPLICABILITY – LEGISLATIVELY-IMPOSED DEVELOPMENT IMPACT FEES

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), held that a unit of government may not condition the approval of a land-use permit on the property owner's/applicant's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land development or use. *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 133 S. Ct. 2586 (2013), expanded *Nollan* and *Dolan* to apply to a monetary exaction for mitigation as a condition for issuing a land-use permit to enable development of an individual property. The legislation at issue in the present case, Subtitle 2 of Title 11 of Article 17 of the Anne Arundel County Code, involves a legislatively-imposed development impact fee. The impact fee ordinance imposes predetermined impact fees, based on a specific monetary schedule, and applies to any person wishing to develop property within the development district. Such impact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny.

STATUTORY APPLICABILITY – VESTING – RETROSPECTIVE APPLICATION – ANNE ARUNDEL COUNTY CODE

Generally, "[a] change in procedure or in a remedy, whether administrative or judicial, *which does not modify substantive rights*, is ordinarily applied to pending matters as well as to all remedial actions taking place after the effective date of the change." *State Admin. Bd. of Election Laws v. Bd. of Sup'rs of Elections of Baltimore City*, 342 Md. 586, 601, 679 A.2d 96, 103 (1996) (emphasis added). Anne Arundel County Bill No. 27-07 does not work a substantive change in policy interfering with any vested rights of the *Dabbs* Class of litigants seeking refunds of impact fees not expended or encumbered lawfully within six fiscal years following their collection. Specifically, the definition of encumbrance, utilized by Anne Arundel County when assessing the amount of impact fees available for refund, before the enactment of Bill No. 27-07, conformed to generally accepted accounting principles. Moreover, the Court determined previously, in *Anne Arundel County v. Halle Development*, 408 Md. 539, 559 n.7, 560, 971 A.2d 226 n.7 (2009), that similarly situated owners' rights in any specific refund award were not vested. Bill No. 27-07 did not interfere with any vested rights of the *Dabbs* Class.

STATUTORY APPLICABILITY – PROSPECTIVE REPEAL – VESTED RIGHTS TO RELIEF – ANNE ARUNDEL COUNTY CODE

Rights of a purely statutory origin, untraceable to the common law, "are wiped out when the statutory provision creating them is repealed, regardless of the time of their accrual, unless the rights concerned are vested." *Selig v. State Highway Admin.*, 383 Md. 655, 676, 861 A.2d 710, 723 (2004). The effective date of the repeal of the refund provision of § 17-11-210 (1 January 2009) of the Anne Arundel County Code occurred well before any impact fees collected through 2003 became ripe for a refund claim, e.g., on or about 29 August 2009. Thus, the *Dabbs* Class' claims for refunds of impact fees collected in FY 2003 were not vested and the repeal of § 17-11-210 barred any refund claims.

Circuit Court for Anne Arundel County
Case No. 02-C-11-165251
Argued: November 3, 2017

IN THE COURT OF APPEALS
OF MARYLAND

No. 23

September Term, 2017

WILLIAM A. DABBS, JR., et al.

v.

ANNE ARUNDEL COUNTY

Adkins,
McDonald,
Watts,
Hotten,
Getty,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned)
Cathell, Dale R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: April 10, 2018

> "[D]espite reams of papers being filed, it is[, still to this day,] [] difficult to tease out [precisely what the *Dabbs* Class'] specific contentions are except for the assertion that they should receive a refund of some unspecified amount."

Memorandum Opinion (at 14), Senior Judge Dennis Sweeney (ret.), *Dabbs, et al. v. Anne Arundel County*, Circuit Court for Anne Arundel County, Case No. 02-C-11-165251 (14 January 2016).

This is the latest installment of a litigation saga (although perhaps we are nearing its end) traveling two quite kindred paths over more than fifteen years, (*Halle, et al. v. Anne Arundel County* ("*Halle*") and *Dabbs, et al. v. Anne Arundel County* ("*Dabbs*")) in Maryland's courts. Pursuant to the power vested in the government of Anne Arundel County, Maryland ("the County") through 1986 Md. Laws, ch. 350, the County imposed road and school impact fees according to County districts beginning in 1987.[1] These fees were paid usually by land developers and builders.[2] Those who paid impact fees (like the

[1] Subtitle 2 of Title 11 of Article 17 of the Anne Arundel County Code (the "Impact Fee Ordinance") explains that its adoption was done

> for the purpose of promoting the health, safety, and general welfare of the residents of the County by: (1) requiring all new development to pay its proportionate fair share of the costs for land, capital facilities, and other expenses necessary to accommodate development impacts on public school, transportation, and public safety facilities. . . .

[2] Section 17-11-208 specifies that there "are three separate special funds, the Anne Arundel County Transportation Impact Fee Special Fund, the Anne Arundel County School Impact Fee Special Fund, and the Anne Arundel County Public Safety Impact Fee Special Fund." Moreover, § 17-11-209(d) announces also that "[f]unds collected from development impact fees shall be used for capital improvements within the *development*

Dabbs Class) might become eligible, under certain circumstances, for refunds of those fees. *See* Anne Arundel County Code § 17-11-210.[3] Refunds were contingent upon the County's

---

impact fee district from which they are collected, so as to reasonably benefit the property against which the fees were charged." (emphasis added).

[3] During Fiscal Years (FYs) 1997-2003 (the years in question here), § 17-11-210 provided:

> (a) Notice of refund availability. If fees collected in any district during a fiscal year have not been expended or encumbered by the end of the sixth fiscal year following collection, the Office of Finance shall give notice of the availability of a refund of the fees and refund the fees as provided in this section.
>
> (b) Publication of notice. Within 60 days from the end of a fiscal year during which fees become available for refund, the Controller shall cause to be published once a week for two successive weeks in one or more newspapers that have a general circulation in the County, a notice that development impact fees collected within a particular district for a preceding fiscal year are available for refund on application by the current owner of the property for which the fee was originally paid. The notice shall set forth the time and manner for making application for the refund.
>
> (c) Refund application deadline. An eligible property owner shall file an application for a refund within 60 days of the last publication of notice. On proper application and demonstration that the fee was paid, the Controller shall refund the fees to the property owner with interest at the rate of 5 [percent] per year.
>
> (d) Refund on pro rata basis. If only a portion of the fees collected in a district during a fiscal year have been expended or encumbered, the portion not expended or encumbered shall be made available for refund on a pro rata basis to property owners. Each eligible property owner who has properly applied for a refund shall receive a refund in an amount equal to the portion of the original fee that way not expended or encumbered.
>
> (e) Extension. The Planning and Zoning Officer may extend for up to three years the date at which the funds must be expended are encumbered under subsection (a). An extension shall be made only on a written finding that within a three-year period certain capital improvements are planned to be constructed that will be of direct benefit to the property against which the fees were charged.

Two bills, at the heart of this case, amended the Impact Fee Ordinance: Bill No. 27-07 (effective 22 May 2007, codifying the county's procedures for calculating and recording

failure to utilize or encumber within a specified time the collected fees for present or future eligible capital improvements, i.e., projects for the "expansion of the capacity of public schools, roads, and public safety facilities and not for replacement, maintenance, or operations." § 17-11-209(a).[4] The *Dabbs* Class' claims are a demand for refunds of an unspecified amount of impact fees collected by the County between fiscal years (FY) 1997-2003.

FACTUAL AND PROCEDURAL BACKGROUND

I. The *Halle* Chronicles.

A total of 12 reported and unreported opinions, orders, and memorandum opinions have been issued to date collectively by this Court, the Court of Special Appeals, and the Circuit Court for Anne Arundel County, in the *Halle* litigation (the older sibling to the present case).[5] The core contention in *Halle* is relevant to the present case. In 2001, the *Halle* Class asserted that they were entitled to refunds of impact fees collected during FY 1988–1996 that were expended on what was ultimately determined to be ineligible capital improvements.[6] In *Halle*, the circuit court, on 15 December 2006, found $4,719,359 in

---

capital expenditures and encumbrances), and Bill No. 71-08 (effective 1 January 2009, amending the Ordinance, to remove prospectively the refund provision provided in § 17-11-210).

[4] Unless specified otherwise, all code references herein are to the Anne Arundel County Code.

[5] Many arguments asserted by the *Dabbs* Class were decided in *Halle*. We shall note and elaborate on prior holdings in *Halle* as they are intertwined with the certiorari questions before us.

[6] For a full history of *Halle*, *see Anne Arundel County v. Halle Dev., Inc*., 408 Md. 539, 543–51, 971 A.2d 214, 216–21 (2009); *Halle Development v. Anne Arundel County*, No. 1299, Sept. Term, 2016 at 1-10 (Md. Ct. Spec. App. Nov. 22, 2017); *Dabbs v. Anne Arundel County*, 232 Md. App. 314, 321–28, 157 A.3d 381, 385–89 (2017), *cert. granted*

refunds were "due to the current owners of specified fee paying properties," plus five-percent interest from the date of the payment of each initial fee.[7] The circuit court based its ruling in favor of the payors on its determination that the § 17-11-210(e) extension[8] decisions made by the County's Planning and Zoning Officer (PZO) were invalid. The *Halle* Class and the County cross-appealed. The County, on appeal,

> argued that the circuit court erred by refusing to permit the County to count the encumbrances in calculating the refund. In their cross-appeal, the [*Halle* Class] contended that (1) the circuit court improperly calculated the amount of impact fees available for refund by excluding funds that were spent on ineligible development projects; and (2) counsel for the property owners were entitled to the 40 [percent] contingency fee provided by their fee agreement with the named class representatives.

Halle Dev., Inc. v. Anne Arundel County, No. 1299, Sept. Term, 2016 at 6 (Md. Ct. Spec. App. Nov. 22, 2017).[9] The intermediate appellate court, in 2008, held, *inter alia* in an

---

Dabbs v. Anne Arundel County, 454 Md. 677, 165 A.3d 473 (2017); *Halle Development v. Anne Arundel County*, No. 2552, Sept. Term 2006 at 1-8 (Md. Ct. Spec. App. Feb. 7, 2008).

[7] Indeed,

> [t]he Circuit Court determined that because (1) $4,719,359 in impact fees collected from property owners were not thereafter timely paid or encumbered for capital improvements within the applicable district, and (2) the period to make capital improvements was not properly extended, the Owners were entitled to refunds.

Halle, 408 Md. at 543, 971 A.2d at 216 (footnote omitted).

[8] *See* § 17-11-210(e).

[9] This opinion includes references to unreported opinions in the *Halle* litigation, in which those litigants invoked many claims that are nearly identical to those posed in the *Dabbs* litigation, although different sets of class property owners and developers and a different stretch of fiscal years are involved in each line of cases. We may cite here or, in one instance, refer to persuasive reasoning, as appropriate, in certain of the *Halle* rulings because of their relevance and inextricable intertwinement with the *Dabbs* Class' contentions and factual background. We do so under "the doctrine of . . . collateral estoppel." Md. Rule 1-104(b); *Corby v. McCarthy*, 154 Md. App. 446, 481, 840 A.2d 188, 208 (2003).

Collateral estoppel provides that, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Cosby v. Dep't of Human Re*s., 425 Md. 629, 639, 42 A.3d 596 (2012); *see also Rourke v. Amchem Products, Inc*., 384 Md. 329, 359, 863 A.2d 926, 944 (2004) (quoting *re Murray Int'l Freight Corp. v. Graham*, 315 Md. 543, 547, 555 A.2d 502, 503 (1989) ("The functions of this doctrine, and the allied doctrine of *res judicata*, are to avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions.").

Four questions must be answered affirmatively before collateral estoppel may be apt to the situation: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) *Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?*; and, (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue? *Colandrea v. Wilde Lake Cmty. Assoc.*, 361 Md. 371, 391, 761 A.2d 899, 909 (2000) (quoting *Washington Suburban Sanitary Comm'n v. TKU Assocs*., 281 Md. 1, 18–19, 376 A.2d 505, 514 (1977)). Elaborating on the third question – mutuality– we explained in *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359, 368–69, 135 A.3d 452, 458–59 (2016), that

> Traditionally, collateral estoppel contemplates a "mutuality of parties," meaning that an issue that was litigated and determined in one suit will have preclusive effect in a second suit when the parties are the same as, or in privity with, those who participated in the first litigation. The mutuality requirement has been relaxed, however, so long as the other elements of collateral estoppel are satisfied. *See Rourke*[, 384 Md. at 349, 863 A.2d at 938 (2004)]. If either the defendant or the plaintiff in the second proceeding was not a party to the first proceeding, we refer to that application of collateral estoppel as "non-mutual." *Id*. at 341 []. Mutual and non-mutual collateral estoppel are further characterized as either "defensive" or "offensive": estoppel is "defensive" if applied by a defendant and "offensive" if invoked by a plaintiff. *See Shader v. Hampton Improvement Ass'n*, 443 Md. 148, 162–63, 115 A.3d 185[, 193] (2015).

The species of collateral estoppel that is apt here is "defensive non-mutual collateral estoppel," which seeks to prevent a plaintiff from re[-]litigating an issue the plaintiff has previously litigated unsuccessfully in another action against a different party." *Rourke*, 384 Md. at 341, 863 A.2d at 933 (2004). We have recognized defensive non-mutual collateral estoppel where the party bound by the existing judgment had a full and fair opportunity to litigate the issues in question, even in a subsequent proceeding involving a different party. *See Pat Perusse Realty v. Lingo*, 249 Md. 33, 44, 238 A.2d 100, 107 (1968). Thus, although there are two different sets of plaintiffs (albeit similar in standing, the confluence of counsel, and many nearly identical claims), the defendant, i.e., the County, was the same

unreported opinion, that the circuit court erred in its formulation of the mathematical formula used to calculate that $4,719,359 in refunds were due. The County was entitled, in fact, to count impact fee encumbrances[10] when determining impact fees available for refund. *Halle Development v. Anne Arundel County*, No. 2552, Sept. Term, 2006 at 8-9 (Md. Ct. Spec. App. May. 5, 2008) (the appellate court granted a motion for reconsideration to clarify its 7 February 2008 remand instruction); *Halle Development v. Anne Arundel County*, No. 2552, Sept. Term, 2006 at 52 (Md. Ct. Spec. App. Feb. 7, 2008) (the intermediate appellate court found that the circuit court erred by refusing to allow the County to count impact fee encumbrances in determining the amount of impact fee refunds to which Owners are entitled under § 17-11-210(b)). The intermediate appellate court, on remand, instructed the circuit court to recalculate appropriately the refunds with consideration given to the encumbered impact fees. *See id.* The County sought successfully a writ of certiorari from this Court to review that judgment. We affirmed, on 6 May 2009,

---

defendant in both streams of litigation. *Halle* decided, with finality, many, if not most, of the claims asserted by the *Dabbs* Class. We believe also that the *Dabbs* class has had a full and fair adjudication of their issues.

In point of fact, the only question or argument in this case where we find the reasoning or conclusions of an unreported opinion in *Halle* persuasive is in our analysis of the argument that Bill No. 27-07 (*see infra* II.a.) should not be given its intended retrospective effect because the *Dabbs* Class members' rights to refunds had vested before the effective date of the legislation. Even there, this Court's 2009 reported opinion in *Anne Arundel County v. Halle Development*, 408 Md. 539, 559 n.7, 560, 971 A.2d 226 n.7 (2009), addressed virtually the same question, although Bill No. 27-07, which was law at that time, was not mentioned specifically by the parties in the briefing and argument or by the Court in its opinion.

[10] § 17-11-201(2) defines encumbrance as a legal commitment for the expenditure of funds, chargeable against the applicable appropriation for the expenditure, that is documented by a contract or purchase order.

the intermediate appellate court regarding its decision as to the encumbrances, and directed a remand to the circuit court to calculate available impact fee refunds. *See Anne Arundel County v. Halle Dev., Inc*., 408 Md. 539, 971 A.2d 214 (2009).

On 25 March 2011, the circuit court reduced the refunds for which the payors were eligible from $4,719,359 to $1,342,360, plus interest. The *Halle* Class, in response, filed a petition for a writ of certiorari with this Court. We denied the *Halle* Class' attempt to pole-vault over review by the intermediate appellate court. The *Halle* Class appealed then to the intermediate appellate court. In a 29 July 2013 unreported opinion, the Court of Special Appeals affirmed the circuit court's 25 March 2011 order. The *Halle* Class petitioned again for a writ of certiorari. We denied that petition also. The circuit court awarded, on remand on 13 May 2014, counsel fees in the amount of 39 percent of the $1,342,360 in refunds, plus five-percent interest on each refund, and, on 8 August 2016, issued its final judgment. The owners appealed to the intermediate appellate court, which, in an unreported opinion on 22 November 2017, affirmed the circuit court's 8 August 2016 order, explaining, "in prior opinions, [the intermediate appellate court and this Court] have already addressed all but one[11] of the arguments raised by the [*Halle* Class]." *Halle Development v. Anne Arundel County*, No. 1299, Sept. Term, 2016 at 1 (Md. Ct. Spec. App. Nov. 22, 2017).[12]

[11] This issue is irrelevant to the present appeal.

[12] The *Halle* class filed, once again, a petition for writ of certiorari to this Court following the intermediate appellate court's 22 November 2017 decision. The Court denied the petition on 26 March 2018. *See Halle Development v. Anne Arundel Co.*, Pet. Docket No. 444, denied 26 March 2018.

II. The *Dabbs* trilogy.

We adopt, supplementing as needed, the intermediate appellate court's recitation of the procedural posture of this case as rendered in *Dabbs v. Anne Arundel County*, 232 Md. App. 314, 328–31, 157 A.3d 381, 389–91 (2017), *cert. granted Dabbs v. Anne Arundel County*, 454 Md. 677, 165 A.3d 473 (2017):

> In the present case, involving impact fees collected in FYs 1997–2002, [the *Dabbs* Class] sought refunds on the ground that the impact fees were not expended or encumbered in a timely manner under § 17–11–210(b). [The *Dabbs* Class] also argued that the amendments to the Impact Fee Ordinance in Bill No. 27–07 and Bill No. 71–08 unconstitutionally interfered with their vested rights in refunds. After hearing from the parties, [the circuit court entered, ultimately, a declaratory judgment in favor of the County as to all issues raised in the proceeding.] [T]he circuit court ruled that the County had applied the Impact Fee Ordinance as required by this Court's 2008 opinion and found that there are no impact fees available for refund under § 17–11–210. Further, the circuit court rejected [the *Dabbs* Class'] constitutional and state law challenges to the Impact Fee Ordinance, finding that most of the challenges had already been resolved against the class plaintiffs in *Halle*.
>
> More specifically, the circuit court found that the County prepared the six FY charts in the format approved by the *Halle* courts, properly comparing the amount of impact fees collected in each FY and district under review to the amount of impact fees expended (disbursed) and encumbered as of the end of the sixth FY following the FY of collection. Kurt Svendsen, the County's Assistant Budget Officer, who had been employed by the County since September 1, 1997, was responsible for (a) the preparation of the County's Capital Budget portion of the Annual Budget and Appropriation Ordinance, and (b) the monitoring of encumbrances and expenditures recorded in connection with appropriations for capital projects. Because Svendsen monitored expenditures and encumbrances recorded against appropriations of capital projects on an almost daily basis, he was delegated the responsibility for conducting the six FY test under § 17–1–210(b).
>
> In the present case, the County prepared six FY charts for FYs 1997–2002 in the same manner as the charts prepared in *Halle* for FYs 1988–2002, but also included impact fee expenditures on temporary classrooms. The charts indicated that all impact fees collected in FYs 1997–2002 were expended or encumbered within six FYs following the FY of collection and, thus, no impact fees collected in these FYs were available for refund.

> Lastly, the circuit court found that, in applying the six FY test, the County properly interpreted the term "impact fees encumbered" in § 17–11–210(b) to mean:
>
> (1) the amount of impact fees collected in a district account in a FY which have not been expended on June 30 of the sixth FY following the FY of collection, for which there is
>
> (2) as of the same date, an encumbrance (purchase order) on an impact fee eligible capital project in the district.
>
> According to the circuit court, this definition is the only logical one based on [generally accepted accounting principles (GAAP)], the applicable provisions of the County Charter, and Annual Budget and Appropriation Ordinances. Under GAAP, an appropriation states the legal authority to spend or otherwise commit a government's resources. *See* Stephen Gauthier, *Governmental Accounting Auditing and Financial Reporting* at 305 (Government Finance Officers Ass'n 2001). Meanwhile, § 715(a) of the County Charter provides that County officials and employees may not spend or commit funds in excess of appropriations, and § 17–11–201(2) defines an encumbrance as "a legal commitment for the expenditure of funds, chargeable against the applicable appropriation for the expenditure, that is documented by a contract or purchase order." Thus, the court concluded that when determining the amount of "impact fees encumbered," the County was correct in comparing the amount of unexpended impact fees in the district account at the end of the relevant FY to the encumbrances entered in relation to capital projects in the district that have been determined by the [Planning and Zoning Office] to be eligible in the district.

As pertinent to the certiorari questions for which we granted the petition in this case, the intermediate appellate court – in reliance on *Waters Landing, Ltd. P'ship v. Montgomery Cnty.*, 337 Md. 15, 650 A.2d 712 (1994)[13] – held unfounded the *Dabbs* Class' arguments that the County's Impact Fee Ordinance is subject to the "rational nexus/rough

[13] *Waters Landing, Ltd. P'ship v. Montgomery Cnty.*, 337 Md. 15, 40, 650 A.2d 712, 724 (1994), held that the rough proportionality test did not apply to a "development impact tax [imposed] by legislative enactment, not by adjudication."

proportionality test" of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141 (1987).[14]

The intermediate appellate court held, moreover, that Bill No. 27-07 had legitimate retrospective applicability. The court, although professing not to be bound by the law of the case doctrine,[15] explained it was unable to reach a different conclusion in this regard than that reached in its 2008, 2011, and 2013 *Halle* opinions and this Court's 2009 *Halle* opinion. Specifically, given the close identity between the *Halle* Class' assertions and many of those advanced in the *Dabbs* Class action, the court "fail[ed] to see how [it could] reach a different conclusion." *Dabbs*, 232 Md. App. at 336, 157 A.3d at 394.

The court held valid also the prospective application of Bill No. 71-08, reasoning that "the repeal of a statute creating a right purely of statutory origin, such as [the right to a refund via] § 17–11–210, wipes out the right unless [it] is vested." *Dabbs*, 232 Md. App.

---

[14] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), held that "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 133 S. Ct. 2586, 2591 (2013).

[15] The law of the case doctrine operates to bar litigants from raising arguments on questions that have been decided previously or could have been decided in that case. *See Reier v. State Dept. of Assessments & Taxation*, 397 Md. 2, 20–22, 915 A.2d 970, 981–82 (2007). The law of the case doctrine is rooted in appellate framework, and its purpose is to prevent piecemeal litigation, *Reier v. State Dept. of Assessments & Taxation*, 397 Md. 2, 21, 915 A.2d 970, 981 (2007), and without it "any party to a suit could institute as many successive appeals as the fiction of his imagination could produce new reasons to assign as to why his side of the case should prevail, and the litigation would never terminate." *Id.* (quoting *Fid.-Baltimore Nat. Bank & Tr. Co. v. John Hancock Mut. Life Ins. Co.*, 217 Md. 367, 372, 142 A.2d 796, 798 (1958)).

at 341, 157 A.3d at 397. In so holding, the court rejected the *Dabbs* Class' argument that Bill No. 71-08 impaired their contractual and legal relationship with the County, also violating the rough proportionality/rational nexus doctrine. *Id.*

Finally, the court held valid also Bill No. 96-01, "which, effective February 3, 2002, authorized the County to use impact fees for temporary classroom structures provided they expanded the capacity of the schools to serve new development." *Dabbs*, 232 Md. App. at 338, 157 A.3d at 395. The court found that neither the rational nexus doctrine nor the takings clause applied to Bill No. 96-01. *Id.* The court noted further that "[t]he County's definition of [school] capacity is consistent with the enabling law for impact fees (1986 Md. Laws, ch. 350, § 1, codified at § 17–11–214), and it is the County, not the State [Board of Education], that determines the scope of its Impact Fee Ordinance." *Id.*

On 31 July 2017, we granted the *Dabbs* Class' certiorari petition, *Dabbs, et al., v. Anne Arundel County*, 454 Md. 677, 165 A.3d 473 (2017), to consider *only* the following questions:

I. Did the lower courts err in determining that ". . . the rough proportionality test [or the rational nexus test] has no application to development impact fees . . . where monetary exactions are imposed," in contravention of *Howard County v. JJM*, 301 Md. 256, 482 A.2d 908 (1984)?

II. Did the lower courts err in permitting the retroactive application of legislation and not finding a taking under Article III, section 40 of the Maryland Constitution?

Standard of Review

Maryland Code (1973, 2006 Repl. Vol.), § 3–409(a) of the Courts and Judicial Proceedings Article provides that a court "may grant a declaratory judgment or decree in a

civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding." We have made clear that the decision to issue a declaratory judgment is within the sound discretion of the trial court. *Sprenger v. Pub. Serv. Comm'n of Maryland*, 400 Md. 1, 20, 926 A.2d 238, 249 (2007). Such discretionary matters are "much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred." *Northwestern Nat'l Ins. Co. v. Samuel R. Rosoff, Ltd*., 195 Md. 421, 436, 73 A.2d 461, 467 (1950). An abuse of discretion

> occurs where no reasonable person would take the view adopted by the [trial] court, or when the court acts "without reference to any guiding rules or principles. We will find an abuse of discretion when the ruling is clearly against the logic and effect of facts and inferences before the court, when the decision is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an "untenable judicial act that defies reason and works an injustice.

Powell v. Breslin, 430 Md. 52, 62, 59 A.3d 531, 537 (2013) (internal citations and quotation marks omitted).

Analysis

I. *Nollan* and *Dolan* - Impact Fees & the Rough Proportionality/Rational Nexus Test.

The *Dabbs* Class argues that the intermediate appellate court erred in concluding that the rough proportionality test/rational nexus test of *Nollan* and *Dolan* has no application to the present case.[16] As this argument goes, the County must "demonstrate

[16] The *Dabbs* Class argues sweepingly that *Nollan* and *Dolan* apply to the County's Impact Fee Ordinance, impact fee expenditures, and ineligible impact fee expenditures.

that its expenditure of impact fees was attributable reasonably to new development and each such expenditure reasonably benefitted 'new development' and/or individual 'against whom the fee was charged.'"

The County responds, consistent with its position asserted in *Halle* and the lower courts in *Dabbs*, that, in *Waters Landing*, 337 Md. at 40-41, 650 A.2d at 724, we held that the individualized determination of rough proportionality required by *Dolan* is not applicable to development impact fees or taxes that are imposed legislatively and set on a general basis across a jurisdiction or district.

At the outset, it must be remembered that the Takings Clause of the Fifth Amendment and Article III, § 40B of the Maryland Constitution do not prohibit the government from taking property for public use; rather, it requires the government to pay "just compensation" for any property it takes. U.S. Const. amend. V; MD Constitution, Art. 3, § 40. For "just compensation" to be paid, however, an actual taking of property must occur. The *Nollan* and *Dolan* line of cases was expanded recently to apply to a narrow set of monetary exactions, i.e., a condition of the payment of money for favorable governmental action on a required permit application for a specific parcel of land. *See Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 599, 133 S. Ct. 2586, 2591 (2013).

In *Koontz*, the Florida legislature enacted a regulation making it illegal for anyone to "'dredge or fill in, on, or over surface waters'" without a Wetlands Resource Management (WRM) permit acquired from the St. Johns River Water Management District (the District). *Koontz*, 570 U.S. at 601, 133 S. Ct. at 2592. Moreover, Florida enacted the

Water Resources Act, authorizing each district to regulate construction impacting waterways in the state. *Id.* Under this regulation, "a landowner wishing to undertake such construction must obtain from the relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose 'such reasonable conditions' on the permit as are 'necessary to assure' that construction will 'not be harmful to the water resources of the district.'" *Id.*

Koontz proposed to develop the northern 3.7 acres of his 14.9 acre property, which would affect local waterways. *Id.* He applied to the District for WRM and MSSW permits. *Id.* The District reviewed Koontz's permit applications and approved them upon his agreement to either of two conditions:

> the District proposed that [Koontz] reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that [Koontz] could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface storm water management system beneath the building site. The District also suggested that [Koontz] install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south. In the alternative, the District told [Koontz] that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, [Koontz] could pay to replace culverts on one parcel or fill in ditches on another.

Koontz, 570 U.S. at 601–02, 133 S. Ct. at 2592–93. Koontz argued that the District's mitigation demands were excessive, and that he was entitled to money damages if the state agency's actions constituted a taking without just compensation. *Koontz*, 570 U.S. at 602, 133 S. Ct. at 2593. The Supreme Court held that a monetary exaction for mitigation as a

condition for issuing a land-use permit to enable development of an individual property must meet the nexus and rough proportionality requirements of *Nollan* and *Dolan*. *Koontz*, 570 U.S. at 612, 133 S. Ct. at 2599. The Supreme Court stressed that the requirements of *Nollan* and *Dolan* were the same for monetary exactions as for when "the government approves a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so." *Koontz*, 570 U.S. at 606, 133 S. Ct. at 2595 (emphasis in original).

In *Koontz*, the Supreme Court explained that its holding was distinguished from *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998) (plurality opinion),[17] explaining that "[u]nlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here '[operated] upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." *Koontz*, 570 U.S. at 613, 133 S. Ct. at 2599. Thus, the District's proposed monetary exaction burdened Koontz's ownership and development of a *specific parcel of land*. *Id.* (emphasis added).

> [17] In *Eastern Enterprises*[] the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families. A four-Justice plurality concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause. Although Justice Kennedy concurred in the result on due process grounds, he joined four other Justices in dissent in arguing that the Takings Clause does not apply to government-imposed financial obligations that d[o] not operate upon or alter an identified property interest. Relying on the concurrence and dissent in *Eastern Enterprises*, respondent argues that a requirement that petitioner spend money improving public lands could not give rise to a taking.

Koontz, 570 U.S. at 613, 133 S. Ct. at 2599 (internal quotation marks, citations, and parenthetical omitted).

The Court elaborated further that *Koontz* resembled cases holding "that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property." *Koontz*, 570 U.S. at 613, 133 S. Ct. at 2599. In holding that the proposed monetary exaction in *Koontz* was subject to *Nollan* and *Dollan*, the Court emphasized that "[t]he fulcrum this case turns on [is] the *direct link* between the *government's demand and a specific parcel of real property*." *Koontz*, 570 U.S. at 613, 133 S. Ct. at 2599 (emphasis added).

The Court affirmed that taxes and user fees, however, are not takings subject to *Nollan* and *Dolan*, and assured that its holding did not affect the authority of governments to "impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Koontz*, 570 U.S. at 615, 133 S. Ct. at 2601.

The *Dabbs* Class' surfeit of arguments relating to *Koontz's* application to the County's development impact fees does not convince us that they have a sound jurisprudential basis.[18] *Koontz* did not hold that land-use regulations are generally subject

[18] The *Dabbs* Class asserts that

> this case is specifically directed at the restricted use of lawful collected special funds, separated into trust accounts, and their restricted use [] to ensure that the fees and all interest accruing to Special funds are designated for improvements reasonably attributable to new development and are expended to reasonably benefit the new development. [Additionally, the Impact Fee Ordinance] restricts the use of these special funds stating, development impact fees shall be used for capital improvements within the development impact fee district from which they are collected, so as to reasonably benefit the property against which the fees were charged.[Thus,] it is beyond dispute that the County's impact fee ordinance is a land use permitting ordinance, as without payment in money or land, no permit will issue to develop a particular property.

to a takings analysis under *Nollan* and *Dolan*; rather, it held that challenges to governmental demands for money (except application fees) in connection with the permit review process for a specific property are subject to nexus and rough proportionality analysis. *Koontz*, 570 U.S. at 618-19, 133 S. Ct. at 2603. The Court went out of its way to stress that it was not expanding *Nollan* and *Dolan* much beyond its narrow confines:

> [Koontz's] claim rests on the [] *limited proposition* that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a per se [takings] approach is the proper mode of analysis under the Court's precedent.

Koontz, 570 U.S. at 614, 133 S. Ct. at 2600 (citing *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235, 123 S. Ct. 1406, 1419 (2003)) (emphasis added and internal quotation marks omitted). Thus, that direct link lead the Court to conclude

> that this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

Id. The exactions concept protects citizens against abuses of power by land-use officials concerning proposed quasi-judicial or administrative action for permit or other development approvals relative to an *individual parcel of land*. There is no analogy to the *Koontz* scenario present here.[19] The County's Development Impact Fee Ordinance is

---

Simply making naked contentions such as these, without appropriate citation of authorities or cogent legal analysis, is unconvincing.

[19] *Koontz's* opinion did not alter *Enterprises v. Apfel*, 524 U.S. 498, 540, 118 S. Ct. 2131, 2154 (1998) (Kennedy, J. concurring), where Justice Kennedy, in a plurality concurrence, joined by four dissenters (Justices Stevens, Souter, Ginsberg and Breyer),

imposed broadly on all properties, within defined geographical districts, that may be proposed for development. The legislation leaves no discretion in the imposition or the calculation of the fee, i.e., the Impact Fee Ordinance demonstrates how the fees are to be imposed, against whom, and how much. The Ordinance is aimed at

> [a]ny person who improves real property and thereby causes an impact upon public schools, transportation, or public safety facilities shall pay development impact fees as provided in this subtitle [and] Any person who subjects an existing use to a change of use or improvement that causes any impact on public schools, transportation, or public safety facilities shall pay a fee based on the net increase in impacts attributable to the change of use or improvement.

§§ 17-11-203, 206. Unlike *Koontz*, the Ordinance here does not direct a property owner to make a conditional monetary payment to obtain approval of an application for a permit of any particular kind, nor does it impose the condition on a particularized or discretionary basis. *See Monterey v. Del Monte Dunes at Monterey, Ltd.* 526 U.S. 687, 702, 119 S. Ct. 1624, 1635 (1999) ("[W]e have not extended [until the narrow holding in *Koontz*] the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use

---

held that the Coal Act, which imposed a financial burden on mine owners without regard to a specific parcel of property, did

> not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest.
>
> Until today, however, one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake.

decisions conditioning approval of development in the dedication of property to public use.).

The imposition of an impact fee under the Ordinance here, as the dissent in *Koontz* and the plurality dissent in *Eastern Enterprises* put it, applied on a generalized district-wide basis, making no determination as to whether an actual permit will issue to a payor individual with a property interest. *See Koontz*, 570 U.S. at 628, 133 S. Ct. at 2608 (Kagan, J. dissent) ("The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable"); *Eastern Enterprises*, 524 U.S. at 540, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part) ("[The Act] does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest."). The legislatively-imposed development impact fee is predetermined, based on a specific monetary schedule, and applies to any person wishing to develop property in the district. *See* §§ 17-11-101, 203, 206, 209(d). This case falls squarely within *Dolan's* recognition that impact fees imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis. *Dolan*, 512 U.S. at 385, 114 S. Ct. at 2316 ("the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," rather than involving an "essentially legislative determinations classifying entire areas of the city.").

The *Dabbs* Class obscures its argument further by looking for support in *Howard County v. JJM, Inc.*, 301 Md. 256, 281, 482 A.2d 908, 921 (1984), where we held "that in order to exact from a developer a setting aside of land for highway purposes there must be

a reasonable nexus between the exaction and the proposed subdivision [of the parcel to be developed]." Although we utilized the rational nexus test there (as it was formulated circa 1984), we are not convinced that its application is apt in the present proceedings. In fact, *JJM* cuts against the *Dabbs* Class due to its explanation of the application of Maryland's taking jurisprudence. *See id.* (a statute requiring developers to reserve a right-of-way for a proposed state road was an unconstitutional taking of developer's property without just compensation.). *JJM's* application of the rational nexus test in a traditional taking analysis does not support the *Dabbs* Class' contention that the rational nexus text extends (or should extend) to the context of development impact fees.

The *Dabbs* Class maintains that, if we find inapplicable *Nollan* and *Dolan* to the present impact fee ordinance, we would be walking against the wind of the majority of our sister states that have held to the contrary. The *Dabbs* Class offers-up in this regard a single case from the Ohio Supreme Court, *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 89 Ohio St.3d 121, 128, 729 N.E.2d 349, 356 (Ohio 2000), holding impact fee expenditures, or the imposition of an impact fee ordinance, subject to *Nollan* and *Dolan*.

This is waver-thin support for the *Dabbs* Class' contention that the rough proportionality/rational nexus test is the "most widely used standard for examining development [i]mpact fees or [] monetary exactions."[20] In fact, reality suggests the

[20] The *Dabbs* Class makes repeated assertions that the majority of courts in this country apply *Nollan* and *Dolan* to impact fees or monetary exactions. Yet, the *Dabbs* Class offers little to no legal basis for this assertions. For example, it asserts that:

> [the *Dabbs* Class] will demonstrate and review the fact that sister states have, to [the *Dabbs* Class]'s knowledge, all held *Nollan* and *Dolan* are

embodied in the Rational/Dual Rational Nexus Test in deciding a challenge to impact fee expenditures[;]

The rational nexus test or doctrine is the most widely used standard for examining development Impact fees or development monetary exactions[;]

The Ohio Supreme Court and those of all sister states have each recognized, as does §§ 208, 209 and 210 of the County's Impact Fee Ordnance, that *Nolan* and *Dolan*'s rough proportionality test is tantamount to the rational nexus test uniformly embraced by all Courts of Appeal[; and,]

Respectfully, the Court [of Special Appeals] below, appears to have accepted at face value a mistaken premise argued by the County that was rejected not only by U.S. Supreme Court, but all Courts of Appeal who have held that, even prior to *Koontz*, the rational nexus test/dual rational nexus test was applied to impact fee exactions.

opposite conclusion.[21] We re-affirm our holding in *Waters Landing*,[22] and, thus, conclude that *Koontz* is inapplicable to the Impact Fee Ordinance in this case. Impact fees imposed

[21] *See California Bldg. Indus. Assn. v. City of San Jose*, 351 P.3d 974, 991 n.11 (Cal. 2015) (a post-*Koontz* case explaining that, despite *Koontz*, it agrees with its prior cases holding "that legislatively prescribed monetary fees [of general application] that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test."); City *of Olympia v. Drebick*, 126 P.3d 802, 808 (Wash. 2006) ("the dissent [fails to] mention that neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances."); *Rogers Mach., Inc. v. Washington County*, 45 P.3d 966, 978 (Or. Ct. App. 2002) (concluding "that the [Traffic Impact Fee] is [a applicable generally development fee imposed on a broad range of specific, legislatively determined subcategories of property], and [the court was] persuaded by the reasoning of other state courts, representing a nearly unanimous view, that *Dolan's* heightened scrutiny test does not extend to development fees of that kind."); *Krupp v. Breckenridge Sanitation Dist*., 19 P.3d 687, 698 (Colo. 2001) ("the [Plant Investment Fee] does not fall into the narrow category of charges that are subject to the *Nollan*/*Dolan* takings analysis."); *Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, (1997) (explaining that *Dolan* is inapplicable because the case before it involved a generally applicable legislative decision by the city); *Ehrlich v. City of Culver*, 911 P. 2d 429, 446-47, 450-52 (Cal. 1996) ("it is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a generally applicable development fee or assessment—cases in which the courts have deferred to legislative and political processes to formulate 'public program[s] adjusting the benefits and burdens of economic life to promote the common good.'" (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646 (1978))); *McCarthy v. City of Leawood*, 257 Kan. 566 (Kan. 1995) ("There is nothing in the opinion, however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee. The landowners cite no authority for the critical leap which must be made from a fee to a taking of property.").

[22] *Waters Landing* held that a

> development impact tax is not a special benefit assessment because it is not a tax imposed by law on real property; rather, it is an excise tax imposed when an owner seeks to develop its land. . . . We think *Dolan*, which concerned the Fifth Amendment Takings Clause, is irrelevant to the issue of special benefit assessments and generally inapplicable to this case. [*Dolan*], specifically relied on two distinguishing characteristics that are absent in the instant case. First, the Court mentioned that instead of making "legislative

by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny.

II. But, Did the *Dabbs* Class' Rights to Refunds Vest Before the County Extinguished the Refund Process?

a. Bill No. 27-07.

The *Dabbs* Class argues (as best we are able to perceive) that: 1) "[r]etroactive Bill [No.] 27-07 cannot be applied to capital projects that were completed and closed long before its enactment as an emergency ordinance on [23 May 2007];" 2) "Bill [No.] 27-07

> determinations classifying entire areas of the city," the City of Tigard "made an adjudicative decision to condition [the landowner's] application for a building permit on an individual parcel." [*Dolan*, 512 U.S. at 385, 114 S. Ct. at 2316]. Second, the Court noted that "the conditions imposed were not simply a limitation on the use [the landowner] might make of her own parcel, but a requirement that she deed portions of the property to the city." *Id*. In contrast, Montgomery County imposed the development impact tax by legislative enactment, not by adjudication, and furthermore, the tax does not require landowners to deed portions of their property to the County.
>
> Furthermore, *Dolan* is inapplicable because it concerns the Takings Clause, which is not implicated in the case before us. To the extent that this tax is a regulation on the development of land, it is not a regulation that "'goes too far'" so as to be "'recognized as a taking.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, [1015], 112 S. Ct. 2886, 2893[] (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160 [] (1922)). A regulation does not "go too far" unless it either "compel[s] the property owner to suffer a physical 'invasion' of his property," or "denies all economically beneficial or productive use of land." [*Pennsylvania Coal*, 505 U.S.] at [1015], 112 S. Ct. at 2893[]; *see also Pitsenberger v. Pitsenberger*, 287 Md. 20, 34, 410 A.2d 1052[, 1060] (1980) ("To constitute a taking in the constitutional sense, so that the State must pay compensation, the state action must deprive the owner of all beneficial use of the property."). . . . Petitioners have not claimed, nor could they claim, that the impact tax has either of these two regulatory effects. Therefore, the Takings Clause being inapplicable, *Dolan* does not affect our decision.

337 Md. at 39-41, 650 A.2d at 724.

was not an emergency ordinance as alleged;" 3) "Bill [No.] 27-07 interfered with the judicial process;" and, 4) "Bill [No.] 27-07 affects substantive rights."[23] Restated, the *Dabbs* Class argues that the County counted improperly impact fees encumbered during the 1997-2003 FYs, and cannot remedy that error now through an unlawful retrospective application of Bill No. 27-07 in violation of their vested rights to obtain impact fee refunds.

The County responds that this Court, the Court of Special Appeals, and numerous adjudications by the circuit court rejected the *Dabbs* Class' argument regarding the County's "ineligible expenditures" and the retrospective nature of Bill No. 27-07. The Country avers that it has been decided, profusely, that "Bill No. 27-07, which did nothing more than codify the County's existing [administrative] procedures for counting impact fee expenditures and encumbrances [] did not retroactively change County policy or purport to take away an accrued cause of action for refunds."

We subscribe to the following from the circuit court's 14 January 2016 memorandum opinion regarding the *Dabbs* Class' argument regarding the retrospective effect of Bill No. 27-07:

---

[23] The *Dabbs* Class relies, in support of this contention, on a *Halle* circuit court holding where a judge purportedly "found in his approved findings of fact and conclusions of law that 'Bill 27-07 [and its] retroactive effect . . . provided a new definition for encumbrance of impact fees which was not part of the prior ordinance. It sought to eliminate the prior requirement for timely recording in capital project funds of unused impact fees encumbered. If applied retroactively, this provision would eliminate the right of many impact fee payers to refunds, and, thus, it presents a substantive and not merely a procedural change of the law.'" No citation of specific origin follows this quotation , which might aid us in appreciating its lineage. In any event, these findings run counter to the intermediate appellate court's 2017, 2013, and 2008 *Halle* opinions and this Court's 2009 *Halle* opinion.

> In pressing their retroactivity argument about encumbrances, [the *Dabbs* Class] seem to cling to an interpretation of the impact fee ordinance and its amendments that was made by their predecessor plaintiffs in the *Halle* litigation which counsel in this case[24] made with great vigor when representing those plaintiffs. That argument was soundly rejected in great detail in an unreported opinion by Judge Lawrence F Rodowsky. [] *Halle* [], [] No. 2552, Sept. Term 2006 [at] 15 - 20.[25] Since this litigation has different parties and a different period of time for the collection of the impact fees, it is technically not a law of the case holding applicable to this case nor as an unreported opinion it is not a citable holding that in binds this Court in this case.
>
> This Court's view is however identical to that of Judge Rodowsky's and there is no need in this document to rehash it or restate it except to say that the ordinance since its inception in 1987 has contained the terms "expended or encumbered" which were not otherwise defined in the Ordinance and that the way the County has interpreted these terms since the inception were the commonly accepted meaning of these terms under GAAP. The fact that the County eventually codified and refined its practices in Bill No. 27-07 does not mean that [the *Dabbs* class] are entitled to their own peculiar methods which would enhance the possibility of refunds.

We see no value in hashing anew the *Dabbs* Class' warmed-over and repetitious arguments. As was explained in great detail in the *Halle* chronicle,[26] the intermediate

---

[24] Lead counsel for the *Dabbs* Class here was also co-counsel for the *Halle* Class.

[25] Judge Rodowsky found it unnecessary to determine "whether the express retroactivity of [Bill No. 27-07] is valid" because the definition of "encumbrance" used in present § 17-11-201(2) was the "pre-existing, generally accepted meaning of the term . . ." and properly adherent to GAAP. *Halle*, No. 2552, Sept. Term, 2006 at 1-8. He, in determining that the circuit court erred in not considering encumbered impact fees in its impact fee refund analysis, held that the circuit court is to determine "the amount of impact fees that had been encumbered, but unexpended, within six years following their collection." *Id.* at 20.

[26] *Halle Development, Inc. et al v. Anne Arundel County*, No. 1299, Sept. Term, 2016, at 16 (Md. Ct. Spec. App. Nov. 22, 2017) ("To the extent that appellants attempt to reargue that the circuit court retroactively applied Bill No. 27-07 because of our use of its definition of 'encumbrance' in our 2008 opinion, we have already explained, in both our 2008 and 2013 opinions that" this case is not about vesting and the owners' rights in any specific refund award are not vested); *Halle Development, lnc. et al. v. Anne Arundel County*, No. 0956, Sept. Term 2011 at 11-14 (Md. Ct. Spec. App. 29 July 2013) ("[T]he

appellate court (in four separate opinions) and this Court ruled that the retrospective application of essentially Bill No. 27-07 has no applicability to the *Halle* litigation. We made clear that "[a] change in procedure or in a remedy, whether administrative or judicial, *which does not modify substantive rights*, is ordinarily applied to pending matters as well as to all remedial actions taking place after the effective date of the change." *State Admin. Bd. of Election Laws v. Bd. of Sup'rs of Elections of Baltimore City*, 342 Md. 586, 601, 679 A.2d 96, 103 (1996) (emphasis added).

We state, with hopeful finality, that Bill No. 27-07 does not work a substantive change in policy interfering with any vested rights of the *Dabbs* Class. As record evidence indicates, Bill No. 27-07 codified the County's pre-existing (though unwritten until Bill No. 27-07) administrative procedures for counting impact fee encumbrances and did not change County policy. *Cf. Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 643, 805 A.2d 1061, 1084 (2002). Bill No. 27-07 (effective 22 May 2007) defined, among other

---

law of the case doctrine precludes re-litigation of these issues." "The Court of Appeals' conclusion that Owners have no rights vested in impact fee refunds further buttresses our holding that the retroactivity of the Ordinance is not implicated here. Accordingly, we hold that Owners' arguments regarding the retroactivity provision of Bill 27-07 are not relevant to this case"); *Order* (at 6), Judge Philip Caroom, *Halle Development, lnc. et al. v. Anne Arundel County*, Circuit Court for Anne Arundel County, Case No. C-01-69418 (25 March 2011) (the circuit court found that we decisively ruled that, "because impact fee payer's rights are not vested, the County [] properly could provide for rules providing for retroactive accounting entries as to encumbrances. The law of the case doctrine . . . [binds the court]."); *Halle*, 408 Md. at 560, n.7, 971 A.2d at 226, n.7 ("This case is not about vesting." "Accordingly, the determination by the Circuit Court as to the amount of the refund may be modified on remand, and the Owners' rights in any specific refund award are not vested."); *Halle*,[] No. 2552, Sept. Term 2006, [at] 15 n.15 ("Because we consider the definition in present §17-11-201(2) simply to state the preexisting, generally accepted meaning of the term, 'encumbrance,' in the context, it is unnecessary for us to determine whether the express retroactivity provision of the amended ordinance is valid.").

things, the word "encumbrance" as now used in §17-11-201(2). The intermediate appellate court and the circuit court in *Halle*, and in the present litigation, pronounced that the definition utilized before the enactment of Bill No. 27-07 conformed to generally accepted accounting principles (GAAP).[27] Moreover, the intermediate appellate court declared in its 2008 opinion, the 2006 circuit court's reference to the County's procedure for showing an encumbrance (conforming to GAAP, but notwithstanding the 2006 circuit court's holding that the County shall not consider encumbrances in the budget process) for deploying impact fees, to be "a reasonable one." *Halle*, No. 2552, Sept. Term, 2006 at 15, 20 (overturning, nevertheless, the 2006 circuit court's decision and remanding "on the encumbrance issue for a determination of the amount of impact fees that had been unencumbered, but unexpended, within six years following their collection."). Suffice it to say, we agree.

In our 2009 *Halle* opinion, we contemplated that the *Halle* Class had no vested rights in impact fee refunds via the method of calculation codified in Bill No. 27-07:

> *This case is not about vesting.* It is about the [County's Planning and Zoning Officer's] [(]PZO's[)] lack of authority under the impact fee ordinance to go back and make administrative decisions it failed to effectively execute when permitted. *Indeed, the Owners may not be vested in their right to a refund.* Whether they are entitled to a refund and in what amount will be determined by the Circuit Court on remand. The full refund amount determined by the Circuit Court may be reduced if the County is able to prove that it, in fact, encumbered the impact fee funds within six years.
>
> * * *

[27] Under GAAP, an encumbrance is a legal commitment, such as a purchase order, entered in relation to an appropriation.

> The intermediate appellate court held in its May 7, 2008 unreported opinion that the Circuit Court, on remand, should re[-]determine the amount that the County had timely encumbered for eligible capital improvements, and in doing so, "should consider not only encumbrances for transportation projects, but for school projects as well when applying the six-year test." We did not grant certiorari as to this issue, and thus the decision of the [I]ntermediate appellate court is law in this case. *Accordingly, the determination by the Circuit Court as to the amount of the refund may be modified on remand, and the Owners' rights in any specific refund award are not vested.*

Halle, 408 Md. at 559, n.7, 971 A.2d at 226, n.7 (emphasis added). We are perplexed that we, the intermediate appellate court, and the circuit court have been called upon continually to beat, with a judicial gavel, the proverbial dead horse on this point. Although this case deals with impact fees collected from FYs 1997-2003, as opposed to the FYs implicated in *Halle* (1988-1996), given the closely intertwined and similar nature of the arguments and allegations advanced in the two litigation streams, we fail to see how (or any reason why) we should reach a different conclusion than that reached in *Halle*. Bill No. 27-07 did not interfere with any vested rights of the *Dabbs* Class. We decline to address any remaining arguments the *Dabbs* Class asserted relating to Bill No. 27-07.

b. Bill No. 71-08.

Finally, we confront a legitimately novel question. Neither we, nor any *Halle* court, have had the prior opportunity to consider whether Bill No. 71-08, i.e., repealing prospectively on 1 January 2009, the impact fee refund provision of § 17-11-210, interfered with any rights vested in a *Dabbs* Class member with regard to impact fee refunds. The *Dabbs* Class argues "[t]his ordinance is yet another clear abuse of government power that attempts to dictate the outcome of this litigation by a rear[]view mirror exclusion of FYs

2002 - 2008 collected fees, making a ripeness argument." We understand this to mean that the *Dabbs* Class contends that a prospective application of the repeal means that the repeal applies only to impact fees collected after the effective date of Bill No. 71-08 (1 January 2009).

The County, on the other hand, contends that Bill No. 71-08 "eliminated [the *Dabbs* Class'] right to recover available refunds of fees collected after FY 2002, and did not interfere with vested rights of [the *Dabbs* Class]." Thus, the prospective repeal of a substantive right to assert a claim grounded within a statute bars any unvested claim before the effective date of the repeal of the availability of refunds effected by the statute.

Statutes are given presumptively purely prospective effect. *Grasslands Plantation, Inc. v. Frizz-King Enterprises*, LLC, 410 Md. 191, 226, 978 A.2d 622, 642 (2009) (explaining that "[t]he basic reason we presumptively apply new legislation prospectively is our concern that a retrospective application may interfere with substantive rights."); *Traore v. State*, 290 Md. 585, 593, 431 A.2d 96, 100 (1981). *Dal Maso v. Bd. of County Com'rs of Prince George's County*, 182 Md. 200, 206–07, 34 A.2d 464, 467 (1943), explained that

> [the] Legislature can amend, qualify, or repeal any of its laws, affecting all persons and property which have not acquired rights vested under existing law; all of the courts agree on this. It has been frequently held that this rule applies also to boards and agencies to which legislative power has been delegated and that they may undo, consider and reconsider their action upon measures before them. It is a general rule, subject to certain qualifications hereinafter noted, that a Municipal Corporation has the right to reconsider its actions and ordinances, and adopt a measure or ordinance that has previously been defeated or rescind one that has been previously adopted before the rights of third parties have vested. Moreover, in the absence of statute or a rule to the contrary, the Council may reconsider, adopt or rescind an

> ordinance at a meeting subsequent to that at which it was defeated or adopted, at least where conditions have not changed and no vested rights have intervened.

(internal citations and quotation marks omitted); *see also Waterman Family Ltd. P'ship v. Boomer*, 456 Md. 330, 344, 173 A.3d 1069, 1077 (2017). Indeed, "[a]bsent a contrary intent made manifest by the enacting authority, any change made by statute or court rule affecting a remedy only (and consequently not impinging on substantive rights) controls all court actions whether accrued, pending or future." *Aviles v. Eshelman Elec. Corp*., 281 Md. 529, 533, 379 A.2d 1227, 1229 (1977); *see also State Admin. Bd. of Election Laws*, 342 Md. at 601, 679 A.2d at 103; *Grandison v. State*, 341 Md. 175, 257, 670 A.2d 398, 437 (1995) ("Despite the presumption of prospectivity, a statute affecting a change in procedure only, and not in substantive rights, ordinarily applies to all actions whether accrued, pending or future, unless a contrary intention is expressed.").

Rights, of a purely statutory origin, untraceable to the common law, "are wiped out when the statutory provision creating them is repealed, regardless of the time of their accrual, unless the rights concerned are vested." *Selig v. State Highway Admin*., 383 Md. 655, 676, 861 A.2d 710, 723 (2004) (quoting *Beachwood Coal Co. v. Lucas*, 215 Md. 248, 256, 137 A.2d 680, 684 (1958)). Thus, once the repealed sections of a statute fade into the mist, any claim to relief traced to a repealed section disappears as well. *McComas v. Criminal Injuries Comp. Bd*., 88 Md. App. 143, 149, 594 A.2d 583, 586 (1991) (quoting *Aviles*, 281 Md. at 535, 379 A.2d at 1231) ("This rule of statutory construction is as applicable to an amendment that limits a purely statutory right as it is to one that completely repeals a right created by statute.").

A legislative body is free to react proactively to changing circumstances and repeal or supplement acts or ordinances it finds inadequate or inappropriate to address present-day circumstances. *See Waterman Family Ltd. P'ship*, 456 Md. at 344-45, 173 A.3d at 1078 ("Were it otherwise, legislative action would be frozen in time with local officials unable to react to changed circumstances or to pursue policies presently preferred over those previously adopted. The general power of a governing body to rescind a prior law or policy on a matter subject to its jurisdiction may be constrained in particular circumstances, as when a party has acquired a vested right in the governing body's prior policy decision. Absent such circumstances, the governing body retains the option of changing its mind.").

The right to rescind a statute, however, is not absolute. "If rights were to vest during the interim between the enactment of a resolution and its rescission, the County would lose its ability to rescind, at least to the extent that rights had vested." *Boomer v. Waterman Family Ltd. P'ship*, 232 Md. App. 1, 12, 155 A.3d 901, 908 (2017) (citing *Dal Maso*, 182 Md. at 206-07, 34 A.2d at 467) *aff'd*, 456 Md. 330, 173 A.3d 1069 (2017). We have explained "vested" to mean an accrued right or one that has been completed or "consummated so precocious" it becomes impossible to be eradicated statutorily. *See, e.g.*, *Langston v. Riffe*, 359 Md. 396, 420, 754 A.2d 389, 401 (2000). In other words, to be vested, a right must be more than a mere expectation based on the anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. *McComas*, 88 Md. App. at 150, 594 A.2d at 586. (quotation marks and brackets omitted).

We agree with the theoretical premise in the present proceeding that "claims for refunds of impact fees collected in FYs 1997–2002, which were not expended or encumbered within six [fiscal years] following the year of collection, were ripe prior to the repeal and may be pursued in this case," if any exist. *Dabbs*, 232 Md. App. at 342 n.8, 157 A.3d at 397 n.8. That premise is of no assistance to the *Dabbs* Class because the County's evidence (accepted as credible and convincing by the circuit court) demonstrated "that the impact fees collected in [FY 1997-2002] were in fact reasonably expended or encumbered during the following six-year period such that no refunds are available to the plaintiffs or the class they represent."

The *Dabbs* Class contends that all fees collected between FY 1997-2003 were ripe for refund at the time the trial in this matter took place in 2010-2011. We disagree; rather, refunds for impact fees collected and unexpended or unencumbered through 2003 were not ripe for collection.

McComas v. Criminal Injuries Compensation Board is convincing on this question. In *McComas*, the court considered whether the "amendment to Md. Ann. Code art. 26A (1987) [(of the Criminal Injuries Compensation Act]), are applicable to [McComas'] claim before the Criminal Injuries Compensation Board ("Board") which was filed before the effective date of the amendments."[28] *McComas*, 88 Md. App. at 145, 594 A.2d at 583-84. McComas, who filed a criminal injuries claim[29] and was heard by the Board before the

[28] The only amendment at issue in *McComas* that is relevant to our present analysis limited the amount of compensation the Board may award a claimant.

[29] Before the amendment took effect, McComas "had been awarded compensation in the amount of $666.80 and had a pending claim for additional benefits." The pending

amendments took effect, averred that the amendments should not be applied to his claim retrospectively because they affected his substantive rights. *McComas*, 88 Md. App. at 146–47, 594 A.2d at 584. The court began its analysis by noting the general rule that rights of pure statutory origin, "unless vested, are subject to repeal or amendment at the will of the legislature." *McComas*, 88 Md. App. at 147, 594 A.2d at 584-85. Moreover, the court explained that any claimant seeking compensation under the Criminal Injuries Compensation Act does not have a vested right to compensation from the State *until* the Board finds the claimant is eligible for such an award. *McComas*, 88 Md. App. at 148, 594 A.2d at 585 (emphasis added).

The court amplified, in *In Re Samuel M.*, 293 Md. 83, 95, 441 A.2d 1072, 1078 (1982), that:

> Treatment as a juvenile is not an inherent right but one granted by the state legislature [;] therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved.
>
> This is also supported by . . . *Beechwood Coal Co.* [*v. Lucas*, 215 Md. 248, 255–56, 137 A.2d 680, 684 (1958),] wherein [we] stated:
>
> > Our views are reinforced by the special rule of statutory construction that rights[,] which are of purely statutory origin and have no basis at common law are wiped out when the statutory provision creating them is repealed, regardless of the time of their accrual, unless the rights concerned are vested.

---

claim for additional benefits awarded him $45,000 – the amended statutory maximum. *McComas v. Criminal Injuries Comp. Bd.*, 88 Md. App. 143, 146, 594 A.2d 583, 584 (1991).

The court held ultimately that McComas "did not have a vested, legally enforceable right to compensation beyond $666.80 [and McComas'] award of compensation made after the amendments were enacted was correctly limited to $45,000." *McComas*, 88 Md. App. at 151, 594 A.2d at 586

We applied this principle of statutory construction in *Aviles* (in the context of a repeal of a mechanics' lien statute) that a mechanic's lien, a creature purely of statute, is "obtainable only if the requirements of the statute are complied with." *Aviles*, 281 Md. at 536, 379 A.2d at 1231 (quoting *Freeform Pools v. Strawbridge*, 228 Md. 297, 301, 179 A.2d 683, 685 (1962)). Thus, claimants would be unsuccessful in seeking a mechanic's lien, under what was codified in Md. Code §§ 9-101-108, 9-111 and 9-113 of the Real Property Article (1974 & 1995 Cum. Supp.), because "the repealed sections of the statute as they existed prior to May 4, 1976, have disappeared as affecting this case to the same extent as though they never existed." *Aviles*, 281 Md. at 535, 379 A.2d at 1230.

The repeal of the impact fee provision of § 17-11-210 took effect on 1 January 2009. Under the prior amended § 17-11-210(b), within 60 days following the end of the sixth fiscal year[30] from when impact fees were collected, the County was to give notice to the public of the availability of impact fee refunds, if any. Upon the notice's publication, an eligible property owner must apply for a refund within 60 days of the publication of the last notice. The County, following an assessment that the applicant had paid rightfully the fees, would refund any available unexpended impact fees to the eligible property owner,

[30] The parties agree that the relevant fiscal year here runs from July 1 through the following June 30.

with interest. Until such time, property owners in the district from which funds were collected were *not* entitled to refunds.

Here, impact fees collected from the *Dabbs* Class through FY 2003 (the last year in the applicable six-year period and which was the basis of the refund claims asserted here) would be eligible for refunds (if any existed) on or about 29 August 2009, i.e., six years (and the 60-day notice period) following the fiscal year of impact fee collection. The effective date of the repeal of the refund provision of § 17-11-210 occurred well before any impact fees collected through 2003 became ripe for a refund claim. The rationales of *McComas* and *Aviles* evince a transparent legislative practice that if a party's rights have not vested before a statute's repeal, there can be no claim as of right to the relief the statute once granted. Here, as in *McComas*, the County, before paying any potential impact fee refunds, had to determine (after a petition by an eligible property owner) if refunds were due from the FY of relevant collection. Until such time, no eligible owner had vested rights in the refunds. Thus, the *Dabbs* Class' claims for refunds of impact fees collected through FY 2003 was not ripe until 29 August 2009 - after the effective date of the repeal of the refund provision in § 17-11-210.

The *Dabbs* Class protests that this constitutes a "cooking of the books," i.e., the County misrepresented intentionally facts to the court, and the passage of Bill No. 27-07 and Bill No. 71-08 were done with intent to deprive the *Dabbs* Class of money they were owed. We disagree, and in response, associate ourselves with the eulogy pronounced by the circuit court in dispensing with this argument,

> [the *Dabbs* Class] seem to broadly suggest that when the Impact Fee Ordinance was enacted that those provisions that pertained to accounting of the fees paid and the possibility of a refund at some future time, *were somehow frozen in amber unable* to be revised or improved by the County as experience demonstrated a need. This would be a surprising result given that as explained above, development impact fee provisions were novel in Maryland and in the County and in some respects were an on going experiment in fiscal funding of the needs arising from development projects. It is exactly the type of legislation that over time may need review and revision to accomplish its intended goals.

(emphasis added). Although the timing of the adoption of Bill No. 27-07 and Bill No. 71-08 may appear, on their faces, opportunistic, they do not exceed the bounds of what the County was authorized by law to do. *See Aviles*, 281 Md. at 535, 379 A.2d at 1230.

The *Dabbs* Class asserted sporadically its dissatisfaction with Bill No. 96-01 in the circuit court and intermediate appellate court in this case. Bill No. 96-01, effective 3 February 2002, authorized, *inter alia*, the County to use impact fees for temporary classroom structures provided the structures expand the capacity of the schools. It appears that they have abandoned, however, any argument to this effect before us. The *Dabbs* Class maintains that they cited Bill No. 96-01 "*passim*" throughout its brief. We, however, could find only two instances where the *Dabbs* Class referred to Bill No. 96-01 in its brief[31] and one reference in its reply brief where it notes that "[t]he Class because of limited space adopts its arguments on Bill 71-08 and State Rated Capacity precludes impact fee

[31] First, "[a]nd while the County's 2008 replenishment of pre 1996 fees and their reallocated expenditure on 2008 capital projects was a per se taking, the character of the County's actions in enacting Bills 96-01, 27-07 and 71-08 during pending litigation, each designed to prevent refunds, bears additional consideration as a regulatory taking . . . ." Second, "Anne Arundel County, in a trilogy of ordinances, Bill 27-07, 96-01 and 71-08 presented a fluctuating legislative policy, knowing who would, in pending litigation, benefit from each ordinance it enacted, the County."

expenditures 'countywide' for relocatable classrooms." We cannot discern where (or if) the *Dabbs* Class asserted meaningful legal arguments (with supporting authorities) regarding the applicability of Bill No. 96-01.[32]

Moreover, the *Dabbs* Class asserts and re-asserts a plethora of alternative arguments "supporting" their claim to its entitlement to impact fee refunds.[33] We adopt, in response to those arguments, once more, "[w]e did not grant certiorari as to [these questions], and thus, the decision of the intermediate appellate court is the law in this case." *Halle*, 408 Md. at 559 n.7, 971 A.2d at 226 n.7.

We find no error or abuse of discretion by any court in this case.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED; COSTS TO BE PAID BY PETITIONERS.

[32] The County, nevertheless, responds briefly that, under conflict preemption (the apparent basis the *Dabbs* Class asserts in support of its argument), "there is nothing in the State definition of [State Rated Capacity] [(]SRC[)] that prohibits the County from applying a definition of [school] capacity for purposes of determining the scope of its use of impact fees broader than the definition used by the State Department of Education for school finance purposes."

[33] We do not address the *Dabbs* Class' following naked arguments, and allegations, including, but not limited to, that: (1) the December 2000 impact fee study committee's report to the county executive made clear the rational nexus test was the legal foundation of the county's impact fee ordinance; (2) "[t]his Court cannot now condone the County's unconscionable shell game gimmickry, it made through known misrepresentations to all courts, regarding its alleged exclusion of the identical fees it now admits were "dollar for dollar" replenished and then reallocated in 2008 to support projects not even in existence in 1996; (3) Bill No. 27-07 was not an emergency ordinance as alleged; (4) Bill No. 27-07 is an abuse of legislative power; (5) Bill No. 27-07 interfered with the judicial process; and, (6) claims relating to the County's 9.9 million "dollar for dollar" replenishment of expended pre-1996 ineligible impact fees.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KNICK *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17–647. Argued October 3, 2018—Reargued January 16, 2019—Decided June 21, 2019

The Township of Scott, Pennsylvania, passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." Petitioner Rose Mary Knick, whose 90-acre rural property has a small family graveyard, was notified that she was violating the ordinance. Knick sought declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property, but she did not bring an inverse condemnation action under state law seeking compensation. The Township responded by withdrawing the violation notice and staying enforcement of the ordinance. Without an ongoing enforcement action, the court held, Knick could not demonstrate the irreparable harm necessary for equitable relief, so it declined to rule on her request. Knick then filed an action in Federal District Court under 42 U. S. C. §1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment. The District Court dismissed her claim under *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, which held that property owners must seek just compensation under state law in state court before bringing a federal takings claim under §1983. The Third Circuit affirmed.

Held:

1. A government violates the Takings Clause when it takes property without compensation, and a property owner may bring a Fifth Amendment claim under §1983 at that time. Pp. 5–20.

(a) In *Williamson County*, the Court held that, as relevant here, a property developer's federal takings claim was "premature" because

he had not sought compensation through the State's inverse condemnation procedure. 473 U. S., at 197. The unanticipated consequence of this ruling was that a takings plaintiff who complied with *Williamson County* and brought a compensation claim in state court would—on proceeding to federal court after the unsuccessful state claim—have the federal claim barred because the full faith and credit statute required the federal court to give preclusive effect to the state court's decision. *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323, 347. Pp. 5–6.

(b) This Court has long recognized that property owners may bring Fifth Amendment claims for compensation as soon as their property has been taken, regardless of any other post-taking remedies that may be available to the property owner. See *Jacobs* v. *United States*, 290 U. S. 13. The Court departed from that understanding in *Williamson County* and held that a taking gives rise not to a constitutional right to just compensation, but instead gives a right to a state law procedure that will eventually result in just compensation. Just two years after *Williamson County*, however, the Court returned to its traditional understanding of the Fifth Amendment, holding that the compensation remedy is required by the Constitution in the event of a taking. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304. A property owner acquires a right to compensation immediately upon an uncompensated taking because the taking itself violates the Fifth Amendment. See *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U. S. 621, 654 (Brennan, J., dissenting). The property owner may, therefore, bring a claim under §1983 for the deprivation of a constitutional right at that time. Pp. 6–12.

(c) *Williamson County*'s understanding of the Takings Clause was drawn from *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, where the plaintiff sought to enjoin a federal statute because it effected a taking, even though the statute set up a mandatory arbitration procedure for obtaining compensation. *Id.*, at 1018. That case does not support *Williamson County*, however, because Congress—unlike the States—is free to require plaintiffs to exhaust administrative remedies before bringing constitutional claims. *Williamson County* also analogized its new state-litigation requirement to federal takings practice under the Tucker Act, but a claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it *is* a Fifth Amendment takings claim. *Williamson County* also looked to *Parratt* v. *Taylor*, 451 U. S. 527. But *Parratt* was not a takings case at all, and the analogy from the due process context to the takings context is strained. The poor reasoning of *Williamson County* may be partially explained by the cir-

cumstances in which the state-litigation issue reached the Court, which may not have permitted the Court to adequately test the logic of the state-litigation requirement or consider its implications. Pp. 12–16.

(d) Respondents read too broadly statements in prior opinions that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation" after a taking. *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659. Those statements concerned requests for injunctive relief, and the availability of subsequent compensation meant that such an equitable remedy was not available. Simply because the property owner was not entitled to injunctive relief at the time of the taking does not mean there was no violation of the Takings Clause at that time. The history of takings litigation provides valuable context. At the time of the founding, there usually was no compensation remedy available to property owners, who could obtain only retrospective damages, as well as an injunction ejecting the government from the property going forward. But in the 1870s, as state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause, they declined to grant injunctions because property owners had an adequate remedy at law. Congress enabled property owners to obtain compensation for takings by the Federal Government when it passed the Tucker Act in 1887, and this Court subsequently joined the state courts in holding that the compensation remedy is required by the Takings Clause itself. Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin government action effecting a taking. Pp. 16–19.

2. The state-litigation requirement of *Williamson County* is overruled. Several factors counsel in favor of this decision. *Williamson County* was poorly reasoned and conflicts with much of the Court's takings jurisprudence. Because of its shaky foundations, the rationale for the state-litigation requirement has been repeatedly recast by this Court and the defenders of *Williamson County*. The state-litigation requirement also proved to be unworkable in practice because the *San Remo* preclusion trap prevented takings plaintiffs from ever bringing their claims in federal court, contrary to the expectations of the *Williamson County* Court. Finally, there are no reliance interests on the state-litigation requirement. As long as post-taking compensation remedies are available, governments need not

Syllabus

fear that federal courts will invalidate their regulations as unconstitutional. Pp. 20–23.

862 F. 3d 310, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 17–647

ROSE MARY KNICK, PETITIONER *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 21, 2019]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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 Comm'n* 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 *Williamson County* Court anticipated that if the property owner failed to secure just compensation under state law in state court, he would be able to bring a "ripe" federal takings claim in federal court. See *id.*, at 194. But as we later held in *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323 (2005), a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit. The takings plaintiff thus finds himself in a

Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.

The *San Remo* preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment. The Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials," and the settled rule is that "exhaustion of state remedies 'is *not* a prerequisite to an action under [42 U. S. C.] §1983.'" *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994) (quoting *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 501 (1982)). But the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.

We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under §1983 at that time.

I

Petitioner Rose Mary Knick owns 90 acres of land in Scott Township, Pennsylvania, a small community just north of Scranton. Knick lives in a single-family home on

the property and uses the rest of the land as a grazing area for horses and other farm animals. The property includes a small graveyard where the ancestors of Knick's neighbors are allegedly buried. Such family cemeteries are fairly common in Pennsylvania, where "backyard burials" have long been permitted.

In December 2012, the Township passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." The ordinance defined a "cemetery" as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." The ordinance also authorized Township "code enforcement" officers to "enter upon any property" to determine the existence and location of a cemetery. App. 21–23.

In 2013, a Township officer found several grave markers on Knick's property and notified her that she was violating the ordinance by failing to open the cemetery to the public during the day. Knick responded by seeking declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property. Knick did not seek compensation for the taking by bringing an "inverse condemnation" action under state law. Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant." *United States* v. *Clarke*, 445 U. S. 253, 257 (1980) (quoting D. Hagman, Urban Planning and Land Development Control Law 328 (1971)). Inverse condemnation stands in contrast to direct condemnation, in which the government initiates proceedings to acquire title under its eminent domain authority. Pennsylvania, like every other State besides Ohio, provides a state inverse condemnation action. 26 Pa. Cons.

Stat. §502(c) (2009).[1]

In response to Knick's suit, the Township withdrew the violation notice and agreed to stay enforcement of the ordinance during the state court proceedings. The court, however, declined to rule on Knick's request for declaratory and injunctive relief because, without an ongoing enforcement action, she could not demonstrate the irreparable harm necessary for equitable relief.

Knick then filed an action in Federal District Court under 42 U. S. C. §1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment.[2] The District Court dismissed Knick's takings claim under *Williamson County* because she had not pursued an inverse condemnation action in state court. 2016 WL 4701549, *5–*6 (MD Pa., Sept. 8, 2016). On appeal, the Third Circuit noted that the ordinance was "extraordinary and constitutionally suspect," but affirmed the District Court in light of *Williamson County*. 862 F. 3d 310, 314 (2017).

We granted certiorari to reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under §1983. 583 U. S. ___ (2018).

---

[1] A property owner in Ohio who has suffered a taking without compensation must seek a writ of mandamus to compel the government to initiate condemnation proceedings. See, *e.g.*, *State ex rel. Doner* v. *Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117, 958 N. E. 2d 1235.

[2] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

II

In *Williamson County*, a property developer brought a takings claim under §1983 against a zoning board that had rejected the developer's proposal for a new subdivision. *Williamson County* held that the developer's Fifth Amendment claim was not "ripe" for two reasons. First, the developer still had an opportunity to seek a variance from the appeals board, so any taking was therefore not yet final. 473 U. S., at 186–194. Knick does not question the validity of this finality requirement, which is not at issue here.

The second holding of *Williamson County* is that the developer had no federal takings claim because he had not sought compensation "through the procedures the State ha[d] provided for doing so." *Id.*, at 194. That is the holding Knick asks us to overrule. According to the Court, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." *Id.*, at 195. The Court concluded that the developer's federal takings claim was "premature" because he had not sought compensation through the State's inverse condemnation procedure. *Id.*, at 197.

The unanticipated consequences of this ruling were not clear until 20 years later, when this Court decided *San Remo*. In that case, the takings plaintiffs complied with *Williamson County* and brought a claim for compensation in state court. 545 U. S., at 331. The complaint made clear that the plaintiffs sought relief only under the takings clause of the State Constitution, intending to reserve their Fifth Amendment claim for a later federal suit if the state suit proved unsuccessful. *Id.*, at 331–332. When that happened, however, and the plaintiffs proceeded to federal court, they found that their federal claim was barred. This Court held that the full faith and credit

statute, 28 U. S. C. §1738, required the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment. 545 U. S., at 347. The adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim simultaneously barred that claim, preventing the federal court from ever considering it.

The state-litigation requirement relegates the Takings Clause "to the status of a poor relation" among the provisions of the Bill of Rights. *Dolan* v. *City of Tigard*, 512 U. S. 374, 392 (1994). Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under §1983, but the state-litigation requirement "hand[s] authority over federal takings claims to state courts." *San Remo*, 545 U. S., at 350 (Rehnquist, C. J., concurring in judgment). Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.

III

A

Contrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: "[N]or shall private property be taken for public use, without just compensation." It does not say: "Nor shall private property be taken for public use, without an available procedure that will result in compensation." If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings. And the property owner may sue the gov-

ernment at that time in federal court for the "deprivation" of a right "secured by the Constitution." 42 U. S. C. §1983.

We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. The Tucker Act, which provides the standard procedure for bringing such claims, gives the Court of Federal Claims jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution" or any federal law or contract for damages "in cases not sounding in tort." 28 U. S. C. §1491(a)(1). We have held that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States* v. *Causby*, 328 U. S. 256, 267 (1946). And we have explained that "the act of taking" is the "event which gives rise to the claim for compensation." *United States* v. *Dow*, 357 U. S. 17, 22 (1958).

The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner. That principle was confirmed in *Jacobs* v. *United States*, 290 U. S. 13 (1933), where we held that a property owner found to have a valid takings claim is entitled to compensation as if it had been "paid contemporaneously with the taking"—that is, the compensation must generally consist of the total value of the property when taken, plus interest from that time. *Id.*, at 17 (quoting *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 306 (1923)). We rejected the view of the lower court that a property owner is entitled to interest only when the government provides a particular remedy—direct condemnation proceedings—and not when the owner brings a takings suit under the Tucker Act. "The form of the remedy d[oes] not qualify the right. It rest[s] upon the Fifth Amendment." 290 U. S., at 16.

Jacobs made clear that, no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it. Whether the government does nothing, forcing the owner to bring a takings suit under the Tucker Act, or whether it provides the owner with a statutory compensation remedy by initiating direct condemnation proceedings, the owner's claim for compensation "rest[s] upon the Fifth Amendment."

Although *Jacobs* concerned a taking by the Federal Government, the same reasoning applies to takings by the States. The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force. The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right. And that is key because it is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court under §1983.

Williamson County had a different view of how the Takings Clause works. According to *Williamson County*, a taking does not give rise to a federal constitutional right to just compensation at that time, but instead gives a right to a state law procedure that will eventually result in just compensation. As the Court put it, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." 473 U. S., at 195. In the absence of a state remedy, the Fifth Amendment right to compensation

would attach immediately. But, under *Williamson County*, the presence of a state remedy qualifies the right, preventing it from vesting until exhaustion of the state procedure. That is what *Jacobs* confirmed could not be done.

Just two years after *Williamson County*, in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), the Court returned to the understanding that the Fifth Amendment right to compensation automatically arises at the time the government takes property without paying for it. Relying heavily on *Jacobs* and other Fifth Amendment precedents neglected by *Williamson County*, *First English* held that a property owner is entitled to compensation for the temporary loss of his property. We explained that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" 482 U. S., at 315. Because of "the self-executing character" of the Takings Clause "with respect to compensation," a property owner has a constitutional claim for just compensation at the time of the taking. *Ibid.* (quoting 6 P. Nichols, Eminent Domain §25.41 (3d rev. ed. 1972)). The government's post-taking actions (there, repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation." 482 U. S., at 321.[3]

---

[3] *First English* distinguished *Williamson County* in a footnote, explaining that the case addressed only "whether the constitutional claim was ripe for review" before the State denied compensation. 482 U. S., at 320, n. 10. But *Williamson County* was based on the premise that there was no Fifth Amendment claim *at all* until the State denies compensation. Having rejected that premise, *First English* eliminated the rationale for the state-litigation requirement. The author of *First*

In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. See *id.*, at 315, 318 (quoting and citing *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U. S. 621, 654, 657 (1981) (Brennan, J., dissenting)).[4] In that opinion, Justice Brennan explained that "once there is a 'taking,' compensation *must* be awarded" because "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation." *Id.*, at 654.

First English embraced that view, reaffirming that "in the event of a taking, the compensation remedy is required by the Constitution." 482 U. S., at 316; see *ibid.*, n. 9 (rejecting the view that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government" (quoting Brief for United States as *Amicus Curiae* 14)). Compensation under the Takings Clause is a remedy for the "constitutional violation" that "the landowner has *already* suffered" at the time of the uncompensated taking. *San Diego Gas & Elec. Co.*,

---

English later recognized that it was "not clear . . . that *Williamson County* was correct in demanding that . . . the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323, 349 (2005) (Rehnquist, C. J., concurring in judgment).

[4]Justice Brennan was joined by Justices Stewart, Marshall, and Powell. The majority did not disagree with Justice Brennan's analysis of the merits, but concluded that the Court lacked jurisdiction to address the question presented. Justice Rehnquist, concurring on the jurisdictional issue, noted that if he were satisfied that jurisdiction was proper, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion." 450 U. S., at 633–634. The Court reached the merits of the question presented in *San Diego* in *First English*, adopting Justice Brennan's view in an opinion by Chief Justice Rehnquist.

450 U. S., at 654 (Brennan, J., dissenting); see *First English*, 482 U. S., at 315.

A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.

In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time. Just as someone whose property has been taken by the Federal Government has a claim "founded . . . upon the Constitution" that he may bring under the Tucker Act, someone whose property has been taken by a local government has a claim under §1983 for a "deprivation of [a] right[] . . . secured by the Constitution" that he may bring upon the taking in federal court. The "general rule" is that plaintiffs may bring constitutional claims under §1983 "without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available." D. Dana & T. Merrill, Property: Takings 262 (2002); see *McNeese* v. *Board of Ed. for Community Unit School Dist. 187*, 373 U. S. 668, 672 (1963) (observing that it would defeat the purpose of §1983 "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"); *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). This is as true for

takings claims as for any other claim grounded in the Bill of Rights.

B

Williamson County effectively established an exhaustion requirement for §1983 takings claims when it held that a property owner must pursue state procedures for obtaining compensation before bringing a federal suit. But the Court did not phrase its holding in those terms; if it had, its error would have been clear. Instead, *Williamson County* broke with the Court's longstanding position that a property owner has a constitutional claim to compensation at the time the government deprives him of his property, and held that there can be no uncompensated taking, and thus no Fifth Amendment claim actionable under §1983, until the property owner has tried and failed to obtain compensation through the available state procedure. "[U]ntil it has used the procedure and been denied just compensation," the property owner "'has no claim against the Government' for a taking." 473 U. S., at 194–195 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1018, n. 21 (1984)).

Williamson County drew that understanding of the Clause from *Ruckelshaus* v. *Monsanto Co.*, a decision from the prior Term. *Monsanto* did not involve a takings claim for just compensation. The plaintiff there sought to enjoin a federal statute because it effected a taking, even though the statute set up a special arbitration procedure for obtaining compensation, and the plaintiff could bring a takings claim pursuant to the Tucker Act if arbitration did not yield sufficient compensation. 467 U. S., at 1018. The Court rejected the plaintiff's claim because "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.*, at 1016 (footnote

omitted). That much is consistent with our precedent: Equitable relief was not available because monetary relief was under the Tucker Act.

That was enough to decide the case. But *Monsanto* went on to say that if the plaintiff obtained compensation in arbitration, then "no taking has occurred and the [plaintiff] has no claim against the Government." *Id.*, at 1018, n. 21. Certainly it is correct that a fully compensated plaintiff has no further claim, but that is because the taking has been *remedied* by compensation, not because there was *no taking* in the first place. See *First English*, 482 U. S., at 316, n. 9. The statute in *Monsanto* simply required the plaintiff to attempt to vindicate its claim to compensation through arbitration before proceeding under the Tucker Act. The case offers no support to *Williamson County* in this regard, because Congress—unlike the States—is free to require plaintiffs to exhaust administrative remedies before bringing constitutional claims. See *McCarthy* v. *Madigan*, 503 U. S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required.").

Williamson County also relied on *Monsanto* when it analogized its new state-litigation requirement to federal takings practice, stating that "taking[s] claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U. S., at 195. But the Court was simply confused. A claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it *is* a Fifth Amendment takings claim. A party who loses a Tucker Act suit has nowhere else to go to seek compensation for an alleged taking.

Other than *Monsanto*, the principal case to which *Williamson County* looked was *Parratt* v. *Taylor*, 451 U. S. 527 (1981). Like *Monsanto*, *Parratt* did not involve a takings claim for just compensation. Indeed, it was not a

takings case at all. *Parratt* held that a prisoner deprived of $23.50 worth of hobby materials by the rogue act of a state employee could not state a due process claim if the State provided adequate post-deprivation process. 451 U. S., at 543–544. But the analogy from the due process context to the takings context is strained, as *Williamson County* itself recognized. See 473 U. S., at 195, n. 14. It is not even possible for a State to provide pre-deprivation due process for the unauthorized act of a single employee. That is quite different from the taking of property *by the government* through physical invasion or a regulation that destroys a property's productive use.

The poor reasoning of *Williamson County* may be partially explained by the circumstances in which the state-litigation issue reached the Court. The Court granted certiorari to decide whether the Fifth Amendment entitles a property owner to just compensation when a regulation temporarily deprives him of the use of his property. (*First English* later held that the answer was yes.) As *amicus curiae* in support of the local government, the United States argued in this Court that the developer could not state a Fifth Amendment claim because it had not pursued an inverse condemnation suit in state court. Neither party had raised that argument before.[5] The Court then adopted the reasoning of the Solicitor General in an alternative holding, even though the case could have been resolved solely on the narrower and settled ground that no

---

[5]The Solicitor General continues this tradition here, arguing for the first time as *amicus curiae* that state inverse condemnation claims "aris[e] under" federal law and can be brought in federal court under 28 U. S. C. §1331 through the *Grable* doctrine. Brief for United States as *Amicus Curiae* 22–24; see *Grable & Sons Metal Products*, *Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308 (2005). Because we agree with the Solicitor General's principal contention that federal takings claims can be brought immediately under §1983, we have no occasion to consider his novel §1331 argument.

taking had occurred because the zoning board had not yet come to a final decision regarding the developer's proposal. In these circumstances, the Court may not have adequately tested the logic of the state-litigation requirement or considered its implications, most notably the preclusion trap later sprung by *San Remo*. That consequence was totally unanticipated in *Williamson County*.

The dissent, doing what respondents do not even dare to attempt, defends the original rationale of *Williamson County*—that there is no Fifth Amendment violation, and thus no Fifth Amendment claim, until the government denies the property owner compensation in a subsequent proceeding.[6] But although the dissent makes a more thoughtful and considered argument than *Williamson County*, it cannot reconcile its view with our repeated holdings that a property owner acquires a constitutional right to compensation at the time of the taking. See *supra*, at 7–11. The only reason that a taking would automatically entitle a property owner to the remedy of compensation is that, as Justice Brennan explained, with the uncompensated taking "the landowner has *already* suf-

---

[6]The dissent thinks that respondents still press this theory. *Post*, at 6 n. 3. But respondents instead describe *Williamson County* as resting on an understanding not of the elements of a federal takings claim but of the scope of 42 U. S. C. §1983. They even go so far as to rewrite petitioner's question presented in such terms. Brief for Respondents i. For respondents, it does not matter whether a property owner has a Fifth Amendment claim at the time of a taking. What matters is that, in respondents' view, no constitutional violation occurs for purposes of §1983 until the government has subsequently denied compensation. That characterization has no basis in the *Williamson County* opinion, which did not even quote §1983 and stated that the Court's reasoning applied with equal force to takings by the Federal Government, not covered by §1983. 473 U. S., at 195. Respondents' attempt to recast the state-litigation requirement as a §1983-specific rule fails for the same reason as the logic of *Williamson County*—a property owner has a Fifth Amendment claim for a violation of the Takings Clause as soon as the government takes his property without paying for it.

fered a constitutional violation." *San Diego Gas & Elec. Co.*, 450 U. S., at 654 (dissenting opinion). The dissent here provides no more reason to resist that conclusion than did *Williamson County*.

C

The Court in *Williamson County* relied on statements in our prior opinions that the Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation" after a taking. *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890). Respondents rely on the same cases in contending that uncompensated takings for which compensation is subsequently available do not violate the Fifth Amendment at the time of the taking. But respondents read those statements too broadly. They concerned requests for injunctive relief, and the availability of subsequent compensation meant that such an equitable remedy was not available. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 107, 149 (1974) (reversing a decision "enjoin[ing]" the enforcement of a federal statute because "the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur"); *Hurley* v. *Kincaid*, 285 U. S. 95, 99, 105 (1932) (rejecting a request to "enjoin the carrying out of any work" on a flood control project because the Tucker Act provided the plaintiff with "a plain, adequate, and complete remedy at law"). Simply because the property owner was not entitled to injunctive relief at the time of the taking does not mean there was no violation of the Takings Clause at that time.

The history of takings litigation provides valuable context. At the time of the founding there usually was no compensation remedy available to property owners. On occasion, when a legislature authorized a particular gov-

ernment action that took private property, it might also create a special owner-initiated procedure for obtaining compensation. But there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use. Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 69–70, and n. 33 (1999).

Until the 1870s, the typical recourse of a property owner who had suffered an uncompensated taking was to bring a common law trespass action against the responsible corporation or government official. The official would then raise the defense that his trespass was lawful because authorized by statute or ordinance, and the plaintiff would respond that the law was unconstitutional because it provided for a taking without just compensation. If the plaintiff prevailed, he nonetheless had no way at common law to obtain money damages for a permanent taking—that is, just compensation for the total value of his property. He could obtain only retrospective damages, as well as an injunction ejecting the government from his property going forward. See *id.*, at 67–69, 97–99.

As Chancellor Kent explained when granting a property owner equitable relief, the Takings Clause and its analogs in state constitutions required that "a fair compensation must, in all cases, be *previously* made to the individuals affected." *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 166 (N. Y. 1816) (emphasis added). If a government took property without payment, a court would set aside the taking because it violated the Constitution and order the property restored to its owner. The Framers meant to prohibit the Federal Government from *taking* property without paying for it. Allowing the government to *keep* the property pending subsequent compensation to the owner, in proceedings that hardly existed in 1787, was not what they envisioned.

Antebellum courts, which had no means of compensating a property owner for his loss, had no way to redress the violation of an owner's Fifth Amendment rights other than ordering the government to give him back his property. See *Callender* v. *Marsh*, 18 Mass. 418, 430–431 (1823) ("[I]f by virtue of any legislative act the land of any citizen should be occupied by the public . . . , without any means provided to indemnify the owner of the property, . . . because such a statute would be directly contrary to the [Massachusetts takings clause]; and as no action can be maintained against the public for damages, the only way to secure the party in his constitutional rights would be to declare void the public appropriation."). But in the 1870s, as state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause, they declined to grant injunctions because property owners had an adequate remedy at law. See, *e.g.*, *Stetson* v. *Chicago & Evanston R. Co.*, 75 Ill. 74, 78 (1874) ("What injury, if any, [the property owner] has sustained, may be compensated by damages recoverable by an action at law."); see also Brauneis, *supra*, at 97–99, 110–112. On the federal level, Congress enabled property owners to obtain compensation for takings in federal court when it passed the Tucker Act in 1887, and we subsequently joined the state courts in holding that the compensation remedy is required by the Takings Clause itself. See *First English*, 482 U. S., at 316 (collecting cases).

Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking. But that is because, as the Court explained in *First English*, such a procedure is a remedy for a taking that violated the Constitution, not because the availability of the procedure

somehow prevented the violation from occurring in the first place. See *supra*, at 9–11.[7]

The dissent contends that our characterization of *Cherokee Nation* effectively overrules "a hundred-plus years of legal rulings." *Post*, at 6 (opinion of KAGAN, J.). But under today's decision every one of the cases cited by the dissent would come out the same way—the plaintiffs would not be entitled to the relief they requested because they could instead pursue a suit for compensation. The premise of such a suit for compensation is that the property owner has already suffered a violation of the Fifth Amendment that may be remedied by money damages.[8]

* * *

We conclude that a government violates the Takings Clause when it takes property without compensation, and

---

[7] Among the cases invoking the *Cherokee Nation* language that the parties have raised, only one, *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18 (1940), rejected a demand for compensation. *Yearsley* concerned a state tort suit alleging a taking by a contractor building dikes for the Federal Government. In ruling for the contractors, we suggested that the taking did not violate the Fifth Amendment because the property owner had the opportunity to pursue a claim for just compensation under the Tucker Act. As explained, however, a claim for compensation brought under the Tucker Act *is* a claim for a violation of the Fifth Amendment; it does not prevent a violation from occurring. Regardless, *Yearsley* was right to hold that the contractors were immune from suit. Because the Tucker Act provides a complete remedy for any taking by the Federal Government, it "excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking," barring the plaintiffs from seeking any relief from the contractors themselves. *Id.*, at 22.

[8] The dissent also asserts that today's ruling "betrays judicial federalism." *Post*, at 15. But since the Civil Rights Act of 1871, part of "judicial federalism" has been the availability of a federal cause of action when a local government violates the Constitution. 42 U. S. C. §1983. Invoking that federal protection in the face of state action violating the Fifth Amendment cannot properly be regarded as a betrayal of federalism.

that a property owner may bring a Fifth Amendment claim under §1983 at that time. That does not as a practical matter mean that government action or regulation may not proceed in the absence of contemporaneous compensation. Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate. But because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action. Takings claims against local governments should be handled the same as other claims under the Bill of Rights. *Williamson County* erred in holding otherwise.

IV

The next question is whether we should overrule *Williamson County*, or whether *stare decisis* counsels in favor of adhering to the decision, despite its error. The doctrine of *stare decisis* reflects a judgment "that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). The doctrine "is at its weakest when we interpret the Constitution," as we did in *Williamson County*, because only this Court or a constitutional amendment can alter our holdings. *Agostini*, 521 U. S., at 235.

We have identified several factors to consider in deciding whether to overrule a past decision, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___–___ (2018) (slip op., at 34–35). All of these factors counsel in favor of overruling *Williamson County*.

Williamson County was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of

our takings jurisprudence. See *supra*, at 12–14. Its key conclusion, which it drew from unnecessary language in *Monsanto*—that a property owner does not have a ripe federal takings claim until he has unsuccessfully pursued an initial state law claim for just compensation—ignored *Jacobs* and many subsequent decisions holding that a property owner acquires a Fifth Amendment right to compensation at the time of a taking. This contradiction was on stark display just two years later in *First English*.

The decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators. See *San Remo*, 545 U. S., at 348 (Rehnquist, C. J., joined by O'Connor, Kennedy, and THOMAS, JJ., concurring in judgment); *Arrigoni Enterprises, LLC* v. *Durham*, 578 U. S. ___ (2016) (THOMAS, J., joined by Kennedy, J., dissenting from denial of certiorari); Merrill, Anticipatory Remedies for Takings, 128 Harv. L. Rev. 1630, 1647–1649 (2015); McConnell, *Horne* and the Normalization of Takings Litigation: A Response to Professor Echeverria, 43 Env. L. Rep. 10749, 10751 (2013); Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1264 (2004); Monaghan, State Law Wrongs, State Law Remedies, and the Fourteenth Amendment, 86 Colum. L. Rev. 979, 989 (1986). Even the academic defenders of the state-litigation requirement base it on federalism concerns (although they do not reconcile those concerns with the settled construction of §1983) rather than the reasoning of the opinion itself. See Echeverria, *Horne* v. *Department of Agriculture*: An Invitation To Reexamine "Ripeness" Doctrine in Takings Litigation, 43 Env. L. Rep. 10735, 10744 (2013); Sterk, The Demise of Federal Takings Litigation, 48 Wm. & Mary L. Rev. 251, 288 (2006).

Because of its shaky foundations, the state-litigation requirement has been a rule in search of a justification for

over 30 years. We eventually abandoned the view that the requirement is an element of a takings claim and recast it as a "prudential" ripeness rule. See *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525–526 (2013); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 733–734 (1997). No party defends that approach here. See Brief for Respondents 37; Brief for United States as *Amicus Curiae* 19–20. Respondents have taken a new tack, adopting a §1983–specific theory at which *Williamson County* did not even hint. See n. 6, *supra*. The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*. See *Janus*, 585 U. S., at ___ (slip op., at 23).

The state-litigation requirement has also proved to be unworkable in practice. *Williamson County* envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under §1983. But, as we held in *San Remo*, the state court's resolution of the plaintiff's inverse condemnation claim has preclusive effect in any subsequent federal suit. The upshot is that many takings plaintiffs never have the opportunity to litigate in a federal forum that §1983 by its terms seems to provide. That significant consequence was not considered by the Court in *Williamson County*.

The dissent argues that our constitutional holding in *Williamson County* should enjoy the "enhanced" form of *stare decisis* we usually reserve for statutory decisions, because Congress could have eliminated the *San Remo* preclusion trap by amending the full faith and credit statute. *Post*, at 17 (quoting *Kimble* v. *Marvel Entertainment, LLC*, 578 U. S. ___, ___ (slip op., at 8)). But takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County*,

a property owner had no federal claim until a state court denied him compensation.

Finally, there are no reliance interests on the state-litigation requirement. We have recognized that the force of *stare decisis* is "reduced" when rules that do not "serve as a guide to lawful behavior" are at issue. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995); see *Alleyne* v. *United States*, 570 U. S. 99, 119 (2013) (SOTOMAYOR, J., concurring). Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed. For the same reason, the Federal Government need not worry that courts will set aside agency actions as unconstitutional under the Administrative Procedure Act. 5 U. S. C. §706(2)(B). Federal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim brought under the Tucker Act.

In light of all the foregoing, the dissent cannot, with respect, fairly maintain its extreme assertions regarding our application of the principle of *stare decisis*.

* * *

The state-litigation requirement of *Williamson County* is overruled. A property owner may bring a takings claim under §1983 upon the taking of his property without just compensation by a local government. The judgment of the United States Court of Appeals for the Third Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–647

ROSE MARY KNICK, PETITIONER *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 21, 2019]

JUSTICE THOMAS, concurring.

The Fifth Amendment's Takings Clause prohibits the government from "tak[ing]" private property "without just compensation." The Court correctly interprets this text by holding that a violation of this Clause occurs as soon as the government takes property without paying for it.

The United States, by contrast, urges us not to enforce the Takings Clause as written. It worries that requiring payment to accompany a taking would allow courts to enjoin or invalidate broad regulatory programs "merely" because the program takes property without paying for it. Brief for United States as *Amicus Curiae* 12. According to the United States, "there is a 'nearly infinite variety of ways in which government actions or regulations can affect property interests,'" and it ought to be good enough that the government "implicitly promises to pay compensation for any taking" if a property owner successfully sues the government in court. Supplemental Letter Brief for United States as *Amicus Curiae* 5 (Supp. Brief) (citing the Tucker Act, 28 U. S. C. §1491). Government officials, the United States contends, should be able to implement regulatory programs "without fear" of injunction or invalidation under the Takings Clause, "even when" the program is so far reaching that the officials "cannot determine whether a taking will occur." Supp. Brief 5.

This "sue me" approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. *Arrigoni Enterprises, LLC* v. *Durham*, 578 U. S. ___, ___ (2016) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 2). Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." *Ibid.* A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking." *Id.*, at ___ (slip op., at 3). If this requirement makes some regulatory programs "unworkable in practice," Supp. Brief 5, so be it—our role is to enforce the Takings Clause as written.

Of course, as the Court correctly explains, the United States' concerns about injunctions may be misplaced. *Ante,* at 15–18. Injunctive relief is not available when an adequate remedy exists at law. *E.g.*, *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. 139, 156 (2010). And even when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory "program," Supp. Brief 5, by granting relief "beyond the parties to the case," *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (THOMAS, J., concurring) (slip op., at 6); see *id.*, at ___ (slip op., at 2) (expressing skepticism about "universal injunctions").

Still, "[w]hen the government repudiates [its] duty" to pay just compensation, its actions "are not only unconstitutional" but may be "tortious as well." *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 717 (1999) (plurality opinion). I do not understand the Court's opinion to foreclose the application of ordinary remedial principles to takings claims and related common-law tort claims, such as trespass. I therefore join it in full.

SUPREME COURT OF THE UNITED STATES

No. 17–647

ROSE MARY KNICK, PETITIONER *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 21, 2019]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

Today, the Court formally overrules *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985). But its decision rejects far more than that single case. *Williamson County* was rooted in an understanding of the Fifth Amendment's Takings Clause stretching back to the late 1800s. On that view, a government could take property so long as it provided a reliable mechanism to pay just compensation, even if the payment came after the fact. No longer. The majority today holds, in conflict with precedent after precedent, that a government violates the Constitution whenever it takes property without advance compensation—no matter how good its commitment to pay. That conclusion has no basis in the Takings Clause. Its consequence is to channel a mass of quintessentially local cases involving complex state-law issues into federal courts. And it transgresses all usual principles of *stare decisis*. I respectfully dissent.

I

Begin with the basics—the meaning of the Takings Clause. The right that Clause confers is not to be free from government takings of property for public purposes.

Instead, the right is to be free from those takings when the government fails to provide "just compensation." In other words, the government *can* take private property for public purposes, so long as it fairly pays the property owner. That precept, which the majority does not contest, comes straight out of the constitutional text: "[P]rivate property [shall not] be taken for public use, without just compensation." Amdt. 5. "As its language indicates, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314 (1987). And that constitutional choice accords with ancient principles about what governments do. The eminent domain power—the capacity to "take private property for public uses"—is an integral "attribute of sovereignty." *Boom Co.* v. *Patterson*, 98 U. S. 403, 406 (1879); see *Kohl* v. *United States*, 91 U. S. 367, 371 (1876) (The power is "essential to [the Government's] independent existence and perpetuity"). Small surprise, then, that the Constitution does not prohibit takings for public purposes, but only requires the government to pay fair value.

In that way, the Takings Clause is unique among the Bill of Rights' guarantees. It is, for example, unlike the Fourth Amendment's protection against excessive force—which the majority mistakenly proposes as an analogy. See *ante*, at 8. Suppose a law enforcement officer uses excessive force and the victim recovers damages for his injuries. Did a constitutional violation occur? Of course. The Constitution prohibits what the officer did; the payment of damages merely remedied the constitutional wrong. But the Takings Clause is different because it does not prohibit takings; to the contrary, it permits them provided the government gives just compensation. So when the government "takes and pays," it is not violating the Constitution at all. Put another way, a Takings

Clause violation has two necessary elements. First, the government must take the property. Second, it must deny the property owner just compensation. See *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525–526 (2013) ("[A] Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation" (emphasis in original)). If the government has not done both, no constitutional violation has happened. All this is well-trod ground. See, *e.g.*, *United States* v. *Jones*, 109 U. S. 513, 518 (1883); *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 586 (1923). Even the majority (despite its faulty analogy) does not contest it.

Similarly well-settled—until the majority's opinion today—was the answer to a follow-on question: At what point has the government denied a property owner just compensation, so as to complete a Fifth Amendment violation? For over a hundred years, this Court held that advance or contemporaneous payment was not required, so long as the government had established reliable procedures for an owner to later obtain just compensation (including interest for any time elapsed). The rule got its start in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641 (1890), where the Tribe argued that a federal statute authorizing condemnation of its property violated the Fifth Amendment because the law did not require advance payment. The Court disagreed. It held that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken" so long as the government made available to the owner "reasonable, certain and adequate provision for obtaining compensation" afterward. *Id.*, at 659. Decade after decade, the Court repeated that principle.[1] As another case put the point: The Takings Clause

---

[1] See also, *e.g.*, *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18, 21–22

does not demand "that compensation should be made previous to the taking" so long as "adequate means [are] provided for a reasonably just and prompt ascertainment and payment of the compensation." *Crozier* v. *Krupp A. G.*, 224 U. S. 290, 306 (1912). And the Court also made clear that a statute creating a right of action against the responsible government entity generally qualified as a constitutionally adequate compensatory mechanism. See, *e.g.*, *Williams* v. *Parker*, 188 U. S. 491, 502 (1903); *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18, 20–21 (1940).[2]

Williamson County followed from those decisions as night the day. The case began when a local planning commission rejected a property owner's development proposal. The owner chose not to seek compensation through the procedure the State had created—an "inverse condemnation" action against the commission. Instead, the owner sued in federal court alleging a Takings Clause violation under 42 U. S. C. §1983. Consistent with the century's worth of precedent I have recounted above, the Court found that no Fifth Amendment violation had yet occurred. See 473 U. S., at 195. The Court first recognized that "[t]he Fifth Amendment does not proscribe the

---

(1940); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932); *Dohany* v. *Rogers*, 281 U. S. 362, 365 (1930); *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 677 (1923); *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 587 (1923); *Hayes* v. *Port of Seattle*, 251 U. S. 233, 238 (1920); *Bragg* v. *Weaver*, 251 U. S. 57, 62 (1919); *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, 251–252 (1905); *Williams* v. *Parker*, 188 U. S. 491, 502 (1903); *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568 (1898); *Sweet* v. *Rechel*, 159 U. S. 380, 400–402 (1895).

[2] In many of these cases, the Court held as well that if payment occurs later, it must include interest. See, *e.g.*, *id.*, at 407; *Albert Hanson Lumber Co.*, 261 U. S., at 586. That requirement flows from the constitutional demand for "just" compensation: As one of the early cases explained, the property owner must be placed "in as good position pecuniarily as he would have been if his property had not been taken." *Ibid.*

taking of property; it proscribes taking without just compensation." *Id.*, at 194. Next, the Court stated (citing no fewer than five precedents) that the Amendment does not demand that "compensation be paid in advance of, or contemporaneously with, the taking." *Ibid.* "[A]ll that is required," the Court continued, is that the State have provided "a 'reasonable, certain and adequate provision for obtaining compensation.'" *Ibid.* (quoting *Cherokee Nation*, 135 U. S., at 659). Here, the State had done so: Nothing suggested that the inverse condemnation procedure was inadequate. 473 U. S., at 196–197. So the property owner's claim was "not yet ripe": The owner could not "claim a violation of the [Takings] Clause until it [had] used the procedure and been denied." *Id.*, at 194–195.

So contrary to the majority's portrayal, *Williamson County* did not result from some inexplicable confusion about "how the Takings Clause works." *Ante*, at 8. Far from it. *Williamson County* built on a long line of decisions addressing the elements of a Takings Clause violation. The Court there said only two things remotely new. First, the Court found that the State's inverse condemnation procedure qualified as a "reasonable, certain and adequate" procedure. But no one in this case disputes anything to do with that conclusion—including that the equivalent Pennsylvania procedure here is similarly adequate. Second, the Court held that a §1983 suit could not be brought until a property owner had unsuccessfully invoked the State's procedure for obtaining payment. But that was a direct function of the Court's prior holdings. Everyone agrees that a §1983 suit cannot be brought before a constitutional violation has occurred. And according to the Court's repeated decisions, a Takings Clause violation does not occur until an owner has used the government's procedures and failed to obtain just compensation. All that *Williamson County* did was to put the period on an already-completed sentence about when a takings

claim arises.[3]

Today's decision thus overthrows the Court's long-settled view of the Takings Clause. The majority declares, as against a mountain of precedent, that a government taking private property for public purposes must pay compensation at that moment or in advance. See *ante*, at 6–7. If the government fails to do so, a constitutional violation has occurred, regardless of whether "reasonable, certain and adequate" compensatory mechanisms exist. *Cherokee Nation*, 135 U. S., at 659. And regardless of how many times this Court has said the opposite before. Under cover of overruling "only" a single decision, today's opinion smashes a hundred-plus years of legal rulings to smithereens.

II

So how does the majority defend taking down *Williamson County* and its many precursors? Its decision rests on four ideas: a comparison between takings claims and other constitutional claims, a resort to the Takings Clause's

---

[3] Contrary to the majority's description, see *ante*, at 15, and n. 6, the respondents have exactly this view of *Williamson County* (and of the cases preceding it). The respondents discuss (as I do, see *supra*, at 3–4) the "long line of precedent" holding that "the availability of a reasonable, certain, and adequate inverse-condemnation procedure fulfills the duty" of a government to pay just compensation for a taking. Brief for Respondents 22–23. The respondents then conclude (again, as I do, see *supra*, at 4–6) that *Williamson County* "sound[ly]" and "straightforwardly applied that precedent to hold that a property owner who forgoes an available and adequate inverse-condemnation remedy has not been deprived of any constitutional right and thus cannot proceed under Section 1983." Brief for Respondents 22. (Again contra the majority, the respondents' only theory of §1983 is the one everyone agrees with—that a §1983 suit cannot be brought before a constitutional violation has occurred.) So while I appreciate the compliment, I cannot claim to argue anything novel or "dar[ing]" here. *Ante*, at 15. My argument is the same as the respondents', which is the same as *Williamson County*'s, which is the same as all the prior precedents'.

text, and theories about two lines of this Court's precedent. All are misguided. The majority uses the term "shaky foundations." *Ante*, at 21. It knows whereof it speaks.

The first crack comes from the repeated assertion (already encountered in the majority's Fourth Amendment analogy, see *supra*, at 2) that *Williamson County* treats takings claims worse than other claims founded in the Bill of Rights. See *ante*, at 6, 8, 11–12, 20. That is not so. The distinctive aspects of litigating a takings claim merely reflect the distinctive aspects of the constitutional right. Once again, a Fourth Amendment claim arises at the moment a police officer uses excessive force, because the Constitution prohibits that thing and that thing only. (Similarly, for the majority's other analogies, a bank robber commits his offense when he robs a bank and a tortfeasor when he acts negligently—because that conduct, and it alone, is what the law forbids.) Or to make the same point a bit differently, even if a government could compensate the victim in advance—as the majority requires here—the victim would still suffer constitutional injury when the force is used. But none of that is true of Takings Clause violations. That kind of infringement, as explained, is complete only after *two* things occur: (1) the government takes property, and (2) it fails to pay just compensation. See *supra*, at 2–3. All *Williamson County* and its precursors do is recognize that fact, by saying that a constitutional claim (and thus a §1983 suit) arises only after the second condition is met—when the property owner comes away from the government's compensatory procedure empty-handed. That is to treat the Takings Clause exactly as its dual elements require—and because that is so, neither worse nor better than any other right.

Second, the majority contends that its rule follows from the constitutional text, because the Takings Clause does not say "[n]or shall private property be taken for public

use, without an available procedure that will result in compensation." *Ante*, at 6. There is a reason the majority devotes only a few sentences to that argument. Because here's another thing the text does not say: "Nor shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures." In other words, the text no more states the majority's rule than it does *Williamson County*'s (and its precursors'). As constitutional text often is, the Takings Clause is spare. It says that a government taking property must pay just compensation—but does not say through exactly what mechanism or at exactly what time. That was left to be worked out, consistent with the Clause's (minimal) text and purpose. And from 1890 until today, this Court worked it out *Williamson County*'s way, rather than the majority's. See *supra*, at 3–4. Under our caselaw, a government could use reliable post-taking compensatory mechanisms (with payment calculated from the taking) without violating the Takings Clause.

Third, the majority tries to explain away that mass of precedent, with a theory so, well, inventive that it appears in neither the petitioner's nor her 15-plus *amici*'s briefs. Don't read the decisions "too broadly," the majority says. *Ante*, at 16. Yes, the Court in each rejected a takings claim, instructing the property owner to avail herself instead of a government-created compensatory mechanism. But all the Court meant (the majority says) was that the plaintiffs had sought the wrong kind of relief: They could not get injunctions because the available compensatory procedures gave an adequate remedy at law. The Court still believed (so says the majority) that the cases involved constitutional violations. Or said otherwise (again, according to the majority), the Court still understood the Takings Clause to prohibit delayed payment.

Points for creativity, but that is just not what the deci-

sions say. Most of the cases involved requests for injunctions, but the equity/law distinction played little or no role in our analyses. Instead, the decisions addressed directly what the Takings Clause requires (or not). And as already shown, *supra*, at 3–4, they held that the Clause does not demand advance payment. Beginning again at the beginning, *Cherokee Nation* decided that the Takings Clause "does not provide or require that compensation shall be actually paid in advance." 135 U. S., at 659. In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 567–568 (1898), the Court declared that a property owner had no "constitutional right to have the amount of his compensation finally determined and paid before yielding possession." By the time of *Williams* v. *Parker*, 188 U. S., at 502, the Court could state that "it is settled by repeated decisions" that the Constitution allows the taking of property "prior to any payment." Similarly, in *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 677 (1923), the Court noted that "[i]t has long been settled that the taking of property . . . need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when" there is a pledge of "reasonably prompt ascertainment and payment." In *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932), the Court repeated that the "Fifth Amendment does not entitle [a property owner] to be paid in advance of the taking." I could go on—there are eighty more years to cover, and more decisions in the early years too—but by now you probably get the idea.

Well, just one more especially good demonstration. In *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18 (1940), the plaintiffs sought money damages for an alleged Takings Clause violation. For that reason, the Court's theory about suits seeking injunctions has no possible application. Still, the Court rejected the claim: The different remedy requested made no difference in the result. And yet more important: In refusing to find a Takings Clause

violation, the Court used the exact same reasoning as it had in all the cases requesting injunctions. Once again, the Court did not focus on the nature of the relief sought. It simply explained that the government had provided a procedure for obtaining post-taking compensation—and that was enough. "The Fifth Amendment does not entitle him [the owner] to be paid in advance of the taking," held the Court, quoting the last injunction case described above. *Id.*, at 21 (quoting *Hurley*, 285 U. S., at 104; brackets in original). Because the government had set up an adequate compensatory mechanism, the taking was "within [the government's] constitutional power." 309 U. S., at 22. Once again, the opposite of what the majority pronounces today.[4]

Fourth and finally, the majority lays claim to another line of decisions—involving the Tucker Act—but with no greater success. The Tucker Act waives the Federal Government's sovereign immunity and grants the Court of Federal Claims jurisdiction over suits seeking compensation for takings. See 28 U. S. C. §1491(a)(1). According to

---

[4]The majority's supposed best case to the contrary, *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), is not so good, as is apparent from its express statement that it accords with *Williamson County*. See 482 U. S., at 320, n. 10. In *First English*, the Court held that a property owner was entitled to compensation for the temporary loss of his property, occurring while a (later-repealed) regulation was in effect. See *id.*, at 321. The Court made clear that a government's duty to compensate for a taking—including a temporary taking—arises from the Fifth Amendment, as of course it does. See *id.*, at 315. But the Court nowhere suggested that a Fifth Amendment violation happens even before a government denies the required compensation. (You will scan the majority's description of *First English* in vain for a quote to that effect—because no such quote exists. See *ante*, at 9–11.) To the contrary, the Court went out of its way to recognize the *Williamson County* principle that "no constitutional violation occurs until just compensation has been denied." 482 U. S., at 320, n. 10 (internal quotation marks omitted).

the majority, this Court's cases establish that such an action "*is* a claim for a violation of the Fifth Amendment"—that is, for a constitutional offense that has already happened because of the absence of advance payment. *Ante*, at 19, n. 7 (emphasis in original); see *ante*, at 13. But again, the precedents say the opposite. The Tucker Act is the Federal Government's equivalent of a State's inverse condemnation procedure, by which a property owner can obtain just compensation. The former, no less than the latter, *forestalls* any constitutional violation by ensuring that an owner gets full and fair payment for a taking. The Court, for example, stated in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 128 (1985), that "so long as [post-taking Tucker Act] compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." Similarly, we held in *Preseault* v. *ICC*, 494 U. S. 1, 4–5 (1990) that when "compensation is available to [property owners] under the Tucker Act[,] the requirements of the Fifth Amendment are satisfied." And again, in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016 (1984) we rejected a takings claim because the plaintiff could "seek just compensation under the Tucker Act" and "[t]he Fifth Amendment does not require that compensation precede the taking." All those decisions (and there are others) rested on the premise, merely reiterated in *Williamson County*, that the "availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 697, n. 18 (1949).[5]

---

[5] *Jacobs* v. *United States*, 290 U. S. 13 (1933), the Tucker Act case the majority cites to support its argument, says nothing different. The majority twice notes *Jacobs*' statement that a Tucker Act claim "rest[s] upon the Fifth Amendment." *Ante*, at 7–8 (quoting 290 U. S., at 16). And so it does, because the compensatory obligation that the Tucker

To the extent it deals with these cases (mostly, it just ignores them), the majority says only that they (like *Williamson County*) were "confused" or wrong. See *ante*, at 13, 19, n. 7. But maybe the majority should take the hint: When a theory requires declaring precedent after precedent after precedent wrong, that's a sign the theory itself may be wrong. The majority's theory is just that.

III

And not only wrong on prior law. The majority's overruling of *Williamson County* will have two damaging consequences. It will inevitably turn even well-meaning government officials into lawbreakers. And it will subvert important principles of judicial federalism.

To begin with, today's decision means that government regulators will often have no way to avoid violating the Constitution. There are a "nearly infinite variety of ways" for regulations to "affect property interests." *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012). And under modern takings law, there is "no magic formula" to determine "whether a given government interference with property is a taking." *Ibid.* For that reason, a government actor usually cannot know in advance whether implementing a regulatory program will effect a taking, much less of whose property. Until today, such an official could do his work without fear of wrongdoing, in any jurisdiction that had set up a reliable means for property owners to obtain compensation. Even if some regulatory action turned out to take someone's property, the official would not have violated the Constitution. But no longer. Now, when a government undertakes land-use

---

Act vindicates arises from—or "rests upon"—the Fifth Amendment. But that is a far cry from saying, as the majority does, that the Government has already violated the Fifth Amendment when the Tucker Act claim is brought—before the Government has denied fair compensation.

regulation (and what government doesn't?), the responsible employees will almost inescapably become constitutional malefactors. That is not a fair position in which to place persons carrying out their governmental duties.

Still more important, the majority's ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts—where *Williamson County* put them. The regulation of land use, this Court has stated, is "perhaps the quintessential state activity." *FERC* v. *Mississippi*, 456 U. S. 742, 768, n. 30 (1982). And a claim that a land-use regulation violates the Takings Clause usually turns on state-law issues. In that respect, takings claims have little in common with other constitutional challenges. The question in takings cases is not merely whether a given state action meets federal constitutional standards. Before those standards can come into play, a court must typically decide whether, under state law, the plaintiff has a property interest in the thing regulated. See *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998); see also Sterk, The Demise of Federal Takings Litigation, 48 Wm. & Mary L. Rev. 251, 288 (2006) ("[I]f background state law did not recognize or create property in the first instance, then a subsequent state action cannot take property"). Often those questions—how does pre-existing state law define the property right?; what interests does that law grant?; and conversely what interests does it deny?—are nuanced and complicated. And not a one of them is familiar to federal courts.

This case highlights the difficulty. The ultimate constitutional question here is: Did Scott Township's cemetery ordinance "go[] too far" (in Justice Holmes's phrase), so as to effect a taking of Rose Mary Knick's property? *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). But to answer that question, it is first necessary to address an issue about background state law. In the Township's view,

the ordinance did little more than codify Pennsylvania common law, which (the Township says) has long required property owners to make land containing human remains open to the public. See Brief for Respondents 48; Brief for Cemetery Law Scholars as *Amici Curiae* 6–26. If the Township is right on that state-law question, Knick's constitutional claim will fail: The ordinance, on that account, didn't go far at all. But Knick contends that no common law rule of that kind exists in Pennsylvania. See Reply Brief 22. And if she is right, her takings claim may yet have legs. But is she? Or is the Township? I confess: I don't know. Nor, I would venture, do my colleagues on the federal bench. But under today's decision, it will be the Federal District Court for the Middle District of Pennsylvania that will have to resolve this question of local cemetery law.

And if the majority thinks this case is an outlier, it's dead wrong; indeed, this case will be easier than many. Take *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992). There, this Court held that a South Carolina ban on development of beachfront property worked a taking of the plaintiff's land—unless the State's nuisance law already prohibited such development. See *id.*, at 1027–1030. The Court then—quite sensibly—remanded the case to the South Carolina Supreme Court to resolve that question. See *id.*, at 1031–1032. (And while spotting the nuisance issue, the Court may have overlooked other state-law constraints on development. In some States, for example, the public trust doctrine or public prescriptive easements limit the development of beachfront land. See Sterk, The Federalist Dimension of Regulatory Takings Jurisprudence, 114 Yale L. J. 203, 227 (2004).) Or consider *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702 (2010). The federal constitutional issue there was whether a decision of the Florida Supreme Court relating to beachfront prop-

erty constituted a taking. To resolve that issue, though, the Court first had to address whether, under pre-existing Florida property law, "littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." *Id.*, at 730. The Court bit the bullet and decided that issue itself, as it sometimes has to (though thankfully with the benefit of a state high court's reasoning). But there is no such necessity here—and no excuse for making complex state-law issues part of the daily diet of federal district courts.

State courts are—or at any rate, are supposed to be—the "ultimate expositors of state law." *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975). The corollary is that federal courts should refrain whenever possible from deciding novel or difficult state-law questions. That stance, as this Court has long understood, respects the "rightful independence of the state governments," "avoid[s] needless friction with state policies," and promotes "harmonious relation[s] between state and federal authority." *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496, 500–501 (1941). For that reason, this Court has promoted practices of certification and abstention to put difficult state-law issues in state judges' hands. See, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 77 (1997) (encouraging certification of "novel or unsettled questions of state law" to "hel[p] build a cooperative judicial federalism"); *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 28 (1959) (approving federal-court abstention in an eminent domain proceeding because such cases "turn on legislation with much local variation interpreted in local settings"). We may as well not have bothered. Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes. It betrays judicial federalism.

IV

Everything said above aside, *Williamson County* should stay on the books because of *stare decisis*. Adherence to precedent is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). *Stare decisis*, of course, is "not an inexorable command." *Id.*, at 828. But it is not enough that five Justices believe a precedent wrong. Reversing course demands a "special justification—over and above the belief that the precedent was wrongly decided." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 8) (internal quotation marks omitted). The majority offers no reason that qualifies.

In its only real stab at a special justification, the majority focuses on what it calls the "*San Remo* preclusion trap." *Ante*, at 2. As the majority notes, this Court held in a post-*Williamson County* decision interpreting the full faith and credit statute, 28 U. S. C. §1738, that a state court's resolution of an inverse condemnation proceeding has preclusive effect in a later federal suit. See *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323 (2005); *ante*, at 1–2, 5–6, 22. The interaction between *San Remo* and *Williamson County* means that "many takings plaintiffs never have the opportunity to litigate in a federal forum." *Ante*, at 22. According to the majority, that unanticipated result makes *Williamson County* itself "unworkable." *Ibid.*

But in highlighting the preclusion concern, the majority only adds to the case for respecting *stare decisis*—because that issue can always be addressed by Congress. When "correction can be had by legislation," Justice Brandeis once stated, the Court should let stand even "error[s on]

matter[s] of serious concern." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting)). Or otherwise said, *stare decisis* then "carries enhanced force." *Kimble*, 576 U. S., at ___ (slip op., at 8); see *South Dakota* v. *Wayfair, Inc.*, 585 U. S. ___, ___ (2018) (ROBERTS, C. J., dissenting) (slip op., at 2) (The *stare decisis* "bar is even higher" when Congress "can, if it wishes, override this Court's decisions with contrary legislation"). Here, Congress can reverse the *San Remo* preclusion rule any time it wants, and thus give property owners an opportunity—*after* a state-court proceeding—to litigate in federal court. The *San Remo* decision, as noted above, interpreted the federal full faith and credit statute; Congress need only add a provision to that law to flip the Court's result. In fact, Congress has already considered proposals responding to *San Remo*—though so far to no avail. See Brief for Congressman Steve King et al. as *Amici Curiae* 7. Following this Court's normal rules of practice means leaving the *San Remo* "ball[in] Congress's court," so that branch can decide whether to pick it up. *Kimble*, 576 U. S., at ___ (slip op., at 8).[6]

And the majority has no other special justification. It says *Williamson County* did not create "reliance interests." *Ante,* at 23. But even if so, those interests are a *plus-factor* in the doctrine; when they exist, *stare decisis* becomes "superpowered." *Kimble*, 576 U. S., at ___ (slip op., at 10); *Payne*, 501 U. S., at 828 (*Stare decisis* concerns are "at their acme" when "reliance interests are involved"). The absence of reliance is not itself a reason for overruling

---

[6] Confronted with that point, the majority shifts ground. It notes that even if Congress eliminated the *San Remo* rule, takings plaintiffs would still have to comply with *Williamson County*'s "unjustified" demand that they bring suit in state court first. See *ante*, at 22. But that argument does not even purport to state a special justification. It merely reiterates the majority's view on the merits.

a decision. Next, the majority says that the "justification for [*Williamson County*'s] state-litigation requirement" has "evolve[d]." *Ante*, at 22. But to start with, it has not. The original rationale—in the majority's words, that the requirement "is an element of a takings claim," *ante*, at 22—has held strong for 35 years (including in the cases the majority cites), and is the same one I rely on today. See, *e.g., Horne*, 569 U. S., at 525–526 (quoting *Williamson County*'s rationale); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 734 (1997) (same); *supra*, at 2–3. And anyway, "evolution" in the way a decision is described has never been a ground for abandoning *stare decisis*. Here, the majority's only citation is to last Term's decision overruling a 40-year-old precedent. See *ante*, at 22 (citing *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___ (2018) (slip op., at 23)). If that is the way the majority means to proceed—relying on one subversion of *stare decisis* to support another—we may as well not have principles about precedents at all.

What is left is simply the majority's view that *Williamson County* was wrong. The majority repurposes all its merits arguments—all its claims that *Williamson County* was "ill founded"—to justify its overruling. *Ante*, at 20–21. But the entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason *other than* the idea "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014); see *supra*, at 16. For it is hard to overstate the value, in a country like ours, of stability in the law.

Just last month, when the Court overturned another longstanding precedent, JUSTICE BREYER penned a dissent. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. ___, ___ (2019). He wrote of the dangers of reversing legal course "only because five Members of a later Court" decide that an earlier ruling was incorrect. *Id.*, at ___ (slip op., at

13). He concluded: "Today's decision can only cause one to wonder which cases the Court will overrule next." *Ibid.* Well, that didn't take long. Now one may wonder yet again.

Illinois Official Reports

Appellate Court

***LMP Services, Inc. v. City of Chicago*, 2017 IL App (1st) 163390**

Appellate Court Caption	LMP SERVICES, INC., Plaintiff-Appellant, v. THE CITY OF CHICAGO, Defendant-Appellee.
District & No.	First District, First Division Docket No. 1-16-3390
Filed	December 18, 2017
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 12-CH-41235; the Hon. Helen A. Demacopoulos, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Eimer Stahl, LLP, of Chicago (James W. Joseph, of counsel), and Institute for Justice, of Arlington, Virginia (Robert Frommer, Robert Gall, and Erica J. Smith (all *pro hac vice*), of counsel), for appellant. Edward N. Siskel, Corporation Counsel, of Chicago (Benna Ruth Solomon, Myriam Zreczny Kasper, and Suzanne M. Loose, Assistant Corporation Counsel, of counsel), for appellee.
Panel	JUSTICE HARRIS delivered the judgment of the court, with opinion. Presiding Justice Pierce and Justice Mikva concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff-appellant, LMP Services, Inc. (LMP), filed this lawsuit seeking both declaratory and injunctive relief against two sections of an ordinance passed by defendant-appellee, City of Chicago (City). The two challenged ordinances pertained to the operation of mobile food vehicles (hereinafter food trucks) within Chicago. Under the first challenged ordinance, food trucks may not, with limited exceptions, locate themselves within 200 feet of the principal customer entrance of a restaurant located at street level. LMP challenged this ordinance under the due process and equal protection clauses of the Illinois Constitution. Under the second challenged provision, food trucks must be equipped with a Global Positioning System (GPS) that sends real-time data to any service that has a publicly accessible application programming interface. LMP challenged this provision as a violation of its right under the Illinois Constitution to be free from unreasonable searches.

¶ 2 After LMP filed an amended complaint, the City moved to dismiss all of LMP's claims. The circuit court granted the motion with respect to the equal protection claim but denied the motion as to the due process and search claims. The City answered the remaining claims and the parties proceeded to discovery. At the close of discovery, the parties moved for cross-summary judgment. As to the 200-foot rule, the circuit court found it rationally related to (1) the City's need to balance the interests of both the food trucks and brick-and-mortar restaurants and (2) the City's need to balance sidewalk congestion. As to the GPS requirement, the circuit court found LMP lacked standing because the City had never requested its GPS information and, therefore, a search had not occurred. The court further concluded that, even if a search had occurred, the search was reasonable and therefore constitutional.

¶ 3 LMP now appeals the circuit court's grant of summary judgment in favor of the City. Upon this court's review, we agree with the circuit court's findings that LMP's constitutional challenge to both sections of the ordinance fails. The City has a critical interest in maintaining a thriving food service industry of which brick-and-mortar establishments are an essential part. The 200-foot exclusion represents a rational means of ensuring the general welfare of the City and is neither arbitrary nor unreasonable. The GPS is not a search pursuant to *United States v. Jones*, 565 U.S. 400 (2012). The GPS rule represents a method of requiring a licensee to maintain records as to its operational location in an electronic form as a condition of conducting business from the city street. Accordingly, the circuit court's grant of summary judgment in favor of the City is affirmed.

¶ 4 JURISDICTION

¶ 5 On June 13, 2013, the circuit court granted the City's motion to dismiss LMP's equal protection claim. On December 5, 2016, the circuit court granted the City's motion for summary judgment on LMP's due process and illegal search claims. LMP's cross-motion for summary judgment was denied the same day. On December 28, 2016, LMP timely filed its notice of appeal as to the December 5, 2016 order.[1] Accordingly, this court has jurisdiction over this matter pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1,

[1]LMP does not challenge the order of June 13, 2013, and has therefore forfeited review of its equal protection claim. *Lewanski v. Lewanski*, 59 Ill. App. 3d 805, 815-16 (1978).

1994); R. 303 (eff. May 30, 2008).

¶ 6 BACKGROUND

¶ 7 The plaintiff-appellant, LMP is a closely held Illinois corporation in Elmhurst, Illinois. Its owner, Laura Pekarik, operates the food truck called Cupcakes for Courage. Cupcakes for Courage is licensed in Chicago as a "mobile food dispenser," and since June 2011, Pekarik has sold cupcakes from the food truck.

¶ 8 On July 25, 2012, the Chicago city council passed an ordinance to expand food truck operations within the city limits of Chicago. The ordinance allows for food preparation on food trucks and established a number of regulations governing location, operation, and inspection of food trucks. The ordinance authorizes the commissioner of transportation for the City to establish fixed stands where parking space for food trucks is reserved. Chicago Municipal Code § 7-38-117(c) (added July 25, 2012). The ordinance requires a "minimum of 5 such stands" in each "community area *** designated in section 1-14-010 of this Code [(Chicago Municipal Code § 1-14-010 (added Dec. 15, 1993))], that has 300 or more retail food establishments." *Id.* Those community areas are the Loop,[2] Near West, Near North, Lincoln Park, Lakeview, and West Town.

¶ 9 Beyond food stands, food trucks may park in legal parking spots on the street for up to two hours. Chicago Municipal Code § 7-38-115(b) (amended July 25, 2012). Food trucks may not park within 20 feet of a crosswalk, 30 feet of a stop light or stop sign, or adjacent to a bike lane. Chicago Municipal Code § 7-38-115(e) (amended July 25, 2012). In addition, the ordinance provides:

> "No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12 a.m. and 2 a.m." Chicago Municipal Code § 7-38-115(f) (amended July 25, 2012).

"Restaurant" is defined as:

> "[A]ny public place at a fixed location kept, used, maintained, advertised and held out to the public as a place where food and drink is prepared and served for the public for consumption on or off the premises pursuant to the required licenses. Such establishments include, but are not limited to, restaurants, coffee shops, cafeterias, dining rooms, eating houses, short order cafes, luncheonettes, grills, tearooms, and sandwich shops." *Id.*

There are two exceptions to the 200-foot requirement. The first exception allows food trucks to park at one of the five established food stands even if that stand is within 200-feet of the primary entrance of a restaurant. The second exception allows food trucks to park near construction sites and serve those sites.

¶ 10 Mobile food vendors are also subject to regulations designed to ensure safe food preparation and sanitary operations, including requirements for storage and plumbing equipment, food preparation, cleaning products, temperature control, and the presence of certified food service manager when food is prepared. Chicago Municipal Code §§ 7-38-132;

[2]The Loop is geographically defined as the downtown area of Chicago bordered by Lake Michigan to the east, the Chicago River to the north and west, and Congress Parkway to the south.

7-38-134 (added July 25, 2012). Each food truck must be linked to a commissary used daily for supplying, cleaning, and servicing. Chicago Municipal Code § 7-38-138 (added July 25, 2012). The Chicago board of health (board) is authorized to enact rules and regulations to implement those requirements (Chicago Municipal Code § 7-38-128 (added July 25, 2012)) and the department of public health conducts inspections. Chicago Municipal Code § 7-38-126 (added July 25, 2012).

¶ 11 The ordinance also has a requirement concerning the use of GPS equipment on the food trucks. The ordinance provides:

> "Each mobile food vehicle shall be equipped with a permanently installed functioning Global-Positioning-System (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device." Chicago Municipal Code § 7-38-115(l) (amended July 25, 2012).

The Board subsequently enacted "Rules and Regulations for Mobile Food Vehicles." Rule 8 provides that the GPS device be permanently installed; be an " 'active,' " not " 'passive,' " device that sends real-time location data to a GPS provider; and be accurate no less than 95% of the time. Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(A)(1)-(3) (eff. Aug. 7, 2014), https://www.cityofchicago.org/content/dam/city/depts/bacp/general/MFV_Rules_and_Regulations-8-7-2014.pdf. The City claimed that the GPS requirement's purpose was so that it could locate food trucks in order to conduct field inspections and investigate public health complaints.

¶ 12 The rule further provides that the device must function during business operations and while at a commissary and transmit GPS coordinates to the GPS service provider at least once every five minutes. Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(A)(4)-(5) (eff. Aug. 7, 2014). The rule further provides that the City will not request GPS information without consent, a warrant, or court authorization unless the information is needed "to investigate a complaint of unsanitary or unsafe conditions, practices, or food or other products at the vehicle"; "to investigate a food-related threat to public health"; to "establish[h] compliance with" the ordinance and regulations; or for "emergency preparation or response." Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(B) (eff. Aug. 7, 2014). Rule 8 also clarified that, while GPS providers must "be able to provide" an API "that is available to the general public," licensees need not "provide the appropriate access information to the API" unless the City establishes a website to display food truck locations and the licensee chooses to participate. Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(C)-(D) (eff. Aug. 7, 2014). The food truck "is not required to provide such information or otherwise allow the City to display the vehicle's location." Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(D) (eff. Aug. 7, 2014).

¶ 13 LMP filed this lawsuit on November 14, 2012, and later amended it on March 8, 2013, challenging both the 200-foot exclusion rule and GPS requirement. Its suit alleged that the 200-foot rule violated the due process and equal protection clauses of article I, section 2, of the Illinois Constitution and the GPS tracking scheme violated the search, seizures, privacy and interceptions clause of article I, section 6, of the Illinois Constitution. The City moved to dismiss the complaint in its entirety, and after briefing, the circuit court granted the City's

motion with respect to LMP's equal protection claim but denied it as to the due process and search claims. The City then answered the amended complaint and the parties proceeded to discovery. The City set forth three reasons for imposing the 200-foot restriction: (1) balance the interests of brick-and-mortar restaurants with the food trucks, (2) encourage food trucks to locate in underserved areas, and (3) manage sidewalk congestion.

¶ 14 The parties engaged in an extensive discovery phase regarding the City's justification for the 200-foot rule and the GPS requirement. The City testified that the 200-foot rule applied "as the crow flies," radiating out 200 feet in all directions from a restaurant's front door. This means a food truck cannot park on the other side of the street or a block over if that position is within 200 feet of a restaurant's principal entrance. The rule also applies to a food truck parked on private property. Pekarik's testified that the 200-foot rule excluded her from many areas she would like to conduct business from in the Loop. As to the construction site exception, the City testified that trucks need only operate within proximity of the construction site, though it could not give a precise definition of "proximity."

¶ 15 Plaintiff hired expert witness, Renia Ehrenfeucht, a professor of urban planning and sidewalk usage, to conduct an observational study of seven different food truck locations across the northern portion of the Loop. Based on what her team observed, she reached two conclusions: (1) there was no observed difference in pedestrian congestion impacts based on the distance between a food truck's operations and a restaurant's front door and (2) there was no difference in the degree of pedestrian congestion at mobile food truck stand locations versus other public-private locations.

¶ 16 The City explained the need for the GPS requirement because it may be necessary to track a food truck's location to conduct a health or administrative investigation. The City admitted that it had never requested GPS data from any licensed food truck. In the few instances the City needed to find a truck, the field inspectors utilized social media to determine a food truck's location. Since the GPS requirement only applies while the food truck is in operation, the City admitted the GPS unit may need to be physically turned on by the truck operator.

¶ 17 At the close of discovery, the parties filed cross-motions for summary judgment. The circuit court ruled that rational-basis review applied to LMP's due process challenge to the 200-foot rule. Under this review, the circuit court upheld the 200-foot rule based on the City's argument that the rule balances the interests of brick-and-mortar restaurants and food trucks. The circuit court found the rule rationally related to the City's interest in managing sidewalk congestion. It rejected the argument that the rule helped spread food truck business to underserved sections of the city. As to the GPS requirement, the court determined LMP lacked standing to even challenge the provision because LMP failed to show its data had ever been requested by the City. The circuit court further explained that even if a search had taken place, the search was reasonable because the City's interest in food safety, the GPS data is necessary to find food trucks for purposes of inspection or notifications, and the rules limit the type of information and the circumstances under which the City will obtain it.

¶ 18 LMP timely appealed the circuit court's grant of summary judgment and this appeal now follows.

¶ 19 ANALYSIS

¶ 20 On appeal, LMP raises two issues: (1) the circuit court erred in concluding that the 200-foot rule does not violate its substantive due process rights, and (2) the circuit court erred in concluding the GPS requirement is not a search.

¶ 21 LMP's appeal arises from an order granting summary judgment in favor of the City upholding the validity of the 200-foot rule and the GPS requirement, our review is therefore *de novo*. *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 128 (2005). *De novo* review is also the appropriate standard when the appellate court reviews the constitutionality of a statute. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33.

¶ 22 LMP alleges the 200-foot restriction violates its due process right under article I, section 2 of the Illinois Constitution, which protects the right of Illinoisans to pursue a legitimate occupation. In claiming a violation of its due process rights, LMP states in its amended complaint, "[t]his lawsuit seeks to vindicate the fundamental rights of the Plaintiffs, who own and operate mobile-vending vehicles, to earn an honest living free from unreasonable and anticompetitive government restrictions."

¶ 23 The fourteenth amendment to the United States Constitution and article I, section 2, of the Illinois Constitution protect individuals from the deprivation of life, liberty, or property without due process of law. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. Case law pertaining to due process recognizes two distinct due process analyses: substantive due process and procedural due process. *Doe v. City of Lafayette*, 377 F.3d 757, 767-68 (7th Cir. 2004); *In re J.R.*, 341 Ill. App. 3d 784, 791 (2003). "Whereas procedural due process governs the procedures employed to deny a person's life, liberty or property interest, substantive due process limits the state's ability to act, irrespective of the procedural protections provided." *In re Marriage of Miller*, 227 Ill. 2d 185, 197 (2007) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). In the case before us, LMP raises no argument concerning the denial of notice or procedure; accordingly, we review LMP's claim only as it relates to substantive due process.

¶ 24 When a party claims a due process violation, a court "must first ascertain that a protected interest has been interfered with by the state. Then and only then does one consider what process is due." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 241 (2005); *In re J.W.*, 204 Ill. 2d 50, 66 (2003). This is a critical step because the "nature of the right dictates the level of scrutiny a court must employ in determining whether the statute in question comports with the constitution." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 307 (2008).

¶ 25 LMP frames the 200-foot rule as a means to suppress its economic rights in violation of article I, section 2, of the Illinois Constitution. The ordinance states in relevant part, "[n]o operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance *** which is located on the street level." Chicago Municipal Code § 7-38-115(f) (amended July 25, 2012). In arguing that its due process right has been violated, LMP cites the accepted general principle that "every citizen has the right to pursue a trade, occupation, business or profession" and this right "constitutes both a property and liberty interest entitled to the protection of the law as guaranteed by the due process clauses of the Illinois and Federal constitutions." *Coldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton*, 105 Ill. 2d 389, 397 (1985).

¶ 26 The right to pursue a profession is not a fundamental right for substantive due process purposes, and the legislature's, or in this case the Chicago City council's, infringement on this right need only be examined using the rational basis test. *Potts v. Illinois Department of Registration & Education*, 128 Ill. 2d 322, 329 (1989). The state, in the proper exercise of its general police powers, may regulate this "economic right," where the public health, safety, or general welfare so requires. *Id.* at 330 (citing *Pozner v. Mauck*, 73 Ill. 2d 250 (1978)).

¶ 27 The fact that the challenged provisions are part of an ordinance enacted by the City and not statutes enacted by the Illinois General Assembly is immaterial. Under the Illinois Constitution of 1970, the City is a home rule unit of local government. Ill. Const. 1970, art. VII, § 6. This provision of our constitution directly allows the City to "regulate for the protection of the public health, safety, morals and welfare." Ill. Const. 1970, art. VII, § 6(a). Local governments granted home rule act with the same powers as the state unless specifically limited by the General Assembly. *City of Urbana v. Houser*, 67 Ill. 2d 268, 273 (1977).

¶ 28 While acknowledging the rational basis standard, LMP argues that under Illinois law, the rational basis test requires a "definite and reasonable relationship to the end of protecting the public health, safety and welfare." *Church v. State*, 164 Ill. 2d 153, 165 (1995); *Krol v. County of Will*, 38 Ill. 2d 587, 590 (1968) (requiring a definite and substantial relation to a recognized police-power purpose). LMP fails to recognize that this argument concerning a "heightened" rational basis test was rejected by the Illinois Supreme Court in *Napleton*, 229 Ill. 2d 296. In that case, the plaintiff "used the term 'substantial relationship' or 'real and substantial' to describe the applicable level of judicial scrutiny" our supreme court should apply in reviewing her facial challenge to Hinsdale's zoning law. *Id.* at 309. In rejecting plaintiff's argument, the court stated,

> "We clarify that the 'substantial relation' language used in cases addressing the validity of zoning regulations has been simply an alternate statement of the rational basis test which was tailored to address the specific interests advanced by the enactment of zoning ordinances, namely, the promotion of the public health, safety, morals, or general welfare." *Id.* at 315.

In accordance with *Napleton*, we reject LMP's argument that in order to survive rational basis scrutiny, the challenged ordinance must have "a definite and substantial" relationship to a recognized police power. As stated by our supreme court in *Napleton*, a challenged zoning ordinance will survive rational basis scrutiny "if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable." *Id.* at 319 (citing *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106 (2004)).

¶ 29 When Illinois courts apply the rational basis test, "a court must identify the public interest that the statute is intended to protect, examine whether the statute bears a reasonable relationship to that interest, and determine whether the method used to protect or further that interest is reasonable." *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 147 (2003). A court's review under this standard is "limited" and " 'highly deferential.' " *Id.* Furthermore, under this test "mathematical precision" is not required and "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by the evidence or empirical data." (Internal quotation marks omitted.) *Cutinello v. Whitley*, 161 Ill. 2d 409, 421-22 (1994). Whether a statute is wise or the best way of achieving a stated end is left to the determination of the legislature. *Arangold Corp.*, 204 Ill. 2d at 147.

¶ 30 Like statutes, ordinances are presumed constitutional, and the opposing party bears the burden of rebutting this presumption. *American Federation of State, County, & Municipal Employees (AFSCME), Council 31 v. State*, 2015 IL App (1st) 133454, ¶ 19. This court must, whenever possible, construe a statute to uphold its constitutionality. *Id.* A party raising a challenge that an ordinance is facially unconstitutional bears the burden of establishing a clear constitutional violation. *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 20. Any doubts are resolved in favor of the challenged regulations. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 164-65 (1993). Under these guidelines, a facial challenge represents "the most difficult challenge to mount successfully because an enactment is invalid on its face only if no set of circumstances exists under which it would be valid." *People v. One 1998 GMC*, 2011 IL 110236, ¶ 20. "The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Napleton*, 229 Ill. 2d at 306.

¶ 31 When LMP challenged the 200-foot rule, the City responded with three government objectives the rule is meant to further (1) strike a balance between brick-and-mortar restaurants and food trucks, (2) spread retail food options to underserved areas of the City, and (3) control sidewalk congestion in the applicable areas. If any one of these justifications is found to be sufficient, the ordinance will be upheld as constitutional. In arguing for reversal before this court, LMP asserts the 200-foot rule is unconstitutional because it is blatant protectionism and protecting brick-and-mortar restaurants from food truck competition is not a legitimate government interest.

¶ 32 We reject LMP's assertion that the City may not protect brick-and-mortar restaurants and uphold the 200-foot rule as a rational means of promoting the general welfare of the City of Chicago. Both the City and its expert testified that brick-and-mortar restaurants bring critical economic benefits to communities, including the payment of property taxes. Unlike brick-and-mortar restaurants, LMP and all food trucks do not pay property taxes or other assorted fees to the City that would be associated with the operation of a brick-and-mortar restaurant occupying real property in the City. Property taxes represent a key source of revenue for the City. The 200-foot rule seeks to protect those in the food service industry who pay and support the City's property tax base from those food businesses that do not. Moreover, brick-and-mortar restaurants also pay utility taxes, lease taxes, and, yes, even restaurant taxes. Chicago Municipal Code §§ 3-30-030 (added Nov. 19, 2003) (restaurant tax); 3-32-030 (amended Oct. 28, 2015) (lease tax); 3-53-020 (added June 10, 1998) (electricity use tax); and 3-80-040 (added Sept. 14, 2016) (water and sewer tax).

¶ 33 Illinois courts have previously found that it is completely rational for an Illinois municipality to favor businesses generating tax dollars over businesses that do not. In *Napleton*, a challenged zoning change prohibited "new depository or nondepository credit institutions from being located on the first floor of any building in the B-1 or B-3 zoning district." 229 Ill. 2d at 302. In upholding the validity of the ordinance, our supreme court stated:

> "[i]t was reasonable and legitimate for Hinsdale to conclude that the continued vitality of its business districts required an appropriate balance between businesses that provide sales tax revenue and those that do not, and its passage of the challenged amendments precluding new banks and financial institutions from locating on the

> ground floors of buildings in the designated districts because they impose an opportunity cost in forgone tax revenue is rationally related to that purpose." *Id.* at 321.

In the same line of reasoning, it is reasonable and legitimate for the City to conclude that continued receipt of property taxes and other city fees associated with running a brick-and-mortar restaurant "required an appropriate balance" with those food businesses that do not.

¶ 34 This proposition is not new and has been accepted as a legitimate and reasonable government action by previous courts. In *City of New Orleans v. Dukes*, the United States Supreme Court acknowledged that the City of New Orleans may ban pushcart food vendors from the city's historic French Quarter. 427 U.S. 297, 303 (1976). In upholding the ban under a rational basis review, the Court recognized the ban as a legitimate way for the city of New Orleans "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists." (Internal quotation marks omitted.) *Id.* at 304.

¶ 35 In *Vaden v. Village of Maywood*, the Seventh Circuit, applying Illinois law, upheld as a legitimate and rational exercise of municipal authority, a Village of Maywood ordinance, which restricted mobile food vending near schools. 809 F.2d 361 (7th Cir. 1987). As the Seventh Circuit pointed out, "distinctions between street vendors and merchants with a fixed place of business have been accepted by other courts in upholding similar ordinances against equal protection challenges."[3] *Id.* at 366. Cases like *Dukes*, *Napleton*, and *Vaden* establish that courts have long upheld city ordinances favoring one business over another under rational basis review.

¶ 36 As LMP admits, it seeks to overturn the 200-foot rule because its main affect is to prevent it from parking in areas close to a restaurant's front door where large amounts of potential customers gather. Notwithstanding LMP's license, which granted them the privilege to conduct business on the City's streets and sidewalks, LMP fails to recognize that while one has a constitutional right to pursue a profession (*Rios v. Jones*, 63 Ill. 2d 488, 496-97 (1976)), Illinois courts have long recognized that no individual or business has the constitutional right to conduct business from the city street or sidewalk. *City of Chicago v. Rhine*, 363 Ill. 619 (1936). The *Rhine* court dealt with a City ordinance that completely prohibited a person from selling newspapers in the Loop or Wilson Avenue districts. *Id.* at 620. In upholding the complete prohibition against the sale of newspapers in those areas, the court stated, "[Rhine] had no property right in the use of any of the streets of Chicago for the location and maintenance of his business." *Id.* at 625. Tellingly, LMP does not address *Rhine* or its progeny in either its opening or reply brief to this court.

¶ 37 The proposition that no individual has the constitutional property right to conduct business from the streets or sidewalks located within the state of Illinois has been reaffirmed several times since *Rhine*. In *Good Humor Corp. v. Village of Mundelein*, 33 Ill. 2d 252, 253-54 (1965), the Illinois Supreme Court upheld an ordinance, which prohibited all vending from the streets or sidewalks in the Village of Mundelein. Relying on *Rhine*, the court upheld the ordinance and found no due process violation because, "[t]he assumed property right upon

[3]While the court discusses this in terms of equal protection, the court had previously noted that whether framed as a due process or equal protection challenge, rational basis review applied. *Vaden*, 809 F.2d at 365.

which the plaintiff's case against the validity of the ordinance is based is nonexistent." *Id.* at 259 (citing *Rhine*, 363 Ill. at 625).

¶ 38 In *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 221-22 (1989), our supreme court was confronted with a Chicago ordinance that banned mobile food trucks from selling within the Medical District. After upholding the ordinance under a rational basis review, our supreme court again reiterated that no individual has the right to use streets or sidewalks for private gain. *Id.* at 229. The *Triple A Services, Inc.*, court further recognized that Chicago's ability to regulate its streets and sidewalks had become even more evident since the *Rhine* decision because of the adoption of the 1970 Constitution and the introduction of "home rule." *Id.* at 230 (citing Ill. Const. 1970, art. VII, § 6). Under article VII, section 6, Chicago had the "same powers as the sovereign, except where such powers are limited by the General Assembly." *Id.*

¶ 39 In accord with *Rhine*, *Good Humor Corp.*, and *Triple A Services, Inc.*, we reiterate that no individual or business has a constitutional property right to use Chicago's streets and sidewalks for private gain. It is only through the issuance of a license that plaintiff may conduct business on the City streets. The issuance of said license did not create a vested property right but rather a "revocable privilege to do an act or a series of acts upon the land of another without possessing any estate or interest in such land." *Grigoleit, Inc. v. Board of Trustees of the Sanitary District of Decatur*, 233 Ill. App. 3d 606, 612 (1992) (citing *City of Berwyn v. Berglund*, 255 Ill. 498, 500 (1912)). As plaintiff acknowledged at oral argument, the City could outright ban all food trucks from operating on the city streets. The issuance of a license to operate on the city street did not abrogate the City's power to legislate for the general welfare, and "[i]t is presumed, absent unequivocal language, that a city, in granting a license, reserves the ability to exercise its police power and place additional regulatory burdens on license holders." (Internal quotation marks omitted.) *Triple A Services, Inc.*, 131 Ill. 2d at 235.

¶ 40 While LMP points out the main thrust of the 200-foot rule is to prohibit street parking, it also points to at least two instances where the 200-foot rule prohibits it from operating on private property. Yet this fact does not render the 200-foot restriction unconstitutional. LMP has raised a facial challenge to the constitutionality of the 200-foot rule, and this court will only sustain a facial challenge "if no set of circumstances exists under which it would be valid." *Napleton*, 229 Ill. 2d at 306. "The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Id.* (citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982)). Significantly, courts are to give "wide latitude" to the states "in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *Dukes*, 427 U.S. at 303. For this reason, LMP's argument concerning the incidental effect of the 200-foot rule does not support its facial invalidity.

¶ 41 We also find all of the cases relied upon by LMP to be readily distinguishable from the facts of this case and do not support a finding of facial invalidity. In attacking the 200-foot rule, LMP relies primarily on *Chicago Title & Trust Co. v. Village of Lombard*, 19 Ill. 2d 98 (1960), a case involving a proximity restriction between existing and new gas stations. In *Chicago Title*, our supreme court invalidated a Village of Lombard ordinance that prevented the establishment of any new gas station within 650 feet of any existing gas station. *Id.* at 100. While proposed on the basis of safety, the reviewing court found the fact that new stations could be built within 150 feet of schools, hospitals, and churches completely undermined the

claim of safety. *Id.* at 104. Additionally, the rule had no effect on those stations within 650 feet already in existence. *Id.* at 106-07. Therefore, the court found no rational basis for the safety concerns. *Id.* at 107. Unlike *Chicago Title*, the restriction at issue in this case was not proffered solely based on safety and does not favor existing food trucks over new truck competitors.

¶ 42 *Chicago Title* is distinguishable for several other reasons. *Chicago Title* was decided before the 1970 Illinois Constitution and the implementation of home rule. As explained in *Triple A Services Inc.*, the home rule provision dramatically altered Chicago's authority, and it can now act with the "same powers as the sovereign." *Triple A Services, Inc.*, 131 Ill. 2d at 230. Notably, the court in *Triple A Services, Inc.*, also rejected plaintiff's attempt to rely on non-home rule case law. *Id.* at 231 (citing *Rocking H. Stables, Inc. v. Village of Norridge*, 106 Ill. App. 2d 179 (1969)). Besides not addressing home rule, *Chicago Title* is also distinguishable because the plaintiff in that case sought to use a piece of real property. 19 Ill. 2d at 106-07 (denies to plaintiffs the right to use their property as a gas station). Unlike the private real property at issue in *Chicago Title*, LMP seeks to make use of Chicago's streets and sidewalks for its own private gain. As previously stated, LMP has no property right to use the streets and sidewalks for its own private gain. *Rhine*, 363 Ill. at 625.

¶ 43 LMP claims that *Chicago Title* stands for the proposition that proximity based restrictions that "promote monopoly" are inherently suspect. See *Chicago Title*, 19 Ill. 2d at 107 ("[i]t exempts from its requirements businesses already established, and, in operation and effect, tends to promote monopoly"). LMP argues that the 200-foot restriction promotes a monopoly because it prevents it from "vending in the vast majority of the Loop" and reduces competition. As previously stated, LMP and all food trucks have no constitutional property right to conduct any private business from the streets or sidewalks of Chicago. *Rhine*, 363 Ill. at 625. Moreover, LMP appears to take the position that the 200-foot restriction promotes a monopoly by the brick-and-mortar restaurants regardless of who actually owns them. Black's Law Dictionary defines monopoly as "[c]ontrol or advantage obtained by *one supplier or producer* over the commercial market within a given region." (Emphasis added.) Black's Law Dictionary (10th ed. 2014). LMP presents no evidence, nor does this court expect it could, that brick-and-mortar restaurants are controlled by one supplier or producer. LMP's claim that the rule supports a monopoly has neither a basis in law or fact and is rejected by this court.

¶ 44 LMP also argues that Illinois may not discriminate against two different business models and cites *Exchange National Bank of Chicago v. Village of Skokie*, 86 Ill. App. 2d 12 (1967). In *Exchange National*, plaintiff was denied a special use permit to open an automated car wash. *Id.* at 13-14. While the court reversed the denial of the permit as arbitrary and unreasonable, it stated in *dicta* that the village did not have the municipal authority to legislate "economic protection for existing businesses against the normal competitive factors which are basic to our economic system." *Id.* at 21.

¶ 45 *Exchange National*, like *Chicago Title*, is a pre-1970 case and does not deal with home rule authority. This alone undercuts the weight to be given to it. Equally as important, the case simply does not support LMP's position. In making its argument, LMP willfully fails to recognize that it is not the same business as a brick-and-mortar restaurant. Unlike *Exchange National*, this is not a case where there are two similar business, one automated and one not, both seeking to permanently operate from private real property. LMP does not seek to permanently conduct its bakery business from a brick-and-mortar establishment in Chicago

using automated techniques, and the 200-foot rule it seeks to invalidate does not prevent it from so doing. Accordingly, *Exchange National* does not support LMP's position.

¶ 46 The other cases relied upon by LMP also involved the use of private real property and are therefore distinguishable from the case currently before the court. A case relied upon by LMP, *Cosmopolitan National Bank v. Village of Niles*, 118 Ill. App. 3d 87 (1983), involved a piece of real property. See *id.* at 88-89 (noting the issue before the court was the denial of a special use permit to operate a McDonald's restaurant). It is further distinguished by the fact that the plaintiff in *Cosmopolitan National Bank* did not seek to invalidate any Niles ordinance. LMP also relies on *Church*, but that case involved licensures and whether the legislature could require practical experience as a prerequisite for issuing a license to become a private alarm installer. 164 Ill. 2d at 167-68. LMP does not claim it has been denied a license because it lacks experience in the food truck business, so its reliance on this case is misplaced.

¶ 47 Based on the above, LMP has failed to establish that the 200-foot restriction is arbitrary and unreasonable as having no relation to the City's authority to promote its general welfare. Accordingly, the circuit court's order granting summary judgment in favor of the City as to the 200-foot restriction is affirmed.[4]

¶ 48 LMP next argues the requirement that it install a GPS unit in its truck and transmit its location to a service provider represents a warrantless search in violation of article I, section 6, of the Illinois Constitution. Under the challenged municipal provision, each food truck "shall be equipped with a permanently installed functioning [GPS] device which sends real-time data to any service that has a publicly-accessible application programming interface." Chicago Municipal Code § 7-38-115(l) (amended July 25, 2012). An applicable board of health rule explains that the GPS device need only transmit location data "while the vehicle is vending food or otherwise open for business to the public, and when the vehicle is being serviced at a commissary." Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(A)(4) (eff. Aug. 7, 2014).

¶ 49 Section 6, of article I, of the Illinois Constitution states:

> "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." Ill. Const. 1970, art. I, § 6.

We note that "the protection against unreasonable searches and seizures under the Illinois Constitution is measured by the same standards as are used in defining the protections contained in the fourth amendment to the United States Constitution." *People v. Thomas*, 198 Ill. 2d 103, 109 (2001).

¶ 50 LMP contends that the GPS requirement constitutes a "search" pursuant to *Jones*, 565 U.S. 400. In the *Jones* case, the FBI suspected the defendant of drug trafficking and obtained a warrant authorizing the installation of a GPS on defendant's car within 10 days. *Id.* at 402-03. The government installed the GPS device on the eleventh day. *Id.* at 403. The government eventually obtained an indictment and was permitted to use the data collected while defendant

[4]Because we uphold the 200-foot rule as a reasonable exercise of the City's power to protect businesses paying property tax over those that do not, we decline to address whether the other proffered reasons would also support the constitutionality of the 200-foot restriction.

moved about the city streets. *Id.* The United States Court of Appeals for the District of Columbia reversed the conviction because the use of the GPS device violated the fourth amendment. *Id.* at 404. On appeal, the United States Supreme Court concluded that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " *Id.* In reaching this conclusion, the Court stated "[t]he Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.* at 404-05 (citing *Entick v. Carrington* (1765) 95 Eng. Rep. 807).

¶ 51 The Court reaffirmed this holing in *Florida v. Jardines*, 569 U.S. 1, 5-7 (2013). In *Jardines*, the Court held that having a drug-sniffing dog nose around a suspect's front porch was a search because the police had "gathered information by physically entering and occupying the [curtilage of the house] to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* at 6. Then in *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368 (2015), the Court found that North Carolina's program of attaching GPS devices to recidivist sex offenders implicated the fourth amendment. Following on *Jones* and *Jardines*, the Court stated, "it follows that a State also conducts a search when it attaches a device to a person's body." *Id.* at ___, 135 S. Ct. at 1370.

¶ 52 Based upon *Jones*, *Jardines*, and *Grady*, we reject LMP's claim that the GPS requirement at issue constitutes a search. No search occurred because the City has not physically trespassed on LMP's property. The key issue in the Court's finding that a search had occurred in the above cases was the *state's physical occupation* of property (*Jones*, 565 U.S. at 404; *Jardines*, 569 U.S. at 6) or the *state's physical intrusion* on the subject's body (*Grady*, 575 U.S. at ___, 135 S. Ct. at 1371). LMP never alleged the City physically entered its mobile food truck to place the device, nor does it allege the device is City property. Because there is no trespass, no search occurred within the context of *Jones*.

¶ 53 Normally, our inquiry would not end with the above. Pursuant to *Katz v. United States*, a search may also occur when the government intrudes on an individual's "reasonable-expectation-of-privacy." *Jones*, 565 U.S. at 409 (citing *Katz v. United States*, 389 U.S. 347 (1967)). However, LMP makes no argument concerning its "reasonable expectation of privacy" and we decline to engage in any analysis absent a properly raised argument by appellant. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing).

¶ 54 This case resembles *Grigoleit*, 233 Ill. App. 3d 606 (1992). Grigoleit discharged its industrial wastewater into the sanitary district's publicly owned water pipes. *Id.* at 608. The ordinance under which this was allowed also required Grigoleit to allow the district access to all discharge locations. *Id.* at 609. Grigoleit refused all such requests for inspection, and the district revoked Grigoleit's license to discharge. *Id.* at 610. The circuit court reinstated the permit, and the district appealed to this court. We reversed the circuit court and reinstated the board's decision to revoke Grigoleit's license. *Id.* at 610-11. In so doing, this court stated, "Grigoleit is not in this instance subject to a regulatory scheme purporting to regulate the internal conduct of its business activities." *Id.* at 611. "Grigoleit instead is subject to regulation which controls the external disposal of wastewater it has generated onto property in which it possesses no interest." *Id.* at 612. We continued "[i]t has long been settled that a license in

respect of real property, either oral or written, is a revocable privilege to do an act or a series of acts upon the land of another without possessing any estate or interest." *Id.*

¶ 55 We concluded that Grigoleit had no "constitutionally protected interest in the sewer connection and may not accept the privileges afforded by the license while simultaneously raising the fourth amendment as a bar to enforcement of the very conditions upon which extension of the license is predicated." *Id.* at 613. As the court succinctly concluded, "[i]f Grigoleit chooses to withhold consent to inspection (as it did here), the permit may be revoked and no inspection takes place—there is no entry of Grigoleit's facility and there is no search implicating the fourth amendment." *Id.* at 614.

¶ 56 The same logic applied by this court in *Grigoleit* applies equally well here. Grigoleit and all other dischargers had no constitutional right to discharge waste into the district's water network. *Id.* at 613. Similarly, LMP and all food trucks have no constitutionally protected property right in conducting business from Chicago's streets or sidewalks. *Rhine*, 363 Ill. at 625. Like the conditions surrounding the district's issuance of discharge licenses, the GPS requirement at issue is a condition precedent that LMP and all food trucks must comply with to obtain a license to sell on the City streets or sidewalks. Like the ordinance in *Grigoleit*, the ordinance at issue here does not regulate the internal conduct of LMP's business activities. *Id.* at 611-12 (citing *New York v. Burger*, 482 U.S. 691, 702 (1987)). LMP makes no argument that the GPS requirement affects or regulates the internal operations of its bakery business. In accepting a license to conduct business from the City street, LMP cannot raise a fourth amendment challenge to "bar *** enforcement of the very conditions upon which extension of the license is predicated." *Id.* at 613.

¶ 57 In view of the above, we affirm the circuit court's finding that the GPS requirement does not constitute a search within the meaning of the Illinois Constitution or the fourth amendment to the United States Constitution.

¶ 58 CONCLUSION

¶ 59 For the foregoing reasons, both the 200-foot restriction and the GPS requirement are constitutionally valid. The decision of the circuit court is affirmed.

¶ 60 Affirmed.

THE SUPREME COURT OF NEW HAMPSHIRE

Grafton
No. 2017-0634

NEW HAMPSHIRE ALPHA OF SAE TRUST

v.

TOWN OF HANOVER

Argued: September 27, 2018
Opinion Issued: March 26, 2019

Cole Associates Civil Law, PLLC, of Lebanon (Carolyn K. Cole on the brief and orally), for the plaintiff.

Mitchell Municipal Group, P.A., of Laconia (Laura Spector-Morgan on the brief and orally), for the defendant.

Myers Associates, PLLC, of Lebanon (Howard Myers on the brief), and Manley Burke, LPA, of Cincinnati, Ohio (Sean P. Callan and Patrick K. Hogan on the brief), for Phi Delta Alpha Corporation, Zeta Association of Psi Upsilon, and Trustees of Alpha Omega Chapter of Beta Theta Pi Fraternity, as amici curiae.

LYNN, C.J. The plaintiff, New Hampshire Alpha of SAE Trust (SAE), appeals an order of the Superior Court (MacLeod, J.) upholding a decision by the Zoning Board of Adjustment (ZBA) for the defendant, Town of Hanover (Town), that the use of SAE's property at 38 College Street (the property) violates the Town's zoning ordinance. We affirm in part, vacate in part, and remand.

I

The following facts are derived from either the trial court's order or the certified record. SAE built the property in the late 1920s specifically to accommodate the Dartmouth College (College) chapter of the Sigma Alpha Epsilon fraternity. Fraternity members have continuously occupied the property since 1931. SAE's use of the property as a student residence was permitted as of right from the time the Town adopted its first zoning ordinance in 1931 until the ordinance was amended in 1976.

Since the 1976 amendment, the property has been zoned in the "'I' Institution" district. Because the purpose of the district is to "permit or allow institutions to use their land for uses related to the purposes of the institutions," all property uses within the district "must relate to the uses of the institutions having ownership interest in land in the district." Student residences are not permitted as of right, but may be permitted by special exception. The ordinance defines "Student Residence" as a "building designed for and occupied by students and operated in conjunction with another institutional use."

In February 2016, the College revoked its official recognition of SAE after learning that the national charter of the Dartmouth chapter had been suspended. As a result, the College no longer recognized the fraternity as a college-approved housing facility or provided insurance coverage. The College then notified the Town that it no longer recognized the fraternity as a student organization. In light of the College's derecognition, the zoning administrator informed SAE that its use of the property as a student residence was now violating the zoning ordinance because it was not operating "in conjunction with an institutional use," and, if continued, would subject SAE to daily fines.

SAE appealed to the ZBA, arguing, in part, that its use of the property was a lawful nonconforming use because the property was never operated in conjunction with the College. In support of its position, SAE submitted several exhibits including affidavits from former fraternity members. The College did not attend the hearing and no contrary evidence was presented to rebut SAE's claims. The ZBA found that SAE's use of the property as a student residence was a lawful nonconforming use because it existed prior to the 1976 amendment that added the "in conjunction with another institutional use" requirement. However, the ZBA noted that "it is conceivable that contrary

evidence could be adduced if a party with standing to request a rehearing (such as the College itself) were to present such evidence." Additionally, before the decision was distributed, a ZBA member urged the zoning administrator to send the decision to the College so that the College would be aware of its "chance to ask for a rehearing."

On May 16, 2016, the College requested a rehearing, arguing that "there is abundant evidence" establishing that "SAE operated 'in conjunction with' the College" prior to the 1976 zoning amendment. SAE objected to the College's motion on two grounds: (1) the ZBA member that urged the zoning administrator to contact the College was biased against SAE; and (2) the College did not have standing to request a rehearing because it did not participate in the initial proceedings. The ZBA did not address SAE's objections prior to granting the rehearing. Instead, the ZBA explained in its final decision that: (1) any potential bias by the ZBA member was moot because he did not participate in the rehearing; (2) it had broad discretion to grant the College's request; and (3) the College was an interested party.

During the rehearing, the College produced evidence that it provided fire safety services to fraternities from 1949 to 1973. The College also produced evidence that it established an independent governing board for fraternities in 1971 and appointed a business manager for fraternities in 1972. In response, SAE produced evidence that the College did not provide health or safety services to SAE from 1972 to 1976. Likewise, SAE presented evidence that it attempted to maintain independence from the College during this period and was run and managed by SAE members. After weighing the evidence, the ZBA found that the College had "engaged in appreciable health and oversight activities with regard to the fraternities generally and to [SAE] in particular prior to 1976, especially in the area of fire safety." Ultimately, the ZBA reversed its original decision and denied SAE's administrative appeal.

The ZBA subsequently denied SAE's request for rehearing, and SAE appealed to the superior court. Following a hearing, the trial court affirmed the ZBA's decision. First, the trial court ruled that, based on our recent decision in Dartmouth Corp. of Alpha Delta v. Town of Hanover, 169 N.H. 743 (2017): (1) the issue before it was "not whether SAE's use of the building as a fraternity house was nonconforming with the zoning ordinance, but whether its use of the building as a student residence was nonconforming with the 'in conjunction with' requirement"; (2) the ZBA's interpretation of the "in conjunction with" requirement was not unreasonable or illegal; and (3) the Town's past lax enforcement of the zoning ordinance did not bar enforcement against SAE. The court went on to find "that there was sufficient evidence for the ZBA to reasonably conclude that SAE operated 'in conjunction with' the College prior to" the 1976 zoning amendment, explaining that "it is not for the court to gainsay the ZBA's determination that SAE's evidence was unpersuasive."

Next, the court rejected SAE's claims that the Town violated its equal protection and due process rights "by creating an unconstitutional classification within the Town's Institution district," reasoning that the claim bore no meaningful difference from SAE's selective enforcement claim, which had been disposed of by the Alpha Delta opinion. Similarly, the court ruled that Alpha Delta disposed of SAE's administrative gloss argument because it held the phrase "in conjunction with" to be plain and unambiguous.

The court further reasoned that SAE's claim that the ZBA's decision amounted to a taking was "starkly contradicted by SAE's own claims" that the property "is also 'used as a gathering hall for Fraternity meetings, events, and alumni functions, an academic study space for members of the fraternity and their invited guests, as a venue for alumni reunions and functions, and as a venue for guest speakers and visitors.'" The trial court noted that the ZBA's decision was "limited to 'continued use of the property as a residence.'" The court also rejected SAE's assertion that the ZBA's decision violated its rights to expressive association, noting that "[t]he certified record does not reflect any Town action that would prevent the members of SAE from assembling, either publicly or in the fraternity house, to discuss or publish their views." Finally, the court ruled that the ZBA did not act "in an ultra vires capacity" and deprive SAE of procedural due process in granting the rehearing because: (1) the ZBA has broad statutory authority to hear and decide appeals; and (2) there was no evidence in the record to support the assertion that the ZBA was unduly influenced by the allegedly biased member. SAE's motion to reconsider was denied, and this appeal followed.

II

Our review in zoning cases is limited. Merriam Farm, Inc. v. Town of Surry, 168 N.H. 197, 199 (2015). Factual findings of the ZBA are deemed prima facie lawful and reasonable, and the ZBA's decision will not be set aside by the superior court absent errors of law unless it is persuaded by the balance of probabilities, on the evidence before it, that the ZBA's decision is unlawful or unreasonable. Id.; see RSA 677:6 (2016). We will uphold the superior court's decision unless the evidence does not support it or it is legally erroneous. Merriam Farm, 168 N.H. at 199. The interpretation and application of a statute or ordinance is a question of law, and we review the trial court's ruling on such issues de novo. Id.

First, SAE argues that the zoning ordinance unlawfully delegates the ZBA's authority to the College. In its view, the "in conjunction with" requirement effectively concedes zoning power to the College because the College "reserves the right" to recognize or derecognize a fraternity for any reason it desires. Thus, recognition by the College is the only way for a property to operate "in conjunction with" another institutional use. We acknowledge that if formal recognition by the College were dispositive of the "in

conjunction with" requirement, an unconstitutional delegation problem might well exist. Cf. Fernald v. Bassett, 107 N.H. 282, 284 (1966) (recognizing that a local zoning ordinance that conferred upon a private landowner the authority to grant a special exception to another landowner was an unauthorized delegation of authority). However, consistent with our longstanding practice, we will not construe a legislative enactment as unconstitutional when it is susceptible to a construction rendering it constitutional. Duncan v. State, 166 N.H. 630, 637 (2014). Therefore, we hold that the definition of "in conjunction with" that we adopted in Alpha Delta does not treat recognition by the College as the sole determinant of whether SAE's use of its property complies with the terms of the ordinance.

Relying on the dictionary definition of the word "conjunction," we held in Alpha Delta that the plain and unambiguous meaning of the word, as used in the ordinance, meant that a property's use "must have some union, association or combination with the College." Alpha Delta, 169 N.H. at 754. In Alpha Delta, the ZBA found, and the trial court affirmed, that "Alpha Delta offered no evidence of any association or relationship with the College following derecognition." Id. We agreed that the record supported the further finding that Alpha Delta was no longer operating "in conjunction with" the College. Id. However, it does not follow from our holding in Alpha Delta that formal recognition by the College is the only way that a property's use would operate "in conjunction with" another institutional use in the district. Rather, the outcome in Alpha Delta was reliant on the facts as they existed in that case.[1] Thus, in Alpha Delta, we did not have the occasion to address the issue before us today. Squarely facing that issue now, we conclude that derecognition by the College is merely one factor to be considered by the ZBA when it determines whether the "in conjunction with" requirement has been met. Accordingly, notwithstanding derecognition, in an appropriate case the ZBA may determine, depending upon all the circumstances, that a fraternity such as SAE continues to use its property "in conjunction with" the College or with another institutional use in the district. Construing the ordinance in this fashion avoids the issue of any arguable improper delegation of ZBA authority to the College; as so construed, it is clear that the determination of whether the "in conjunction with" requirement is met is controlled by the ZBA, not the College.

The above construction of the ordinance does not aid SAE in this case, however. In the proceedings before the ZBA, SAE took pains to distance itself from the College and put forth substantial evidence that it wanted no relationship with the College. Consequently, on the record before it, the ZBA was justified in finding that SAE "offered no evidence of any association or

[1] Importantly, in Alpha Delta, the fraternity declined to pursue on appeal its argument before both the ZBA and trial court that, despite derecognition, the mere circumstance of its continuing to function as a place where more than three unrelated students attending the College resided was sufficient to satisfy the "in conjunction with" requirement. See Alpha Delta, 169 N.H. at 748, 749.

relationship with the College" following derecognition, and thus was no longer operating "in conjunction with" the College.

Next, SAE argues that it does not need to associate itself with the College because it is itself an "Institution" as defined by the ordinance. Table 204.4 of the zoning ordinance defines the "Objective" of the Institution district as follows:

> The chief present land use in the district, and the use that can be expected in the future, is institutional. This use has certain peculiar needs that best can be met by identifying it as a special district. In addition to the normal institutional uses in this area, certain complementary and support facilities are desirable as Special Exceptions. Because of the specialized nature of these institutions, these support and complementary land uses involve a selective list of residential, commercial and public uses which are desirable in such a district providing the necessary safeguards are incorporated. It is the intent of this provision to permit or allow institutions to use their land for uses related to the purposes of the institutions.

The table also contains a list of permitted uses within the district, as well as a list of uses allowed by special exception. The ZBA did not consider whether SAE's use of the property fell within one of these permitted institutional uses because the ZBA concluded that the term "Institution" as used in the zoning ordinance was intended to cover only "major institutions" such as the College, the former Mary Hitchcock Hospital, and certain other entities, and that SAE was not a "major institution." In reaching its decision, the ZBA relied upon language contained in the 1976 amended ordinance, which has not been retained in subsequent versions of the ordinance. That language, moreover, does not limit the scope of institutions to "major institutions." Therefore, the ZBA's finding that SAE did not qualify as an "Institution" was predicated upon its erroneously narrow interpretation of the term "Institution." Accordingly, we vacate the ZBA's ruling on this issue and remand the case to the ZBA for further proceedings consistent with this opinion. See, e.g., Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 583 (2005). On remand, if the ZBA finds that SAE is an "Institution," the ZBA should then address SAE's argument that its residential use is allowed. In light of this ruling, we need not consider SAE's claim that the Town has engaged in a taking by restricting SAE's residential use of the property.

SAE further argues that the trial court erred by failing to rule that its equal protection rights were violated by the Town's conduct. According to SAE, the Town created an illegal classification of those fraternal institutions that severed ties with the College before 2015 and those that severed ties after 2015. We agree with both the trial court and the Town that this argument

merely recasts SAE's selective enforcement claim, which we already rejected in Alpha Delta. See Alpha Delta, 169 N.H. at 753. The crux of SAE's argument is that "[p]rior to 2015, the Town never enforced Section 902 against a landowner whose fraternity tenant had severed ties" with the College. In fact, SAE directly states: "The Town's selective enforcement of the Zoning Ordinance marked by its 2015 policy change indisputably was conscious and intentional." We squarely addressed the selective enforcement argument in Alpha Delta, holding that "the mere fact that a Town may have been lax in its enforcement in the past does not prohibit enforcement in the present." Id. at 753 (brackets and quotation omitted). SAE has neither asked us to revisit our holding in Alpha Delta, nor has it sought to distinguish that case, and we see no reason to depart from the decision reached therein.

SAE also contends that the ZBA, and in turn the trial court, erred by "failing to apply the correct legal timeframe of reference for nonconforming uses." Specifically, SAE argues that because the College did not present documentary evidence that the fraternity associated itself with the College between 1972 and 1976, the ZBA was required to find that SAE did not operate "in conjunction with" the College in those years immediately before the zoning amendment took effect. But there was both ample evidence of an association between SAE and the College in the decades prior to 1972 and an absence of any explicit evidence that the College had altered the tenor of its relationship with SAE during the 1972 to 1976 time frame. The ZBA, as fact finder, was therefore free to infer that such association continued to exist between 1972 and 1976. Cf. State v. Palumbo, 113 N.H. 329, 330 (1973) (noting that the fact finder "may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided that they can be reasonably drawn therefrom").

In essence, SAE takes issue with the fact that the ZBA rejected portions of its evidence as irrelevant but made factual findings based on inferences it drew from the evidence presented by the College. It is well settled, however, that the ZBA is free to accept or reject proffered evidence as long as the decision is reasonable. See, e.g., Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 519 (2011) ("It was for the ZBA, however, to resolve conflicts in evidence and assess the credibility of the offers of proof."); Burke v. Town of Jaffrey, 122 N.H. 510, 514 (1982) ("The resolution of conflicts in the evidence and the determination of issues of fact are functions of the board."). Simply because the ZBA rejected SAE's evidence in favor of contrary evidence does not mean it acted unreasonably in reaching its decision. In turn, the trial court was not obligated to second guess the ZBA or make contrary factual findings, as it was acting in an appellate capacity and not as a fact finder. See Chester Rod & Gun Club, 152 N.H. at 583. Having reviewed the record submitted on appeal, we conclude that the ZBA acted reasonably in reaching its decision and that the trial court did not commit error in upholding the decision. See Merriam Farm, 168 N.H. at 199.

Finally, SAE claims that the Town violated its procedural due process rights by granting the College's motion for rehearing. We are not persuaded. The ZBA is given broad authority to grant a rehearing upon motion of an aggrieved party, see RSA 677:2 (2016), and we have recognized the inherent authority of local land use boards "to reverse themselves at any time prior to final decision if the interests of justice so require," 74 Cox St. v. City of Nashua, 156 N.H. 228, 231 (2007). Nor do we agree that reversal is required based on SAE's allegation that the ZBA member who drafted the initial decision and participated in the decision to grant the rehearing was biased. The mere fact the ZBA member requested that Dartmouth, an abutter, be notified of the decision does not, in and of itself, establish a bias; and SAE has not cited any authority supporting a contrary conclusion. In the first place, directing the zoning administrator to distribute the decision to the College did not constitute an ex parte communication. The e-mail from the ZBA to the zoning administrator was a communication within the municipal body. Moreover, the decision itself is a publicly available document and SAE was provided with a copy of it. Thus, we agree with the trial court that SAE's procedural due process rights were not violated.

We note that SAE presented 18 issues in its notice of appeal for our review but briefed only six. To the extent that this opinion does not dispose of the issues not briefed, we deem them waived. See Town of Londonderry v. Mesiti Dev., 168 N.H. 377, 379-80 (2015) (noting that issues raised in the notice of appeal but not briefed are deemed waived).

To summarize, we affirm the rulings of the ZBA on all issues addressed herein except that of whether SAE itself qualifies as an "Institution" in its own right under the zoning ordinance. As to that issue, we vacate the ruling of the ZBA and remand for further proceedings consistent with this opinion.

Affirmed in part; vacated in part; and remanded.

HICKS, HANTZ MARCONI, and DONOVAN, JJ., concurred; SMUKLER, J., retired superior court justice, specially assigned under RSA 490:3, concurred.

NY Court of Appeals and It's Lasting Impact

What is Old is New Again

John R. Nolon

I. Rogers v Tarrytown ***Rodgers v. Tarrytown*, 302 N.Y. 115 (1951)**

- Spot zoning
  - If an ordinance is enacted in accordance with a comprehensive plan, it cannot be considered spot zoning, even if it singles out a single plot.
- Changed or changing conditions call for changed plans
  - Persons who own property in a particular zone or district have no vested rights to that classification if the public interest demands otherwise
  - How properties are to be classified or reclassified rests with the local legislative body, so long as their decision making is not arbitrary.
- Floating zones
  - The uncertainty as to the location and boundaries does not preempt the validity of the ordinance.
    - The ordinance merely provides the mechanics pursuant to which property owners might, in the future, apply for redistricting of property.
  - "to condemn the action taken by the board in effectuating a perfectly permissible zoning scheme and to strike down the ordinance designed to carry out that scheme merely because the board had employed two steps to accomplish what may be, and usually is, done in one, would be to exalt form over substance and sacrifice substance to form."

II. Boomer v Atlantic Cement ***Boomer v. Atlantic Cement Co*., 26 N.Y.2d 219 (1970)**

- The limits of common law
  - Private litigation has its limit to addressing environmental problems
  - The court is not equipped enough to implement effective policy to address pollution and climate change
  - It is the responsibility of the government to take action for environmental policy
  - "This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant -- one of many -- in the Hudson River valley.
- Permanent damages
  - Due to the disparity between the loss of value to the homeowner and the loss of value to Atlantic Cement by ceasing production an injunction would not be an appropriate remedy
    - Weighed the benefit of allowing Atlantic to continue as is against the interest of the homeowner

- Seeking equity through creative means
    - An injunction would result in a permanent taking of property
    - A temporary injunction would prevent the nuisance from occurring but provides no assurances for the future
    - Permanent damages that would cease after the industry found a solution for the nuisance would motivate a corporation to research and find a method to prevent the nuisance occurring in the future.
- "The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court."

III. Golden v Ramapo ***Golden v. Planning Bd. of Ramapo*****, 30 N.Y.2d 359 (1972)**

- Techniques
    - Moratorium on growth
        - If a municipality is declaring a moratorium, they must lay out the purpose, the standards, length of time, and what you will be doing during the moratorium
    - Special use permits
        - By requiring special permits before applying for approval of a subdivision, a municipality may control growth more effectively.
            - Adopting a new class of special use permits
            - Conditions that require that water, electric, and waste services already be existing in order to develop (Town Law §277)
    - Capital programs and capital budgets.
        - Program limiting the budget to slow the installation of capital improvements, therefore slowing growth.
- Growth Management and phased growth
    - Ordinances must promote the general welfare of the town, and there must be a rationally related to the general welfare in order to be constitutional.
    - A planning board has the right to refuse approval of subdivision plans in the absence
    - Timed growth does not impose a permanent restriction upon land use
    - "where it is clear that existing physical and financial resources of the community are inadequate to furnish the essential services and facilities where a substantial increase in population requires, there is a rational basis for phased growth."
- "What we will not countenance, then, under any guise, is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced, cohesive community dedicated to the efficient utilization of land."

IV. Berenson v. Town of New Castle ***Berenson v. Town of New Castle*****, 44 A.D.2d 564 (1975)**

- Providing diverse housing opportunities and dense development
    - "The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land."
    - "In enacting a zoning ordinance, consideration must be given to regional housing needs and requirements."
        - There must be a balancing of local goals that maintain local community standards and goals that promote the greater public interest.
    - Zoning law that is enacted for an exclusionary purpose would be a valid rationale for finding zoning law unconstitutional

V. Sun Beach Real Estate v Anderson ***Sun Beach Real Estate Dev. Corp.*** **v. Anderson, 98 A.D.2d 367 (1983)**

- Shifting priorities
    - An application for preliminary approval of a subdivision is not complete until a SEQRA review has been completed.
    - The court favored the environmental review deadlines were given priority over the subdivision review deadline
    - The deadline extension showed the court realizing it's role in protecting the environment.
- When a planning agency has determined that development of the subdivision might significantly affect the environment the application for preliminary approval is not complete until DEIS has been filed and completed
- "we have no difficulty in according priority to SEQEA because the legislative declaration of purpose in that statue makes it obvious that protection of the environment for the use and enjoyment of this and all future generation far overshadows the rights of developers to obtain prompt action on their proposals"

VI. McMinn v Town of Oyster Bay ***McMinn v. Oyster Bay*****, 105 A.D.2d 46 (1985)**

- What's the relationship?
    - Two-part substantive due process test
        - The ordinance must further a government interest
        - An ordinance must be reasonably related to a legitimate government purpose.
    - Possible legitimate government purposes
        - Preserving the character of a neighborhood
        - Reducing parking
        - Reducing traffic
        - Control population density
        - Prevention of noise and disturbance
    - "The ordinance is fatally overbroad because it forbids segments of the population … from living in a house with another person or other persons who are not blood, marital or adoptive relatives, a use which poses no threat to the maintenance of the governmental objectives sought to be achieved. Those objectives can be achieved constitutionally by prohibiting

hotels or rooming houses in residential districts, invoking criminal and general power statutes to control disruptive behavior, imposing single housekeeping unit criteria in zoning ordinances, and establishing off-street parking requirements."

VII. Goldblatt v Town of Hempstead

- New York Court of Appeals ***Hempstead v. Goldblatt*, 9 N.Y.2d 101 (1961)**Defendants fail to demonstrate that the safety standards required by the town are an unreasonable means to protect public interests.
- While the conditions do make it difficult to conduct a mining business, it does not preclude a business from existing on the property.
- Conditions may be placed on properties for the good of the community.
- "There must be progress, and if in its march, private interests are in the way they must yield to the good of the community."
- "It is not the function of the courts but of legislators to determine the reasonableness, wisdom, and propriety of the regulations needed to protect the community."
    - So long as an ordinance paces rational basis review, the court is not in a position to overturn an ordinance.
- Supreme Court of the United State ***Goldblatt v. Hempstead*, 369 U.S. 590 (1962)**
    - A regulation may deprive a property of its most beneficial use and not being a taking
        - Although a comparison of value before and after is relevant it, is by no mean the sole grounds to determine if a taking occurred
    - The regulation must be excessively burdensome to the use of the land in order to be a regulatory taking
    - If the use could have been enjoined as a nuisance prior to the regulation, the regulation cannot be a taking

VIII. Penn Central

- New York Court of Appeals ***Penn Cent. Transp. Co. v. New York*, 42 N.Y.2d 324 (1977)**
    - "Land use regulation often diminishes the value of the property to the landowner. Constitutional standards, however, are offended only when that diminution leaves the owner with no reasonable use of the property."
    - "For this case, and for the cases which may follow in its wake, deference to the unknown must be accorded."
- Supreme Court ***Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)**
    - owners could not establish a "taking" merely by showing that they had been denied the right to exploit the airspace.
        - The ordinance did not interfere with the present use of the terminal
            - While they were not able to increase the income, Penn Central was already able to yield a reasonable return on their investment.

    - Their right to build was not denied but was transferred to other areas where they could have developed.
- Even though the regulation affected some owners more severely than others, the regulation does not rise to the level of a taking.
- Local governments may use land use regulation to enhance the quality of life by preserving the aesthetic features of the area.
- Created the three-factor balancing test to determine if a taking occurred
    - The economic effect of the regulation
    - Interference with reasonable investment-backed expectation
    - The character of the regulation

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0233p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM HAROLD THOMAS, JR.,

Plaintiff-Appellee,

v.

CLAY BRIGHT, Commissioner of Tennessee Department of Transportation,

Defendant-Appellant.

No. 17-6238

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 2:13-cv-02987—Jon Phipps McCalla, District Judge.

Argued: January 30, 2019

Decided and Filed: September 11, 2019

Before: COLE, Chief Judge; BATCHELDER and DONALD, Circuit Judges.

COUNSEL

ARGUED: Sarah Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Owen Yeates, INSTITUTE FOR FREE SPEECH, Alexandria, Virginia, for Appellee. Lindsey Powell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Eugene Volokh, UCLA SCHOOL OF LAW, Los Angeles, California, for Amici Curiae. **ON BRIEF:** Sarah Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Owen Yeates, Allen Dickerson, INSTITUTE FOR FREE SPEECH, Alexandria, Virginia, for Appellee. Lindsey Powell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Eugene Volokh, UCLA SCHOOL OF LAW, Los Angeles, California, Kannon K. Shanmugam, A. Joshua Podoll, WILLIAMS & CONNOLLY LLP, Washington, D.C., Ilya Shapiro, CATO INSTITUTE, Washington, D.C., Braden H. Boucek, BEACON CENTER OF TENNESSEE, Nashville, Tennessee, Timothy Sandefur, GOLDWATER INSTITUTE, Phoenix, Arizona, Robert Alt, THE BUCKEYE INSTITUTE, Columbus, Ohio, for Amici Curiae.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Under Tennessee's Billboard Act, anyone intending to post a sign along a Tennessee roadway must apply to the Tennessee Department of Transportation (TDOT) for a permit, unless the sign falls within one of the Act's exceptions. This case presents a constitutional challenge to the Act, based on the "on-premises exception" for signs relating to the use or purpose of the real property (premises) on which the sign is physically located, typically signs advertising the activities, products, or services offered at that location.

William Thomas owned a billboard on an otherwise vacant lot and posted a sign on it supporting the 2012 U.S. Summer Olympics Team. Tennessee ordered him to remove it because the State had denied him a permit and the sign did not qualify for the exception, given that there were no activities on the lot to which the sign could possibly refer. Thomas sued, claiming that this application of the Billboard Act violated the First Amendment. The district court held the Act unconstitutional because the on-premises exception was content-based and thus subject to strict scrutiny, failed to survive strict scrutiny, and was not severable from the rest of the Act. We affirm, recognizing that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), overruled our existing circuit precedent on this issue in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987).

I. BACKGROUND

A. Tennessee's Billboard Act

In 1965, Congress enacted the Federal Highway Beautification Act ("HBA"), 23 U.S.C. § 131, which sought to "promote the safety and recreational value of public travel, and to preserve natural beauty." *Id.* The HBA conditions ten percent of a State's federal highway funds on the State's maintaining "effective control" of signs within 660 feet of an interstate or primary highway, *id*. at § 131(b), meaning the State must limit signage to (1) "directional and official signs and notices," (2) "advertising [for] the sale or lease of property upon which

[the sign is] located," (3) "advertising [for] activities conducted on the property on which [the sign is] located," (4) "landmark[s] . . . or historic or artistic significance," or (5) "advertising [for] the distribution by nonprofit organizations of free coffee." *Id*. at § 131(c). The State may also, with U.S. Department of Transportation approval, permit signs in areas zoned industrial or commercial. *Id*. at § 131(d).

In order to comply with the HBA and ensure full federal funding, Tennessee enacted the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tenn. Code Ann. (T.C.A.) § 54-21-101, *et seq*. The Billboard Act parallels the HBA in most relevant respects and prohibits all outdoor signage within 660 feet of a public roadway unless expressly permitted by TDOT permit. *Id*. § -103. But the Act also provides exceptions under which certain signs may be posted without permit, including an exception for signage "advertising activities conducted on the property on which [the sign is] located." *Id*. § -103(3). This is referred to as the "on-premises exception" and corresponds to the HBA's third limitation. Under the Act's implementing regulations:

> A sign will be considered to be an on-premise[s] sign if it meets the following requirements:
>
> (a) Premise[s] - The sign must be located on the same premises as the activity or property advertised.
>
> (b) Purpose - The sign must have as its purpose (1) the identification of the activity, or its products or services, or (2) the sale or lease of the property on which the sign is located, rather than the purpose of general advertising.

Tenn. Comp. R. & Regs. (T.C.R.R.) § 1680-02-03-.06(2). The regulations elaborate further:

> The following criteria shall be used for determining whether a sign has as its purpose [] the identification of the activity located on the premises or its products or services, . . . rather than the business of outdoor advertising.
>
> (a) General
>
> 1. Any sign which consists solely of the name of the establishment is an on-premises sign.
>
> 2. A sign which identifies the establishment's principle [sic] or accessory product or services offered on the premises is an on-premises sign.

> 3. An example of an accessory product would be a brand of tires offered for sale at a service station.
>
> (b) Business of Outdoor Advertising
>
> 1. When an outdoor advertising device (1) brings rental income to the property owner, or (2) consists principally of brand name or trade name advertising, or (3) the product or service advertised is only incidental to the principle [sic] activity, it shall be considered the business of outdoor advertising and *not an on-premises sign*. An example would be a typical billboard located on the top of a service station building that advertised a brand of cigarettes or chewing gum which is incidentally sold in a vending machine on the property.
> 2. An outdoor advertising device which advertises activities conducted on the premises, but which also advertises, in a prominent manner, activities not conducted on the premises, is *not an on-premises sign*. An example would be a sign advertising a motel or restaurant not located on the premises with a notation or attachment stating 'Skeet Range Here,' or 'Dog Kennels Here.' The on-premises activity would only be the skeet range or dog kennels.

T.C.R.R. § 1680-02-03-.06(4) (emphasis added; alteration of "premise" to "premises" throughout). So, to recap, and to be a bit more specific, the sign must (1) be physically located on the same "premises" (real property) as the activity being advertised on the sign, and must (2) have as its purpose the identification of that activity occurring on the premises, or the products or services provided by that activity on the premises, not the purpose of advertising generally or advertising an activity, product, or service occurring elsewhere.

Finally, we would be remiss if we did not acknowledge that, by all indications, the Act was intended to, and routinely does, apply to only commercial speech, namely, advertising. But in this case, Tennessee applied the Act to restrict speech conveying an idea: "non-commercial speech" that was not advertising nor commercial in any way, but might be labeled "patriotic speech."

B. State Court Litigation

In 2006, Thomas—the owner of over 30 billboards in Tennessee—applied to the TDOT for a permit to erect a billboard on a vacant lot, hereinafter referred to as the "Crossroads Ford billboard," on which he would display a commercial advertisement. TDOT denied the

application but Thomas constructed the Crossroads Ford billboard and posted his sign anyway. TDOT sued in the Tennessee state court, claiming that Thomas was in violation of the Billboard Act and also arguing that the Crossroads Ford billboard could not satisfy the on-premises exception because it was located on a vacant lot with no on-premises activity whatsoever.

The state trial court found "substantial evidence of selective and vindictive enforcement against [Thomas]," including emails from TDOT employees working in concert with a competitor of Thomas's to "defeat" him, and unsolicited emails sent from TDOT employees to advertisers on Thomas's other billboards suggesting that his billboards were illegal and that associating with Thomas would reflect "negatively" on them. The court granted a temporary restraining order forbidding TDOT from enforcing the Billboard Act against Thomas's Crossroads Ford billboard until further notice. Thomas subsequently obtained a billboard permit from the Memphis and Shelby County (Tenn.) Office of Construction Code Enforcement but did not obtain a state permit from TDOT. He used the Crossroads Ford billboard for commercial advertising until 2012. Meanwhile, TDOT had appealed the decision and the Tennessee Court of Appeals vacated the judgment and remanded the case, instructing the trial court to hear Tennessee's requests for relief. *State ex rel. Dep't of Transp. v. Thomas*, 336 S.W.3d 588, 608 (Tenn. Ct. App. 2010).

By 2012, Thomas had stopped posting commercial advertising on the Crossroads Ford billboard and instead had posted a message about free speech, which he later changed to "Go USA!," imposed on a large American flag, in support of the USA Olympic Team in the 2012 Summer Games. On remand, the state trial court found that this, the conveyance of an idea, was not commercial advertising, and was excepted from TDOT's authority to enforce the Billboard Act. TDOT again appealed and the Tennessee Court of Appeals again reversed, reiterating that, "[u]nless [the sign] fits within one of the exceptions named in the Act, if he does not have a State billboard permit, [Thomas] is not allowed to erect a billboard[,] [p]eriod[,] . . . [r]egardless of what message is displayed on the Crossroads Ford site billboard." *State ex rel. Dep't of Transp. v. Thomas*, 2014 WL 6992126 at *7 (Tenn. Ct. App. Dec. 11, 2014) (editorial mark, quotation marks, and citation omitted).

On remand, Thomas relied on the district court's opinion here, which was proceeding simultaneously, to persuade the state trial court to reinstate its original order (in his favor), but the Tennessee Court of Appeals again reversed, holding that "the 2017 [f]ederal [d]istrict [c]ourt [r]uling does not represent a change in controlling law for purposes of the law of the case doctrine," and this time reassigning the case to a different trial judge. *State ex rel. Dep't of Transp. v. Thomas*, 2019 WL 1602011, at *8 (Tenn. Ct. App. Apr. 15, 2019). Thus, state proceedings are ongoing.

C. Federal Court Litigation

In 2013, Thomas sued in federal court, alleging that the Billboard Act was an unconstitutional restriction of speech in violation of the First Amendment. The district court ultimately agreed, quoting and relying on *Reed*, 135 S. Ct. at 2222, for the proposition that "a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Thomas v. Schroer*, 248 F. Supp. 3d 868, 871 (W.D. Tenn. 2017) (quotation and editorial marks omitted). The district court explained that, under the Act, "the only way to determine whether a sign is an on-premise[s] sign, is to consider the content of the sign and determine whether that content is sufficiently related to the activities conducted on the property on which they are located," *id*. at 879 (quotation marks and record citation omitted), so the Act "is a content-based regulation that implicates Thomas's noncommercial speech," *id*. at 878. This required strict scrutiny, which the Act "does not survive," *id.*, because Tennessee's asserted interests are not compelling, *id*. at 881-82, nor is the Act narrowly tailored to achieve them, *id*. at 885. The court held the Billboard Act unconstitutional as applied to the Crossroads Ford billboard sign. *Id*.

Thomas moved to expand the relief he sought, asking the district court to permanently enjoin Tennessee from enforcing the Billboard Act against *all* signs or at least against *all of his* signs. Thomas argued that his challenge had been both facial and as-applied, but the court held that it was only as-applied and Thomas had not justified an expansion of the relief sought. *Thomas v. Schroer*, No. 13-cv-02987, 2017 WL 6489144, at *1 (W.D. Tenn. Sept. 20, 2017) ("On March 31, 2017, the [c]ourt found the Billboard Act, as applied to Thomas's non-

commercial messages on his Crossroads Ford sign, a violation of the Free Speech provision of the First Amendment of the United States Constitution."); *see also id.* at *7 ("Upon review of the record, it is clear that [Thomas] has not alleged the Billboard Act is unconstitutional in all its applications, or even unconstitutional as to a substantial number of applications."). The court permanently enjoined Tennessee from enforcing the Billboard Act against Thomas's Crossroads Ford sign. *Id*. at *10.

At the same time, Tennessee had moved the court to reconsider its holding that the Billboard Act was not severable. The court denied the motion, finding that there was no clear or prudent line at which to sever, *id*. at *5, and nothing in the Act said that it was severable, as is required for severability under Tennessee law, or that the Tennessee legislature would have enacted it without the unconstitutional portions, *id*. at *3. Thus, the court declined to save the Act's commercial or off-premises aspects by severing the on-premises exception, and instead left that for the Tennessee legislature.[1] *Id*. at *5. Thomas resumed commercial advertising on his Crossroads Ford billboard and Tennessee appealed the judgment here.

II. ANALYSIS

Tennessee appeals the district court's holding that the Billboard Act, as effectuated by the on-premises exception, is an unconstitutional restriction of Thomas's non-commercial speech at the Crossroads Ford billboard location. We review de novo a district court's decision on the constitutionality of a State statute, including whether the statute satisfies the applicable level of scrutiny. *Assoc. Gen. Contr. of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734 (6th Cir. 2000).

A. Exceptions as Restrictions

The restriction here is based on an exception to a regulation, which makes the exception—the *denial of the exception*, actually—the restriction. This posture does not change our analysis.

[1]The district court's rulings reflect an apparent inconsistency: on one hand, the Act was not severable and entirely unconstitutional, but on the other hand, the court limited its as-applied holding to Thomas's non-commercial speech on his Crossroads Ford billboard. Whatever the practical effects, this does not affect our analysis in this appeal.

Textually, the Billboard Act is a blanket, content-neutral prohibition on any and all signage speech except for speech that satisfies an exception; here, the on-premises exception. In this way, Tennessee favors certain content (i.e., the excepted content) over others, so the Act, "on its face," discriminates against that other content. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-66 (2011). The fact that this content-based aspect is in the *exception* to the general restriction, rather than the restriction itself, does not save it from this analysis. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Selective exclusions from [speech restrictions] may not be based on content alone, and may not be justified by reference to content alone."); *see City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (the notion that the exceptions to a restriction of speech may be insufficiently expansive "is firmly grounded in basic First Amendment principles").

B. Severability

The district court held that the Billboard Act was not severable, and Tennessee has not challenged that holding in this appeal. We will not *sua sponte* address the merits of that issue.

Tennessee had argued to the district court that the non-commercial, on-site exception was severable from the remainder of the Act, particularly the commercial or off-site applications, and, after losing that argument, moved the court to reconsider, which the court denied:

> [T]he [c]ourt declines (1) to find the Billboard Act's provisions concerning outdoor advertising severable as to the challenged provisions or (2) to sever the non-commercial application of those provisions. The Billboard Act does not explicitly address whether it could function without the on-premises/off-premises provision or without application to non-commercial speech.

Thomas, 2017 WL 6489144, at *4. But Tennessee did not raise severability here, in either its briefing or during oral argument. We do not decide issues or arguments that are not directed to us, nor do we make or assume them on behalf of litigants. *See Gradisher v. City of Akron*, 794 F.3d 574, 586 (6th Cir. 2015). Therefore, we will not disturb the district court's determination that the Act, as applied in this case, is unconstitutional inasmuch as the on-premises exception is not severable from it, and that "it is for the Tennessee State Legislature—and not this [c]ourt—to clarify the Legislature's intent regarding the Billboard Act in the wake of *Reed*." *Thomas*, 2017 WL 6489144, at *5.

C. Content-Based Restrictions

The Billboard Act's on-premises exception scheme is a content-based regulation of (restriction on) free speech. Although we discuss this at length, this is neither a close call nor a difficult question. If not for Tennessee's proffered disputes, we would label this "indisputable."

When a case implicates a core constitutional right, such as a First Amendment right, we must determine the level of scrutiny to apply based on whether the restriction is content-based or content-neutral. *Reed*, 135 S. Ct. at 2226-27. Because Thomas's challenge to the Act concerned only non-commercial speech ("Go USA!") and this appeal stems from the district court's as-applied holding, we necessarily confine the analysis here to non-commercial speech and need not consider the commercial-speech doctrine. And, as just explained, the provision is not severable.

Under the First Amendment, the State may regulate certain aspects of speech but has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Content-based regulations are "presumptively unconstitutional" and analyzed under strict scrutiny. *Reed*, 135 S. Ct. at 2226. Content-neutral regulations of non-commercial speech need only survive intermediate scrutiny. *Id*. at 2228.

Although "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task," *Turner Broad. Sys. Inc., v. FCC*, 512 U.S. 622, 642 (1994), the Supreme Court has provided several means for doing so. As applicable here, a law regulating speech is facially content-based if it "draws distinctions based on the message," *Reed*, 135 S. Ct. at 2227; if it "distinguish[es] among different speakers, allowing speech by some but not others," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010); or if, in its application, "it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)) (quotation marks omitted).[2]

[2]The Court has also recognized that some laws "though facially content-neutral, will be considered content-based," *Reed*, 135 S. Ct. at 2227, such as if the law "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message [the prohibited speech] conveys." *Id*. (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (quotation marks omitted).

The Billboard Act's on-premises exception allows a property owner to avoid the permitting process and proceed to post a sign without any permit, so long as the sign is "advertising activities conducted on the property on which [the sign is] located." T.C.A. § 54-21-103(3). The enabling regulation specifies that the sign must be "located on the same premises as the activity" and "have as its purpose [the] identification of the activity[,] products[,] or services [offered on that same premises]." T.C.R.R. § 1680-02-03-.06(2). Therefore, to determine whether the on-premises exception does or does not apply (i.e., whether the sign satisfies or violates the Act), the Tennessee official must read the message written on the sign and determine its meaning, function, or purpose.

The Supreme Court has made plain that a purpose component in a scheme such as this is content-based: "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its *function or purpose*." *Reed*, 135 S. Ct. at 2227 (emphasis added). Clearly, this regulatory scheme requires Tennessee officials to assess the meaning and purpose of the sign's message in order to determine if the sign violated the Act. *See McCullen*, 573 U.S. at 479. To digress a bit, a sign written in a foreign language would have to be translated (and interpreted) before a Tennessee official could determine whether the on-premises exception would apply or the sign violated the Act. There is no way to make those decisions without understanding the content of the message. More to the point here, Tennessee's own agent confirmed at trial that officials would be "looking at the content of [the] sign to make [a] determination whether it's on-premises or off-premises." That makes the Billboard Act—via the on-premises exception—content based. "[A] regulatory scheme [that] requires a municipality to examine the content of a sign to determine which ordinance to apply . . . appears to run afoul of *Reed*'s central teaching." *Wagner v. City of Garfield Heights*, 675 F. App'x 599, 604 (6th Cir. 2017) (quotations omitted).

Moreover, under this scheme, to determine whether a violation has occurred, the Tennessee official not only "examines the content of the *message* that is conveyed," *see McCullen*, 573 U.S. at 479 (emphasis added), but must also identify, assess, and categorize the

---

Because the Billboard Act is facially content-based, however, we need not proceed to these other means in this analysis.

activity conducted at that location and determine whether the content of the message sufficiently relates to that activity, product, or service. *See* T.C.R.R. § 1680-02-03-.06(2). The examples provided in the Tennessee regulations are relatively straightforward: a sign on a service station advertising a brand of tires versus one advertising a brand of cigarettes. *Compare* -.06(4)(a)(3) *with* (b)(1). And the present case is hardly more difficult, given that the Crossroads Billboard is on a vacant lot. But what if this sign, with its "Go USA!" and American flag referencing the Summer Olympics were posted on a U.S. Olympic Committee facility? Or on an unaffiliated athletic training facility, a retail store selling U.S. Olympic Team merchandise, an NBC station broadcasting the Games, a travel agency offering discount trips to London for the Games, a casino with wagering on Olympic events, an animal shelter that names each of the pets after an American Olympic athlete because that faciliates adoptions, or a Korean consulate attempting to extend diplomatic good will? Which of these activities, products, or services falls satisfactorily within the meaning, function, or purpose of the sign so as to meet the exception? More importantly, who decides? The Tennessee official decides.

This brings us back around to Tennessee's argument that *nothing* at the Crossroads Ford billboard location could satisfy the exception because *nothing* happens there; it is a vacant lot. But rather than render the scheme content-neutral, that redoubles the importance of the content of the message. Suppose the sign said: "vacant lot, lots of vacancy," "free air—stop and enjoy some," or "fill wanted." Those messages might or could be the lot's activities, products, or services.

Tennessee contends that the Billboard Act's on-premises exception is not content-based because the operative distinction is "between signs that are related to the property on which they are located and those which are not . . . [meaning] the on-premise[s] exception distinguishes between signs based on their location, and not their content." That is, the content of the message is irrelevant; all that matters is its location—*signs can say whatever they want so long as they are in the correct location*. But Tennessee's argument is specious: whether the Act limits on-premises signs to only certain messages or limits certain messages from on-premises locations, the limitation depends on the content of the message. It does not limit signs from or to locations

regardless of the messages—those would be the (content-neutral) limitations that would fit its argument.

Even if Tennessee were correct, this "location" argument would simply trade one problem for another: instead of discriminating against the signs' messages, the Act would discriminate against the speaker. A law that allows a message but prohibits certain speakers from communicating that message is content-based. *See Turner*, 512 U.S. at 658 ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-94 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, [regulations] that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

Tennessee cites language from *Reed*, 135 S. Ct. at 2227, that the law in question there "depend[ed] entirely on the communicative content of the sign," for its argument that *Reed* means that a law is content-based only if it "depends entirely" on the content of a message. But that language was a factual statement describing the defendant's municipal code, not part of *Reed*'s analysis or holding. In any event, the Supreme Court has repeatedly held that laws combining content-based and content-neutral factors are nonetheless content-based. *See Mosley*, 408 U.S. at 98 (holding a law was content-based where it prohibited nonlabor-related picketing at a place of employment); *Carey v. Brown*, 447 U.S. 455, 460 (1980) (same); *Boos v. Barry*, 485 U.S. 312, 319 (1988) (holding a law was content-based where it prohibited speech critical of a foreign government within 500 feet of that government's embassy). In fact, in those cases, the Court used the same or similar "depends entirely" language to describe a necessarily content-based component even though it was combined with a content-neutral one. *See, e.g., Boos*, 485 U.S. at 318 (holding that restriction "depends entirely upon whether [the] signs are critical of the foreign government"). The Act's on-premises exception employs a similar conjunctive binary of location and purpose: a sign must meet *both* prongs to qualify. Either can render the whole provision content-based.

Tennessee also argues that an otherwise content-based law is content-neutral if the State's justifications for that law are content-neutral, relying on *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 590–94 (6th Cir. 1987), in which we considered a similar challenge to Kentucky's identical billboard law and held that it was not content-based because Kentucky's justifications were content-neutral. But *Reed* established that the State's justifications or motivations are relevant only if the law appears facially content-neutral:

> A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. . . . That is why we have repeatedly considered whether a law is content-neutral on its face *before* turning to the law's justification or purpose.

Reed, 135 S. Ct. at 2228 (quotations and citations omitted). In fact, *Reed* criticized the same argument Tennessee makes now: "The Court of Appeals . . . misunderstand[s] our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content-based on its face. That is incorrect." *Id*. Rather, while "a content-based purpose may be sufficient" to transform a facially content-neutral law into one that is content-based, "an innocuous justification cannot transform a facially content-based law into one that is content-neutral." *Id*. (citation omitted). Simply put, *Reed* overruled *Wheeler*, which is no longer good law.

Finally, Tennessee would have us reconstruct the *Reed* decision by engaging in a form of speculative vote-counting. All nine Justices joined the judgment in *Reed*, but three concurred in the judgment only, with Justice Kagan opining that she would have applied intermediate scrutiny, *id*. at 2238 (Kagan, J.), and three concurred in Justice Alito's "few words of further explanation," in which he identified some examples of state regulations that would not be content-based, including one for "[r]ules distinguishing between on-premises and off-premises signs." *Id*. at 2233 (Alito, J.). Tennessee pounces on this example and contends that the three Justices who joined Justice Alito would find an on/off-premises distinction content-neutral, as would the three who joined Justice Kagan—ergo, six of the nine Justices would find an on/off-premises distinction content-neutral. The district court appropriately made quick work of this argument:

> This Court agrees it is possible for a restriction that distinguishes between off- and on-premises signs to be content-neutral. For example, a regulation that defines an off-premise[s] sign as any sign within 500 feet of a building is content-neutral. But if the off-premises/on-premises distinction hinges on the content of the message, it is not a content-neutral restriction. A contrary finding would read Justice Alito's concurrence as disagreeing with the majority in *Reed*. The Court declines such a reading. Justice Alito's exemplary list of "some rules that would not be content-based" ought to be read in harmony with the majority's holding. [] Read in harmony with the majority, Justice Alito's concurrence enumerates an 'on-premises/off-premises' distinction that is not defined by the sign's content, but by the sign's physical location or other content-neutral factor.

Thomas, 248 F. Supp. 3d at 879. There might be many formulations of an on/off-premises distinction that are content-neutral, but the one before us is not one of them.

Tennessee's Billboard Act contains a non-severable regulation of speech based on the content of the message. Applied to Thomas's billboard, it is, therefore, a content-based regulation of non-commercial speech, which subjects it to strict scrutiny. *See Reed*, 135 S. Ct. at 2226–27.

D. Strict Scrutiny

For a content-based restriction of non-commercial speech to survive strict scrutiny, the State must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quotation omitted). Because the on-premises exception is not severable from the Billboard Act, we must consider the Act as a whole and analyze both Tennessee's interests and precisely how Tennessee has tailored the Act to achieve those interests.

1. Compelling State Interests

Tennessee proffers three "compelling state interests": public aesthetics, traffic safety, and safeguarding the constitutional rights of property owners. Tennessee furthers its interests in aesthetics and traffic safety through enforcement of the Billboard Act and the Act's general prohibition of signage. Tennessee pursues its interests in safeguarding the constitutional rights of property owners through the Billboard Act's exceptions, including the on-premises exception.

In *Reed*, 135 S. Ct. at 2231, the Court "assum[ed] for the sake of argument that [aesthetic appeal and traffic safety] are compelling governmental interests." In *Wagner*, 675 F. App'x at 607, we decided to "follow the Court's example in *Reed* and assume without deciding that [aesthetic appeal and traffic safety] are sufficiently compelling."

But the Supreme Court has repeatedly found a State's interest in public aesthetics to be only "substantial" (rather than compelling), which is the interest level of intermediate scrutiny. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425–29 (1993). Tennessee concedes that no court has ever found public aesthetics to be a *compelling* interest and presents no persuasive arguments for finding that it is, but nonetheless urges us to break new ground. We decline to do so.

Traffic safety presents a different scenario. In the Fourth Amendment context, the Supreme Court has recognized a compelling interest in "highway safety," *Mackey v. Montrym*, 443 U.S. 1, 19 (1979) (upholding a Massachusetts "implied consent" law for breathalyzer tests), and we have done likewise, *see Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 479–80 (6th Cir. 1991) (upholding an Ohio law requiring public bus drivers to submit to randomized drug tests). But neither the Supreme Court nor this court has issued any such holding in the First Amendment context. We would, again, be breaking new ground and decline to do so.

As an aside, the Court has held elsewhere (under intermediate scrutiny) that the State must show that its justifications for a restrictive law are "genuine [and] not hypothesized or invented *post-hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, we have persuasive evidence that Congress in enacting the HBA, and in turn Tennessee in enacting the Billboard Act, were motivated almost exclusively by aesthetic, not public safety, concerns. *See Brief for the Buckeye Institute as Amicus Curiae in Support of Appellee*, pgs. 4–11. Moreover, exceptions "diminish the credibility of the government's rationale for restricting speech in the first place." *Gilleo*, 512 U.S. at 52. The Billboard Act's ready exceptions, *see* T.C.A. §§ 54-21-103(4)-(5); -104; -107, undermine Tennessee's professed concern for traffic safety by allowing significant commercial signage that serves Tennessee's economic interests, which Tennessee concedes are not compelling. And, we note that, despite

"[a]ssuming for the sake of argument," that traffic safety is a compelling interest, the Court in *Reed*, 135 S. Ct. at 2231-32, nonetheless concluded that restrictions on non-commercial signs were not "justified by traditional safety concerns."

Finally, Tennessee argues that it has a compelling interest in safeguarding the constitutional rights of business and property owners, namely their First Amendment rights, through the on-premises exception to the Billboard Act. It is undoubtedly true that a State's interest in complying with its constitutional obligations is compelling. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Thomas concedes this point but objects to Tennessee's raising the argument here, protesting that Tennessee forfeited the issue by not raising it clearly to the district court. We agree—and Tennessee admits—that Tennessee could have done a better job of addressing this issue to the district court, but we proceed as if Tennessee sufficiently raised the issue and preserved it for appeal. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009).

2. Narrowly Tailored

To establish that a law regulating or restricting speech is narrowly tailored, "the Government carries the burden of showing that the challenged regulation advances the Government's [compelling] interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quotation omitted). While the regulation need not be perfectly tailored, the State's burden is not carried if the regulation "provides only ineffective or remote support" of the claimed compelling interest. *Greater New Orleans*, 527 U.S. at 188 (quotation omitted).

In *Metromedia*, 453 U.S. at 503, the Court addressed a billboard ordinance similar to Tennessee's Billboard Act. Under that ordinance:

> a sign advertising goods or services available on the property where the sign is located is allowed; [but] a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; [and] non-commercial advertising, unless [relating to the premises], is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most non-commercial messages.

Id. Finding the ordinance unconstitutional as applied to non-commercial speech, a divided court rendered a four-Justice plurality opinion, a two-Justice concurrence in the judgment only, and three separate dissents, each agreeing with different aspects of the plurality opinion or concurrence. *Id*. Later, in another First Amendment challenge to a sign ordinance, the Court affirmed both the plurality and concurrence as "two analytically distinct grounds for challenging the constitutionality of [an ordinance] regulating the display of signs." *Gilleo*, 512 U.S. at 50.

The first ground is if the law is overinclusive. *Metromedia*, 453 U.S. at 521-39 (Brennan, J., concurring in the judgment only). A content-based law regulating speech is overinclusive if it implicates more speech than necessary to advance the government's interests. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). "[S]uch provisions are subject to attack on the ground that they simply prohibit too much protected speech." *Gilleo*, 512 U.S. at 51. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 538 (1980); *see also Jamison v. Texas*, 318 U.S. 413, 416 (1943) (holding invalid the total prohibition of handbills on the public streets); *Martin v. City of Struthers*, 319 U.S. 141, 145–149 (1943) (holding invalid the total prohibition of door-to-door distribution of literature); *but see City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (upholding a total prohibition of signage attached to utility poles). To survive an overinclusiveness challenge, the State must both meet the requisite tailoring requirements and "leave open ample alternative channels for communication" of the affected speech. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The second ground is if the law is underinclusive. *Metromedia*, 453 U.S. at 512-17 (White, J., plurality). This type of challenge is generally appropriate when a regulation functions "through the combined operation of a general speech restriction and [selected] exemptions." *Gilleo*, 512 U.S. at 51. Such a law is problematic "because its exemptions discriminate on the basis of the signs' messages." *Id*. By picking and choosing which subjects or speakers are exempted, the government may "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank v. Bellotti*, 435 U.S. 765, 785

(1978). The underinclusiveness of a law can be cured by either eliminating the exemptions such that all speech is treated equally or expanding the exemptions to include more protected speech. *See Metromedia*, 453 U.S. at 513-15 (plurality).

Although Thomas makes both overinclusiveness and underinclusiveness arguments, his challenge is more appropriately one of underinclusiveness. Most obviously, the Billboard Act's "operation of a general speech restriction and [selected] exemptions" clearly lends itself to such an examination. *See Gilleo*, 512 U.S. at 51. Notably, the ordinance in *Metromedia* would have required the removal of long-standing billboards and the parties jointly stipulated that billboards had long been "an effective medium of communication" and "other forms of advertising [were] insufficient, inappropriate, and prohibitively expensive." *Metromedia*, 453 U.S. at 525-26 (concurrence). Those stipulated facts were central to the concurrence's finding that an overinclusiveness challenge was the "appropriate analytical framework to apply." *Id*. at 525. That dynamic is not present here—indeed there is no broad reliance interest at stake nor does Thomas argue, or Tennessee concede, that billboards are necessary media for non-commercial speech.

Because, as applied in this case, the exception is the restriction, we must consider whether the exception is sufficiently expansive to save constitutionally protected speech from the Act's effective prohibition. *See Metromedia*, 453 U.S. at 520. If not, then the "exemptions discriminate on the basis of the signs' messages," and the Act is an underinclusive restriction on speech. *See Gilleo*, 512 U.S. at 51. We find the Act underinclusive in two ways.

First, the Act discriminates among non-commercial messages on the basis of content. Consider a hypothetical. A crisis pregnancy center erects a sign on its premises that says: "Abortion is murder!" Such a sign would presumably qualify for the on-premises exception because the message is related to the activities, goods, and services at the center. But may the property owner next door, who provides no services related to abortion, erect a sign that says: "Keep your laws off of my body!"? Under the Billboard Act, no. Two identically situated signs about the same ideological topic—one sign/speaker/message is allowed; the other is not.

By favoring on-premises-related speech over speech on but unrelated to the premises, the Billboard Act "has the effect of disadvantaging the category of non-commercial speech that is probably the most highly protected: the expression of ideas." *Ackerley Commc'ns. of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st. Cir. 1996). That Tennessee favors speech related to the premises—intentionally or not—"does not justify prohibiting an occupant from displaying its own ideas. . . . Although the [State] may distinguish between the relative value of different categories of commercial speech, the [State] does not have the same range of choice in the area of non-commercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia*, 453 U.S. at 513-15 (plurality). "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive [the State's] *ad hoc* balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

The Billboard Act is underinclusive also because it discriminates against *non-commercial* speech on but unrelated to the premises while allowing on-premises *commercial* speech. Consider another scenario. A pet store that sources its dogs from a notorious puppy mill erects a sign on its premises that says: "We have the most dogs around—and can always pump out more! Come get one!" Such a sign would presumably qualify for the on-premises exception because the message is related to the on-premises commercial activity of the pet store. But may the property owner across the street, who offers no services regarding animals, erect an otherwise identical sign that says: "Puppy Mills are Animal Cruelty!"? Under the Billboard Act, no. Yet, in this instance, the speech that would be allowed is unsettling commercial advertising while the speech prohibited is non-commercial protest. This contradicts established First Amendment caselaw, which "ha[s] consistently accorded non-commercial speech a greater degree of protection than commercial speech." *Metromedia*, 453 U.S. at 513 (plurality).

> Insofar as the [State] tolerates billboards at all, it cannot choose to limit their content to commercial messages; the [State] may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages.

Id. (plurality). That Tennessee allows some so-called "on-premises non-commercial speech" does not save it from this conclusion.

> The rule against content discrimination forces the government to limit all speech—including speech the government does not want to limit—if it is going to restrict any speech at all. By deterring the government from exempting speech [that] the government prefers, the Supreme Court has helped to ensure that [the] government only limits any speech when it is quite certain that it desires to do so.

Rappa v. New Castle County, 18 F.3d 1043, 1063 (3d Cir. 1994). By placing a burden "more heavily on ideological than on commercial speech" the Billboard Act represents "a peculiar inversion of First Amendment values." *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 15-16 (1st Cir. 1980) (finding Maine billboard law underinclusive of non-commercial speech).

Our review of the record and the language of the Billboard Act leads to one more inescapable conclusion: the on-premises exception is tailored to promote Tennessee's economic interests. Of all possible speech, the on-premises exception allows for signage that communicates messages that encourage commercial patronage. Tennessee argues that this is sufficient First Amendment protection—*property owners can choose to say whatever they want, so long as their messages relate to the activities, goods, or services at the premises*—which reminds us of Henry Ford's famous quip about options for the original Model T: "Customers can choose any color they want, so long as it is black." That there is some overlap between what the on-premises exception allows and what property owners may choose to communicate does not mean that Tennessee is safeguarding its citizens' First Amendment rights. Because the Billboard Act is "hopelessly underinclusive," it is not narrowly tailored to further a compelling interest and thus is an unconstitutional restriction on non-commercial speech. *See Reed*, 135 S. Ct. at 2231.

E. Tennessee's Policy Arguments

Tennessee also presses two policy concerns as if they were legal arguments. First, Tennessee urges us to pay special attention to the practical distinction between billboards and signs, and include that in our analysis. The Billboard Act and its attendant regulations cover all signs near public roadways regardless of whether those signs are situated on the ground, mounted on business or residential buildings, or affixed to billboard bases. The Act also regulates billboard bases as structures, imposing certain size, spacing, lighting, and safety

requirements. Tennessee complains that it will not be able to enforce these content-neutral regulations of billboard bases if we affirm the district court. Second, Tennessee complains that if the on-premises exception is unconstitutional, then it is henceforth powerless to regulate even commercial signage.

As the district court explained, these are problems for the Tennessee Legislature, not the courts. *Thomas*, 2017 WL 6489144, at *5. Indeed, in the wake of *Reed*, state legislatures and municipal governments have begun to preemptively cure their signage regulations to satisfy the First Amendment. *See, e.g.*, Indianapolis, Ind. Code § 734 (Amended, Nov. 30, 2015); Ind. Code § 734-501(b) (amending definitions of on-premises, off-premises, and advertising signs to clarify that the limitations "[do] not apply to the content of noncommercial messages"); *Geft Outdoor LLC v. Consol. City of Indianapolis and Cnty. of Marion, Ind.*, 187 F. Supp. 3d 1002, 1009 (S.D. Ind. 2016) (noting that the city brought its regulations "into compliance with *Reed*"); *see also* Tex. Transp. Code § 391.031, Tex. S.B. 2006, 85th Leg., ch. 964 (S.B. 2006), §§ 6, 7, 33(3), eff. June 15, 2017 (changing the prohibition from "outdoor advertising" to only "commercial signs").

Tennessee is free to regulate the erection and attributes of billboard bases—and all other content-neutral aspects of signs—provided that it does so without unconstitutional reference to the content of the signage affixed to those billboard bases. Nothing in this opinion disturbs that longstanding principle, which the Court affirmed in *Reed*, 135 S. Ct. at 2232. But Tennessee's policy considerations are irrelevant to the constitutional matter before this court.

III. CONCLUSION

The district court determined that the Tennessee Billboard Act, as effectuated here by its non-severable on-premises exception, is a content-based regulation of free speech that cannot survive strict scrutiny and is, therefore, unconstitutional. For the reasons stated in the district court's opinions and those elaborated upon herein, we find that we agree and must AFFIRM.

Two Recent State High Court Decisions on Short-Term Rentals and Residential Zoning:

Is Zoning *Really* About Use and Not About Ownership?

Michael Allan Wolf
Richard E. Nelson Eminent Scholar Chair in Local Government
University of Florida Levin College of Law

Slice of Life, LLC v. Hamilton Township Zoning Hearing Board, 207 A.3d 886 (Pa. 2019)

[T]the property at the center of this controversy is a house located in the Poconos in Hamilton Township, Monroe County, Pennsylvania (the "Property") and its use is governed by the 1985 Hamilton Township Zoning Ordinance (the "Ordinance"). The Ordinance divides the township into zoning districts, and those districts into classes of districts. *See* Ordinance, § 302. The Property is located in Zoning District A, which provides for several permitted uses, the only relevant of which is "Use Class 1 - Single Family Residential," where "[p]ermitted uses include: [s]ingle family detached dwellings [and a]ccessory uses and essential services." *Id.*, § 402.1.2 Section 201.4 defines a "dwelling" as "[a] building or structure designed, arranged, intended, or used as the living quarters for one or more families living independently of each other upon the premises. The term 'dwelling' shall not be construed to included hotel, motel, rooming houses, or other tourist home." *Id*., § 201.4. A "one-family" dwelling is "[a] building on a lot, designed, arranged or intended for and occupied exclusively as a residence for one (1) family." *Id*., § 201.4(a). . . .

At all times relevant to the pending matter, the Property was owned by Appellee Slice of Life, LLC ("Slice of Life"), a limited liability corporation formed, organized and existing under the laws of Pennsylvania. Appellee Val Kleyman ("Kleyman" and together with Slice of Life, "Appellees") is the sole member of Slice of Life. Kleyman, who lives in Brooklyn, New York, has never lived at the Property or considered it to be his personal residence. Rather, Slice of Life purchased the Property as an investment property that was to be used exclusively for short-term rentals.

On May 22, 2014, a Hamilton Township zoning officer issued an enforcement notice to Appellees based upon Appellees' use of the Property "as [a] Hotel and/or other types of transient lodging, Rental of Single Family Residential Dwelling for transient tenancies," in violation of the permitted uses for Zoning District A. Township's Exhibit 1 (Enforcement Notice). The notice instructed Appellees that they must "Cease Use as a hotel/transient rental facility" by May 31, 2014. . . .

Kleyman testified that he is a real estate investor, estimating that he owned between ten and twelve properties at the time of the hearing, more than one of which is located in the Poconos. He stated that he created Slice of Life for the purpose of purchasing the Property. Kleyman advertised the Property online for short-term rentals — a minimum of two nights and a maximum of one week — through companies that specialize in internet-based rentals including Home Away and Luxury Stay, the latter of which he and his business partner, Oleg Gorshkov, formed in 2012 or 2013. Luxury Stay, which is based in New York, makes "reservations" and manages the Property (and others) through an informal agreement with Slice of Life.

Kleyman described the Property as a three-bedroom house that can sleep between twelve and fourteen people on a variety of beds and pullout couches that are located in various rooms throughout the house. Evidence submitted at the hearing, however, revealed that the Property is advertised as a six-bedroom house that sleeps seventeen people. Although one person signs the lease, it is expected and understood that large groups will utilize the Property, but neither Luxury Stay nor Slice of Life is aware of (or makes any effort to ascertain) the relationship, if any, between the individuals occupying the Property at any given time. Luxury Stay at times will verify that the person making the reservation is the minimum age for renting the Property (twenty-five), but collects no information regarding the additional people who will be staying there. Id. at 250, 268, 271. When guests arrive at the Property, they find a welcome book that identifies area businesses and instructions for using the amenities of the Property.

After each group leaves the Property, Kleyman testified that a crew is dispatched to clean it within thirty-six hours, and that other "crews . . . run around . . . and fix everything that's broken." He estimated that the Property is rented approximately twenty-five weekends per year.

He admitted that he had received complaints from neighbors to the Property concerning noise — in particular, the use of fireworks at 2:00 a.m. by renters. Leopold Zappler, the adjacent property owner, also testified to activities occurring on the Property that threaten the health, safety and welfare of his home and his family, including public urination, fireworks, loud music, large bonfires in the heavily wooded area, nudity and lewd conduct. The record further reflects that neighbors had called the police to the Property for noise (fireworks and loud parties) on several occasions as well. There was also the suggestion that the septic system, designed for use by a single family in a three-bedroom house, could be inadequate to accommodate the number of people who routinely utilized the home.

Kleyman acknowledged that this is his business and that it is part of "the tourism industry" of the Poconos. He further stated that he is required to pay Pennsylvania's Hotel Occupancy Tax on the Property. While Kleyman denied that the Property constituted a "hotel" or "transient boarding house" he agreed that the people who rented the Property fit the dictionary definition of the term "transient," i.e., "passing through or by a place with only a brief stay or sojourn." . . .

The prevalence of short-term rentals in Pennsylvania (and throughout the country) has grown over the last several years, requiring cities, townships and boroughs to make case-by-case determinations as to whether and where such rentals should be permitted. Further, given the significant amount of time that typically passes between a decision by a zoning hearing board and an appeal taken to this Court, the circumstances of this case are easily repeated, i.e., the property owner divests its interest therein following a decision in the property owner's favor. As the circumstances of this case are capable of repetition (by Appellees and others) but could easily evade review in this same manner, we will proceed to address the merits of the claim raised. . . .

The requirement that courts strictly construe a zoning ordinance does not mean that they must ignore uses that clearly fall outside those that are permitted by the ordinance. The use of the Property is not by a "family" because the users do not function as a "family" as defined by the Ordinance. There is no ambiguity in the language of the Ordinance because there is no ambiguity in the phrase "single housekeeping unit" that is at the heart of the definition of "family." Zoning District A permits the use of a single-family detached dwelling. This requires use by a single

housekeeping unit. This Court has clearly and straightforwardly defined single housekeeping unit as precluding purely transient use.

The use in the case at bar is purely transient. Individuals rent the premises for a minimum of two nights and up to one week at a time. Kleyman estimated that the Property was rented twenty-five separate times over a one-year period. As Kleyman acknowledged during his testimony, this fits squarely within the common usage of the word "transient." The use is not as a single-family dwelling, i.e., use by a single housekeeping unit, and therefore, is not a permitted use in Zoning District A.

Morgan County v. May, 824 S.E.2d 354 (Ga. 2019)

May built a vacation home in Morgan County, and in 2008 she began renting her house to others, typically for periods of about a week. The County's zoning ordinance in effect at that time did not contain any specific language addressing rentals of any duration for houses in May's zoning district. In practice, the County took the position that fewer-than-30-day rentals were prohibited but rentals for 30 days or longer were permitted. In October 2010, the County amended its zoning ordinance to explicitly prohibit most “short-term rentals,” which were defined as rentals for fewer than 30 consecutive days. May had continued to rent her house, and in August 2011, after she again rented her house for seven nights, the County issued her a citation for violating the amended zoning ordinance, thereby initiating a misdemeanor criminal proceeding against her. May's criminal case was stayed for several years, however, while she and the County extensively litigated a civil lawsuit she filed challenging the short-term rental ban in the County's amended ordinance as applied to her property.

After her criminal case was revived in 2015, May filed a motion to dismiss her citation, arguing among other things that the County's old zoning ordinance was unconstitutionally vague because it did not specifically prohibit seven-night rentals, that her use of her house for such rentals was therefore lawful under the old ordinance, and that she consequently had a grandfathered right to continue renting the house in that way that precluded her from being prosecuted under the short-term rental prohibition in the amended ordinance. The trial court held a bench trial in June 2015. In November 2015, the court denied May's motion to dismiss on non-constitutional grounds, and in March 2016, the court found her guilty of violating the amended zoning ordinance and imposed a sentence of 30 days in jail, six months on probation, and a $500 fine. May appealed, and her case worked its way through the appellate courts and was ultimately remanded to the trial court in October 2017 for a ruling on her constitutional vagueness challenge.

On May 31, 2018, the trial court granted May's motion to dismiss her criminal citation, ruling that the County's old zoning ordinance was unconstitutionally vague as applied to short-term rentals of the sort at issue; that consequently, there was no zoning ordinance prohibiting such rentals when May began renting her house; and that her use of her house for such rentals was therefore grandfathered so that the explicit prohibition of that use under the amended ordinance does not apply to her property. Morgan County appealed the dismissal order to this Court, and May then filed a cross-appeal. . . .

The County's old zoning ordinance listed permitted uses for properties in May's zoning district and banned any uses that were not listed. There was no mention of rentals of any duration. The County contends that because the ordinance did not list rentals, a person of ordinary intelligence would understand that short-term rentals of "single-family detached dwellings" were not allowed. But the old ordinance failed to provide any guidelines whatsoever to enable May to determine that fewer-than-30-day rentals would be prohibited but rentals for 30 days or longer would be allowed, as the County contends and as the County applied the old ordinance in practice. . . .

[T]he County's "actually live" versus "temporary sojourn" view of what makes a dwelling "residential" does not make clear that seven-night rentals are prohibited. As the trial court aptly said in its order dismissing May's citation, "The County's definitions within definitions fail to provide any sort of practical guidelines to enable a homeowner to determine at *what point* a structure ceases to be 'residential.' " (emphasis supplied). We are persuaded by the trial court's reasoning, which the County has failed to address, much less rebut, in its brief on appeal. Accordingly, we agree with the trial court's determination that the County's old zoning ordinance was unconstitutionally vague as applied to seven-night rentals of May's property. As a result, the old ordinance cannot be applied to that use of May's property, meaning that her use of her house for such a rental was grandfathered and not subject to the short-term rental ban in the amended ordinance. May's criminal citation for violating the amended ordinance was properly dismissed.