

New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

VOLUME 262—NO. 17

An ALM Publication

WEDNESDAY, JULY 24, 2019

ZONING AND LAND USE PLANNING

U.S. Supreme Court Pushes Takings Claims to Federal Court

By
**Anthony S.
Guardino**



Since the U.S. Supreme Court rendered its decision last month in *Knick v. Township of Scott, Pennsylvania*, 588 U.S. (June 21, 2019), a good deal of the commentary about the case has focused on the fate of *stare decisis* and the court's rejection in *Knick* of its own precedential decision from 1985.

Although there is much to debate about those issues, the court's ruling in *Knick* has special practical significance for property owners, state and local governments and officials with zoning and land use responsibilities, and federal judges in New York and across the country who are likely to see a substantial increase in takings claims in which they will have to interpret and apply state property laws.

Knick, in other words, is a groundbreaking ruling not only because of what it may signify about the court's adherence to *stare decisis* but also for its effect on takings claims brought

by property owners against state and local governments.

Background

The case involved Rose Mary Knick, the owner of 90 acres of land in Scott Township, Pennsylvania, a small community just north of Scranton. Knick's property includes a small graveyard.

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."

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. She did not seek compensation by bringing an "inverse condemnation" action under state law, which, if successful, would have allowed her to recover the value of the property that had been

taken from her by the township.

In response, the township withdrew the violation notice and agreed to stay enforcement of the ordinance during the state court proceedings. The state court 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 a federal district court in Pennsylvania under 42 U.S.C. §1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment, which states that "private property [shall not] be taken for public use, without just compensation." The district court, noting that Knick had not pursued an inverse condemnation action under Pennsylvania law in a Pennsylvania state court and had not been denied just compensation, dismissed Knick's takings claim under the Supreme Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

In *Williamson County*, the Supreme Court held that a property owner whose property had been taken by a local government has not suffered a violation of the property owner's Fifth Amendment rights—and, therefore, cannot bring a federal takings claim in federal court—until a state court has denied the property owner's claim for just compensation under state law.

The U.S. Court of Appeals for the Third Circuit affirmed, and the Supreme Court granted certiorari.

Supreme Court's Decision

The court, in a decision by Chief Justice John Roberts, in which Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh joined, vacated the Third Circuit's decision. It concluded that the state litigation requirement in *Williamson County* imposed an "unjustifiable burden on takings plaintiffs" and had to be overruled. The court held that a property owner has an actionable Fifth Amendment takings claim when the government takes the property owner's property without paying for it. Simply put, it ruled that a property owner has suffered a violation of the property owner's Fifth Amendment rights when the government takes the owner's property without just compensation and, therefore, the owner may bring an action in federal court under Section 1983 at that time.

The court explained that the "unanticipated consequences" of its ruling in *Williamson County* became clear when it decided *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005). In that case, the plaintiffs complied with *Williamson County*

and brought a claim for compensation in state court. Their complaint made clear that they sought relief 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. When that happened, however, and the plaintiffs proceeded to federal court, they found that their federal claim was barred.

The court in *Sam Remo Hotel* held that the full faith and credit statute, 28 U.S.C. §1738, requires the federal court to give preclusive effect to

The court's ruling in 'Knick' has special practical significance for property owners, state and local governments and officials with zoning and land use responsibilities, and federal judges across the country who are likely to see a substantial increase in takings claims in which they will have to interpret and apply state property laws.

the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment. The adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim also barred that claim, preventing the federal court from considering it.

That problem led the court in *Knick* to reject the takings rule it set forth in 1985 in *Williamson County* and to hold that a property owner has a claim for a violation of the Takings Clause as

soon as a government takes the property owner's property for public use without paying for it. It observed that the Takings Clause states, "[N]or shall private property be taken for public use, without just compensation," and that it does not say, "Nor shall private property be taken for public use, without an available procedure that will result in compensation."

In other words, the court continued, if a local government takes private property without paying for it, it has violated the Fifth Amendment, "just as the Takings Clause says," without regard to subsequent state court proceedings. Moreover, the property owner "may sue the government at that time in federal court" for the "deprivation" of a right "secured by the Constitution," within the meaning of Section 1983.

The court noted that it had "long recognized" that property owners may bring Fifth Amendment claims against the federal government as soon as their property is taken as provided by the Tucker Act, which waives the federal government's sovereign immunity and grants 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). According to the court, the same reasoning applies to takings by the states, and 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."

The court added that the fact that a state has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the property owner of the property owner's Fifth Amendment right to compensation under the U.S. Constitution. In its opinion that was "key" because it was the existence of the Fifth Amendment right that allowed the property owner to proceed directly to federal court under Section 1983. It added that a "later payment of compensation may remedy the constitutional violation that occurred at the time of the taking," but it did "not mean the violation never took place."

In sum, the court concluded that a government violates the Takings Clause when it takes property without just compensation, and that a property owner may bring a Fifth Amendment claim under Section 1983 at that time.

Interestingly, the court said that its 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." Moreover, the court said, governments "need not fear" that its holding would lead federal courts to invalidate their actions as unconstitutional. According to the court, as long as just compensation remedies are available, "injunctive relief will be foreclosed." (Yet at another point, it said that, given the availability of post-taking compensation, barring the government

from acting "will ordinarily not be appropriate.")

Conclusion

Last year, in my column previewing *Knick* (Anthony S. Guardino, "U.S. Supreme Court May Alter Process for 'Takings' Claims Against Local Govt's," *NYLJ* Nov. 28, 2018), I suggested that the court was considering a decision with broad ramifications. Now that the decision has come down and has done what I and many others had expected, those effects are becoming clear.

First, federal courts will now be home in the first instance to a potentially massive number of takings

In sum, the court concluded that a government violates the Takings Clause when it takes property without just compensation, and that a property owner may bring a Fifth Amendment claim under Section 1983 at that time.

claims. As a result, federal judges will have to become immersed in complex state law issues to determine as a matter of state law whether a property interest has been unconstitutionally infringed, although the court itself had previously observed that land use regulation is "perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768, n. 30 (1982). Inverse condemnation proceedings will, in effect, typically now take place in federal courts rather than in state courts.

Thus, in *Knick*, the U.S. District Court for the Middle District of Pennsylvania will have to resolve

a question of local cemetery law to determine whether Knick's property rights had been taken.

Moreover, given that the court has ruled that the Takings Clause is violated when property is taken, even if there is a procedure for the owner to obtain compensation, local officials may become reluctant to act in certain situations because of a concern about violating the Constitution. Their counsel, too, may be reluctant to advise them to act when doing so violates (or may violate) the Constitution—even if compensation is subsequently paid. As Justice Elena Kagan pointed out in her dissent, in which Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor joined, the court's decision "will inevitably turn even well-meaning government officials into lawbreakers."

Finally, one must wonder whether federal courts will be willing to enjoin government actions that they deem to violate the Constitution or otherwise sanction the government (or its officials) for acting. It is worth noting that Justice Thomas, in a concurring opinion, said that he did "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."

Knick is a major land use decision by the U.S. Supreme Court with implications destined to play out in the months and years to come.