The Seminar Group
Oregon Land Use Law
*Knick v. Township of* Scott, 139 S. Ct. 2162 (June 21, 2019)[1]

## I. Summary

*Knick v. Township of Scott (Knick)*, is an important federal Fifth Amendment, unconstitutional takings case.

*Knick* overrules one of the two ripeness prongs of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) - the requirement to seek compensation 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."[2]

Recall, SCOTUS in *Williamson County sua sponte* raised an issue neither party had raised in the federal unconstitutional taking claim pending before the Court (viz.) that the claim was not "ripe". Under *Williamson County,* SCOTUS held that federal taking claim ripeness meant (1) there was a final decision, and that (2) the plaintiff had sought compensation from the state court. *Knick* overrules the second prong. In *Knick,* SCOTUS held*:*

> "Williamson County was not just wrong, its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence."[3]

*Knick* is also important in its view of the nature and elements of a Fifth Amendment taking claim. As to its nature, SCOTUS affirmed that the Fifth Amendment was "self-executing" and may be brought under 42 USC 1983.[4] The majority of the Court held that the denial of compensation by a state court is not an element of a Fifth Amendment taking claim. *Id.* The Court simply defined the elements of taking claims:

> *"by the government* through physical invasion or a regulation that destroys a property's productive use." (Emphasis in original.)[5]

Not that the Court expressed the substantive law as the taking of a property's productive "use," not its value.

The Court further held:

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[1] Wendie L. Kellington, Kellington Law Group PC, Lake Oswego.

[2] *Knick v. Township of* Scott, 139 S. Ct. 2162, 2167 (2019).

[3] *Id.* at 139 S.Ct. at 2178.

[4] *Id.* at 139 S.Ct. at 2172.

[5] *Id.* at 139 S.Ct. at 2174.

> "We conclude that a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under Section 1983 at that time."[6]

## II. *Knick* Facts

In 2008, 86-year old Robert Vail Sr., after conducting genealogical research, concluded that some of his ancestors were buried on property belonging to Rose Mary Knick. He initially trespassed on Ms. Knick's property to find the supposed burial sites. When she objected, he then persuaded the Township of Scott, Pennsylvania to adopt a law requiring owners of cemeteries to maintain cemeteries, as well as to keep cemeteries open to the public during the day; and to allow code compliance staff to enter "any property" to inspect and to determine whether and where any cemeteries are located on the property.

Under that law, a township code enforcement agent came onto Ms. Knick's 90-acre property without a warrant and without her permission, in the belief that there was an old cemetery on her property. The property included a small "backyard burial" site "where ancestors of some of Knick's neighbors are allegedly buried."[7] Apparently, backyard burials were common in this part of the country. Ms. Knick disputed that her property was a burial site. The dispute was never resolved. She used the property for her small single family dwelling and to graze horses and other farm animals. The code enforcement agent issued Ms. Knick a citation in the belief that there was a cemetery on her property, because she refused public access to the alleged gravesites on her property, as the ordinance required.

Ms. Knick sued the Township in state court, to enjoin Township's enforcement action. The Township withdrew the notice of violation and the parties agreed to stay enforcement actions pending the resolution of her state court lawsuit. Ms. Knick had not included a state or federal taking claim in her state court challenge; although her injunction did allege that the ordinance was unconstitutional to the extent it purported to authorize trespass onto her property. The state court refused to act on her complaint for declaratory and injunctive relief because of the code enforcement case had been withdrawn. The court found that without ongoing code enforcement, she could not demonstrate "irreparable harm" necessary for injunctive relief.

She sued the Township again, but this time in federal court, alleging (among other things) that the ordinance violated her Fifth and Fourteenth Amendment rights to due process and just compensation. The federal District Court dismissed under *Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 31098, 87 L.Ed.2 126 (1985) (*Williamson County*), holding that Ms. Knick had not exhausted her state law remedy to obtain state compensation.

The Third Circuit affirmed. As relevant here, the court affirmed that her taking claim was subject to *Williamson County* requirement to seek compensation in state court. The court

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[6] *Id.* at 139 S.Ct. at 2177.

[7] *Id*., 139 S. Ct. at 2168.

decided that her earlier state court lawsuit was inadequate to satisfy that prong because it sought injunctive relief and not compensation. The federal court refused to hear her taking claim under the principles of *Williamson County* and instead sent her back to state court.

Ms. Knick, with the help of the Pacific Legal Foundation, appealed to SCOTUS, which granted certiorari.

The case was argued on October 3, 2018. The oral argument did not go well. As one commentator put it "The Lordships were out of it big time; some of them confused direct and inverse condemnation, one wanted to talk about abstention, one let it slip that she was trying to 'get around' prior law, and another asked why not 'let this sleeping dog lie.' In short, an intellectual disaster area."[8]

Not long after Justice's Kavanagh joined the Court, and acting on its own motion, on November 28, 2018, SCOTUS ordered a re-argument of the case and sought additional briefing. Additional briefing occurred and the case was re-argued in January 2019. It is generally agreed that the second oral argument went better than the first.

## III. The Decision

On June 21, 2019, SCOTUS decided the *Knick* case. Chief Justice Roberts wrote the opinion for majority of the five-Justices (Roberts, Thomas, Alito, Gorsuch, and Kavanagh), Justice Thomas wrote a short concurring opinion and Justice Kagan wrote a dissent in which Justices Ginsburg, Breyer, and Sotomayor, joined.

A majority of the Court explained that the core of a federal takings claim is that a regulation deprives an owner of "productive use" of property and the government has not provided compensation.[9] This is to be contrasted with the dissent which views the elements of a federal taking claim to include both the denial of "productive use" of property and also that a state court has denied compensation.

The majority clearly dispensed of the dissent's view of a Fifth Amendment taking claim:

> "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." *Knick*, 139 S. Ct. at 2167.
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> And:

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[8] Gideon Kanner, December 4, 2018 http://gideonstrumpet.info/2018/12/whats-the-us-solicitor-general-up-to-in-the-knick-case/

[9] *Knick v. Township of* Scott, 139 S. Ct. at 2170.

"The *San Remo*[10] preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment." *Knick*, 139 S. Ct. at 2167.

And

"The unanticipated consequences of [*Williamson County*] were not clear until 20 years later, when this court decided *San Remo*. In that case, the takings plaintiff complied with *Williamson County* and brought a claim for compensation in state court. 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 claim proved unsuccessful. When that happened, however, and the plaintiffs proceeded to federal court, they found that their federal claim was barred. This Court held [in *San Remo*] that the full faith and credit statute, 28 USC Sec. 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. 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."

## IV. Abuses that Led to ***Knick***[11]

*Williamson County* led to municipal abuses of private property owners that, in turn, led to numerous petitions for certiorari to SCOTUS. Basically, a property owner would bring her taking claim in state court, then government defendants would remove the case to the federal court and then argue that the case should be dismissed because the plaintiff-owner should have sued in state court. Another variation on the theme, was a property owner litigated their state taking claim in state court, reserving their federal claim, but when they went to federal court, their state law case precluded the federal case under the full faith and credit clause.

*Williamson County* had assured the claimants could never get their federal Fifth Amendment takings claims heard by a federal court.

Specific problematic issues with *Williamson County*, are below.

1. Removal to Federal Court for the Purpose of Dismissing the Taking Claim

[10] *San Remo Hotel L.P. v. City of San Francisco*, 545 U.S. 323, 347 (2005).

[11] More reading: Rob Thomas' excellent blog and five part Knick analysis can be found here: https://www.inversecondemnation.com/inversecondemnation/2019/06/knick-analysis-part-ii-.html; and see Michael M. Berger, Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings, 3 Wash. U. J. L. & Pol'y 099 (2000), https://openscholarship.wustl.edu/law_journal_law_policy/vol3/iss1/5; Michael M. Berger Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urban Lawyer 671, 671-72 (2004); *see also* Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199 (2006).

This shenanigans began with *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). In *International College of Surgeons*, SCOTUS held that it was proper for a takings claim defendant to remove a federal taking claim to federal court. It said nothing about the sleight of hand where state and local defendants would do so and then move to dismiss the federal taking claim because it had not been brought in the state court under *Williamson County*. But certain unconstitutional taking defendants seized upon *International College of Surgeons* as a license for gamesmanship.

Thus, in *Warner v. City of Marathon*, No. 16-10086 (Unpublished, 11 Cir, Dec. 8, 2017), the plaintiffs federal takings claim was properly brought, under *Williamson County*, in the courts of the State of Florida. The City of Marathon removed the case to federal court, and then promptly moved to dismiss the taking claim, arguing that the federal taking claim was unripe. The district court dismissed the takings claim as unripe citing *Williamson County*, and the Eleventh Circuit affirmed.

Similarly, in *Snaza v. City of St. Paul*, No. 08-1604 (Unpublished, 8th Cir., Dec. 12, 2008), the plaintiff brought a federal taking claim in state court as required by *Williamson County*. The city removed the taking claim to the federal court and filed for summary judgment that the taking claim was not ripe because state compensation had not yet been denied. The district court granted summary judgment in favor of the municipal defendant agreeing that plaintiff's taking claim was not ripe because she had not been denied just compensation in a state court:

> "Although Snaza filed an inverse condemnation claim in state court, she had not completed the required state process before the action was removed to federal court."

Not all federal court's appreciated the game, however. In *A Forever Recovery, Inc. v. Township of Pennfield*, No. 13-2657 (Unpublished, 6th Cir., 2015), the federal circuit court affirmed the federal district court's award of attorneys' fees and costs to a property owner who brought its federal taking claim in the state court, the Township of Pennfield removed the case to federal court and then moved to dismiss the claim a few days later, using the *Williamson County* state compensation ripeness prong.

The district court granted the motion to dismiss and remanded the case back to state court, but in so doing held the Township liable for fees and costs under the removal statute (authorizing fees where defendant doesn't have an "objectively reasonable basis for seeking removal"). The district court decided that the Township's removal was for no purpose other than delay; the court termed the removal as having a "bad faith motivation."

The Sixth Circuit's opinion explained that the district court's "bad faith motivation" finding was not clear error because it did not stink like a "five week-old, unrefrigerated dead fish" – "We review the district court's finding of bad-faith motivation for clear error, and so we would reverse only if the 'decision strikes us as wrong with the force of a five-week-old, unrefrigerated dead fish.'")

The Sixth Circuit held "The Plaintiffs properly filed their federal takings claims in Michigan state court as part of an inverse-condemnation action. It was Pennfield's choice to remove to federal court that brought these claims before a forum in which they were unripe. Therefore, Pennfield is responsible for ripeness-related delays." *See Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031 (E.D. Wis. 2008) (explaining the view that the *Williamson County* ripeness rule is wrong and that the court would have granted fees to defendants for removing from state court and then dismissing, had the plaintiff requested the same.)

2. The Issue and Claim Preclusion "Gotcha"

In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), a SCOTUS majority ruled that the process by which an owner ripened a federal takings claim (filing the taking claim in state court and losing there), also meant that the ripened federal takings claim was precluded in federal court by principles of claim and/or issue preclusion under the full faith and credit clause. That scenario happened in Oregon before the *San Remo Hotel* case was decided.

Tom and Doris Dodd purchased 40 acres in a secluded area of Hood River County where they wanted to build their retirement home. Oregon's resource zone rules precluded them from doing so. In an effort to comply with *Williamson County*, they sought redress in state court and raised only state law issues there, expressly reserving their federal claims for federal court. The Oregon courts observed that limitation and limited their decisions to matters involving Oregon state law. The Dodds lost in the Oregon state and administrative tribunals and then sued in the United States district court on federal Fifth Amendment unconstitutional taking grounds. While the Ninth Circuit determined that under the federal reservation, claim preclusion could not be applied, it also held that since factual issues had been litigated that issue preclusion could prevent re-litigation of resolved facts in the federal case. On remand, that is exactly what the district court did; dismiss on issue preclusion. The 9th Circuit affirmed.

Interestingly, the 9th Circuit relied upon the fact that in the LUBA appeal of the county's denial, that the Dodds could have but did not seek an evidentiary hearing, something anyone who practices land use law in Oregon knows is almost never granted. The 9th Circuit[12] held:

> "A full and fair opportunity to be heard is provided at an administrative adjudication such as the Dodds' proceeding before LUBA "if the parties had both a full opportunity and the incentive to contest the point at issue on a record that also was subject to judicial review." *See Chavez v. Boise Cascade Corp*., 307 Or. 632, 635, 772 P.2d 409 (1989). The Dodds argue that they had no incentive to litigate the issue of the parcel's remaining value because "both parties and LUBA were well aware that the Dodds had filed their federal constitutional claim in federal court and had expressly reserved the right to litigate the claim in that forum." The fallacy of irrelevance, or ignoratio elenchi, abounds in the Dodds' argument. That the Dodds had no incentive to litigate the federal claim is

[12] *Dodd v. Hood River County*, 136 F3d 1219 (9th Cir. 1998)

> irrelevant to the question of their incentive to litigate the actual issue involved-the value of their land-in the state takings claim being adjudicated at the time. The incentive for the Dodds to litigate the issue before LUBA was great: Were they to succeed, LUBA had the express authority to grant them relief under the Oregon Constitution. Or.Rev.Stat. § 197.835(9)(a)(E); *see Dunn v. City of Redmond*, 303 Or. 201, 209, 735 P.2d 609 (1987).
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> "The Dodds argue that LUBA did not afford them a full and fair opportunity to be heard because its procedures were not as formal as those found in court proceedings. Specifically, at its hearing LUBA considered as evidence written documents that were not sworn testimony, and no witnesses were cross-examined. *Under Oregon law, however, the Dodds could have requested a full evidentiary hearing before LUBA, which would have given them all of the procedures they claim were erroneously lacking in their own hearing. See Or.Rev.Stat. § 197.835. Had the Dodds asked for and utilized these procedures, there is no doubt that they would have received a full and fair opportunity to litigate*. *See Hickey v. Settlemier*, 116 Or.App. 436, 439, 841 P.2d 675 (full and fair opportunity to litigate when plaintiff was represented by counsel and allowed to cross-examine witnesses, a transcript was provided, there was a neutral factfinder and the decision was subject to judicial review), rev'd on other grounds, 318 Or. 196, 864 P.2d 372 (1993). But the Dodds did not ask for the evidentiary hearing. We must decide, therefore, if the availability of these procedures was enough to satisfy this prong of the issue preclusion doctrine. We conclude that it was." (Emphasis supplied.)

Accordingly, the Dodds were deemed to have had a full and fair opportunity to litigate their case and as a result were foreclosed from re-litigating it in federal court. Eventually the Dodds' case was dismissed on issue preclusion grounds.

The Dodds' situation would not have happened under *Knick*. Rather, the Dodds would have been able to go directly to the federal court with their taking claim.

3. Scholarly Criticism

Professor Daniel Mandelker, generally known to be sympathetic to planners and regulators, testified to Congress about the situation being so bad that his review of federal court decisions demonstrated a "wholesale abdication of federal jurisdiction in law suits where issues are raised concerning the constitutional validity of land use regulation [because] federal judges have distorted the Supreme Court's ripeness precedents to achieve [the] undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits."[13] He was supporting a legislative fix, which Congress ultimately refused to adopt.

He eloquently explained the problem:

> "Land use agencies across the country have applied the ripeness requirement to frustrate as-applied takings claims in federal court. I was of counsel on an amicus

[13] http://landuselaw.wustl.edu/testmony.htm The testimony of Professor Daniel R. Mandelker before the House Judiciary Committee is reproduced in full at 31 URB. LAW. 234, 236 (1999)

curiae brief submitted by the American Planning Association (APA) in a ripeness takings case decided in the 1996-1997 term, *Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997). The brief supported the land use agency in this matter, but it also recognized that current ripeness rules: invite[ ] local government to create a more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of [the ripeness requirement] Brief Amicus Curiae of the American Planning Association in Support of Respondent, *Suitum v. Tahoe Regional Planning Agency*, No. 96-243, at 13 ("APA Brief"). Examples of these sentiments, in the reported case law alone, are legion. The problem is especially serious because property owners may have neither the means nor stomach to litigate ripeness issues indefinitely. *See* Stein, *Regulatory Takings and Ripeness in Federal Court*s, 48 Vand. L. Rev. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small").

"Consider *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir.), *on remand*, 95 F.3d 1422 (9th Cir.), aff'd, 119 S.Ct. 1624 (1999). In 1981, the property owners submitted a subdivision proposal to build 344 residential units. The plan was rejected, and city planners informed that a plan for 264 units would be reviewed favorably. The owners then submitted a plan for 264 units; city planners rejected it, and informed that a plan for 224 units would be reviewed favorably. The owners then submitted a plan for 224 units; city planners rejected it, and informed that a plan for 190 units would be reviewed favorably. The owners then submitted a plan for 190 units; city planners rejected it, and the owners appealed to the city council. The city council found the plan "conceptually satisfactory," and granted a conditional 18-month use permit to commence construction for the project. Subsequently, the developer worked with planning board staff to meet the city council's conditions for the 190-unit development. Staff recommended approval of the site plan, but the planning board overrode staff's recommendation and issued a denial. The property owners then appealed this decision to the city council, which this time denied the site plan for 190 units. Meanwhile, a sewer moratorium was imposed, a request to extend the special use permit was rejected, and the permit expired. The local officials thus expected the developer to start from square one. Following this Kafkaesque process, the federal district court dismissed a takings claim for lack of ripeness, but the appellate court then reversed. *See* 920 F.2d at 1502-1506; 119 S.Ct. at 1632. After 17 years of negotiation and litigation--and because the municipality permitted absolutely no use of the property at issue--the Supreme Court finally put an end to this case by upholding the lower court's award of just compensation to the land owner. It is significant that the Supreme Court recognized that takings plaintiffs have a federal

constitutional right under the Seventh Amendment to a federal jury trial in a 5th Amendment property rights cases. 119 S.Ct. at 1637-1645."