

KNICK v. TOWNSHIP OF SCOTT: SUBSTANTIAL CHANGES COMING IN MUNICIPAL TAKINGS LITIGATION

***League of California Cities
City Attorneys' Department Webinar***

*August 27, 2020
2:00 – 3:30 p.m.*

Presented by
GLEN HANSEN







Welcome to Scott Township.



SCOTT TOWNSHIP LACKAWANNA COUNTY ORDINANCE NO. 12-12-20-001

ORDINANCE OF THE TOWNSHIP OF SCOTT TOWNSHIP, LACKAWANNA COUNTY, PENNSYLVANIA, RELATING TO THE OPERATION AND MAINTENANCE OF CEMETERIES AND BURIAL PLACES.

WHEREAS, Scott Township is a Pennsylvania Township of the Second Class duly organized and existing under the laws of the Commonwealth of Pennsylvania; and

WHEREAS, the Second Class Township Code grants the Board of Supervisors of the Township to adopt Ordinances in which general or specific powers of the Township may be exercised in order to promote the health, safety and welfare of its residents; and

WHEREAS, 53 P.S. §66536 (a) (§1536) entitled "Cemeteries" authorizes the Board of Supervisors to make rules and regulations regarding the location, operation and maintenance of cemeteries within the Township by Ordinance; and

WHEREAS, the Board of Supervisors of Scott Township believes that regulating cemeteries within the Township serves in the best interest of the Township.

NOW, THEREFORE, the Board of Supervisors of the Township of Scott, Lackawanna County, Pennsylvania, hereby ENACTS and **ORDAINS** as follows:

1.) Definitions -

5.) Open to Public - All cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner or personal shall unreasonably restrict access to the general public nor shall any fee for access be charged.

- a. "Burial Place" - Any structure, monument, or other object used as a tomb or grave or set apart for the purpose of burial.
- b. "Code" - The official Code of the Township of Scott, Lackawanna County.
- c. "Cemetery" - Any place, whether private or public, used as a burial place for the dead.
- d. "Owner" - Any individual(s), entity, group, association or organization who holds title to the land upon which any cemetery is located or who is otherwise vested with the authority to operate/maintain same.
- e. "Township" - Scott Township, Lackawanna County, Pennsylvania.

2.) Applicability - All cemeteries, whether private or public, and whether existing or established prior to the date of this Ordinance or hereafter created, are subject to the terms and

Court of Common Pleas

The Court of Common Pleas of Lackawanna County is the 45th of sixty (60) judicial districts in the state of Pennsylvania. The court of common pleas has general jurisdiction over civil and criminal matters. The Lackawanna County Courthouse is located in Scranton, Pennsylvania.

President Judge Michael J. Barrasse handles all administrative duties for the entire court, assigns the judges to various divisions of the court and exercises general supervision and administrative authority over the ten (10) district courts. The judges hear a wide spectrum of cases.



MAX ROSENN
UNITED STATES
COURTHOUSE

Case 3:14-cv-02223-ARC Document 1 Filed 11/20/14 Page 1 of 11

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

ROSE MARY KNICK :
Plaintiff : CIVIL ACTION - LAW
vs. : JURY TRIAL DEMANDED
SCOTT TOWNSHIP and :
CARL S. FERRARO, : NO.:
Individually and in his Official :
Capacity as Scott Township Code :
Enforcement Officer, : [ELECTRONICALLY FILED]
Defendants :

COMPLAINT

AND NOW comes Plaintiff, Rose Mary Knick, by and through her attorney, Frank J. Bolock, Jr., Esquire, who files this Complaint against Defendants above-named as follows:

I. INTRODUCTION

I. Plaintiff, Rose Mary Knick, brings this action for monetary damages to address the deprivation of civil rights secured to her by 42 U.S.C. Section 1983. Specifically, she alleges that she was subjected to an unlawful search of her property on April 10, 2013 in violation of her rights under the Fourth Amendment to the United States Constitution. Additionally, Scott Township enacted "special legislation" in the form of Ordinance 12-12-20-001 in December of 2012. Plaintiff asserts that Scott Township Ordinance No. 12-12-20-001 violates the Constitution

**ABBOTT &
KINDERMANN, INC.**
ATTORNEYS AT LAW

ROSE MARY KNICK,
Plaintiff,
v.
SCOTT TOWNSHIP,
Defendant.

MEMORANDUM

Presently before the Court is a Motion to Dismiss Plaintiff Rose Mary Knick's Second Amended Complaint ("SAC," Doc. 21) filed by Defendant Scott Township. Plaintiff's SAC asserts claims for damages under 42 U.S.C. § 1983 for an unlawful search and seizure of her property in violation of the Fourth Amendment, and an unlawful physical taking of her property without just compensation in violation of the Fifth and Fourteenth Amendments. Additionally, Plaintiff seeks a declaratory judgment declaring the Scott Township Ordinance No. 12-12-20-001 unconstitutional, and a temporary restraining order as well as preliminary injunctive relief against Scott Township's enforcement of said Ordinance. Plaintiff's claims will be GRANTED. Because Defendant's Motion to

2. **Plaintiff's Facial Challenge Does Not Satisfy the Williamson County Exhaustion Requirement**

Commonw. 1999) (same). Because both a facial and as-applied Takings Clause claim does not present a "case or controversy" unless and until a "plaintiff has sought and been denied just compensation," the federal court system is unable to address Ms. Knick's takings claim until she first attempts to secure just compensation from the state via Pennsylvania's Eminent Domain Code. See *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 806 (D.N.J. 1993); *id.* at 807 ("Plaintiff's takings claim will not be ripe until Plaintiff has sought just compensation in state court."). Accordingly, Defendant's Motion to Dismiss Count II of Plaintiff's SAC will be GRANTED because the takings claims are not ripe for review in federal court. Plaintiff's Fifth and

**WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION ET AL. v. HAMILTON BANK
OF JOHNSON CITY**

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

No. 84-4. Argued February 19, 1985—Decided June 28, 1985

As required under Tennessee law, in 1973 respondent's predecessor in interest, a land developer, obtained petitioner Planning Commission's approval of a preliminary plat for development of a tract. The tract was to be developed in accord with the requirements of a county zoning ordinance for "cluster" development of residential areas and the Commission's implementing regulations. In 1977, the county zoning ordinance was changed so as to reduce the allowable density of dwelling units, but the Commission continued to apply the 1973 ordinance and regulations to the developer's tract. In 1979, however, the Commission decided that further development of the tract should be governed by the ordinance and regulations then in effect. The Commission thereafter disapproved plats proposing further development of the remainder of the tract on various grounds, including failure to comply with current density requirements. Respondent filed suit against the Commission and its members and staff (also petitioners) in Federal District Court pursuant to 42 U. S. C. § 1983, alleging that the Commission had taken its property without just compensation by refusing to approve the proposed development. The jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause of the Fifth Amendment, and awarded damages for the temporary taking of respondent's property. The District Court entered an injunction requiring the Commission to apply the 1973 ordinance and regulations to the project, but granted judgment notwithstanding the jury's verdict for the Commission on the taking claim, concluding that the temporary deprivation of economic benefit from respondent's property, as a matter of law, could not constitute a taking. The Court of Appeals reversed, holding that application of government regulations affecting an owner's use of property may constitute a taking, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the plat and the jury's verdict.

Held:

1. Even assuming, *arguendo*, that government regulation may effect a taking for which the Fifth Amendment requires just compensation,

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROSE MARY KNICK,

Plaintiff,

v.

SCOTT TOWNSHIP,

Defendants.

CIVIL ACTION NO. 3:14-CV-02223

(JUDGE CAPUTO)

ORDER

NOW, this 7th day of September, 2016, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss Plaintiff's Complaint (Doc. 22) is **GRANTED**.

- (1) Plaintiff's Fourth Amendment claims in Counts I and II of Plaintiff's Second Amended Complaint ("SAC," Doc. 21) are **dismissed with prejudice**.
- (2) Plaintiff's Fifth and Fourteenth Amendment takings claims in Count II of Plaintiff's SAC are **dismissed without prejudice**. Plaintiff must attempt to avail herself of the just compensation procedures provided for under Pennsylvania law before re-filing these takings claims in federal court.
- (3) Plaintiff's claims for declaratory and injunctive relief in Count III of Plaintiff's SAC are **dismissed without prejudice**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

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



SUPREME COURT OF THE UNITED STATES

Syllabus

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

THE GUARANTEE OF A FEDERAL FORUM LIES BEHIND 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, Penn. Mary Knick, owns 60 acres of land in

THE COURT'S REASONS TO OVERTURN THE STARE DECISIS IN *WILLIAMSON COUNTY*:

- “Unworkable in practice”
- “exceptionally ill founded”
- “repeated criticism”
- “no reliance interests”



* * *

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

IMPLICATIONS OF THE *KNICK* DECISION:

1. Will there be more
takings claims in federal
court?

KAGAN, J., dissenting

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.



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

- *“one can expect a steady stream of new takings claims against state and local actions”*
- *“we expect to see an increase in federal takings claims brought in federal courts across the country”*

Paul Beard, II, “‘High Court’s Knick Ruling Is a Big Win for Property Rights,’ *Law260*, June 28, 2019, found at <https://www.alston.com/en/insights/publications/2019/06/high-courts-knick-ruling-is-a-big-win> (last accessed August 8, 2019)



Knick v. Township of Scott: Ending a Catch-22 that Barred Takings Cases from Federal Court

Ilya Somin*

Introduction

The Supreme Court's decision in *Knick v. Township of Scott* put a long-overdue end to a badly misguided precedent that had barred most takings cases from federal court.¹ The Court reversed a 1985 ruling that created a catch-22 blocking property owners from bringing takings claims against state and local governments in federal court. *Knick* was a closely divided 5-4 decision, with the justices split along left-right ideological lines. The case was initially argued before a court of only eight justices on October 3, 2018, during the period when Justice Brett Kavanaugh was still in the midst of a contentious confirmation process. It was then reargued in January, with Kavanaugh participating (likely because the Court had been evenly divided, 4-4, after the first oral argument).²

* Professor of law, George Mason University. I would like to thank James Burling, Trevor Burrus, Marty Lederman, Michael Masinter, Robert Thomas, and Ernie Young for helpful suggestions and comments, and Taylor Alexander and Tierney Walls for valuable research assistance. Parts of this article adapt material from an amicus curiae brief I wrote in the *Knick* case on behalf of the Cato Institute, the National Federation of Independent Business, the Southeastern Legal Foundation, the Reason Center of Tennessee, and the Reason Foundation. However, the views expressed in the article are solely my own, and do not necessarily reflect those of the organizations that joined the brief.

¹ *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019).

² For my analyses of the first and second oral arguments, see Ilya Somin, *Thoughts on Today's Supreme Court Oral Argument in Knick v. Township of Scott—A Crucial Property Rights Case*, Reason: Volokh Conspiracy, Oct. 3, 2018, <https://reason.com/2018/10/03/thoughts-on-todays-supreme-court-oral-ar/>; Ilya Somin, *Thoughts on the Second Oral Argument in Knick v. Township of Scott*, Reason: Volokh Conspiracy, Jan. 16, 2019, <https://reason.com/2019/01/16/thoughts-on-the-second-oral-argument-in->

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“Critics of *Knick* argue that it could generate a flood of new federal court litigation. It is by no means clear that this will happen.”

Ilya Somin, “*Knick v. Township of Scott*: Ending A Catch-22 The Barred Takings Cases From Federal Court, George Mason University Legal Studies, Research Paper Series, LS 19-16 (Sept. 9, 2019), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450572&dgcid=ejournal_html_email_u.s.:constitutional:law:rights:liberties:ejournal_abstractlink (last accessed September 25, 2019)

IMPLICATIONS OF THE *KNICK* DECISION:

2. How will the federal courts address state property law issues?

QUESTIONS OF STATE LAW

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.



QUESTIONS OF STATE LAW

SCOTT TOWNSHIP
LACKAWANNA COUNTY
ORDINANCE NO. 12-12-20-001

ORDINANCE OF THE TOWNSHIP OF SCOTT TOWNSHIP,
LACKAWANNA COUNTY, PENNSYLVANIA, RELATING TO
THE OPERATION AND MAINTENANCE OF CEMETERIES
AND BURIAL PLACES.

WHEREAS, Scott Township is a Pennsylvania Township of the Second Class organized and existing under the laws of the Commonwealth of Pennsylvania; and

WHEREAS, the Second Class Township Code grants the Board of Supervisors of the Township to adopt Ordinances in which general or specific powers of the Township may be exercised in order to promote the health, safety and welfare of its residents; and

WHEREAS, 53 P.S. §66536 (a) (§1536) entitled "Cemeteries" authorizes the Board of Supervisors to make rules and regulations regarding the location, operation and maintenance of cemeteries within the Township by Ordinance; and

WHEREAS, the Board of Supervisors of Scott Township believes that the operation and maintenance of cemeteries within the Township serves in the best interest of the Township;

NOW, THEREFORE, the Board of Supervisors of the Township of Scott Township, Lackawanna County, Pennsylvania, hereby ENACTS and ORDAINS as follows:

1.) Definitions -

- a. "Burial Place" - A portion of ground either occupied by a tomb or grave for burial of the dead.
- b. "Code Enforcement Officer" - The person duly appointed by the Board of Supervisors as Code Enforcement Officer for Scott Township, Lackawanna County.
- c. "Cemetery" - A place or area of ground, whether owned by the Township or private property, which has been set apart for or otherwise used for the interment of deceased human beings.
- d. "Owner" - Any individual(s), entity, group, association or partnership having title to the land upon which any cemetery is located or which has the authority to operate/maintain same.
- e. "Township" - Scott Township, Lackawanna County, Pennsylvania.

2.) Applicability - All cemeteries, whether private or public, established prior to the date of this Ordinance or hereafter created, are subject to the provisions of this Ordinance.

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,





QUESTIONS OF STATE LAW

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.

QUESTIONS OF STATE LAW



Lucas v. S.C. Coastal Council
505 U.S. 1003 (1992)

Murr v. Wisconsin
137 S.Ct. 1933 (2017)

(Slip Opinion)

OCTOBER TERM, 2016

1

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

MURR ET AL. v. WISCONSIN ET AL.

CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

No. 15–214. Argued March 20, 2017—Decided June 23, 2017

The St. Croix River, which forms part of the boundary between Wisconsin and Minnesota, is protected under federal, state, and local law. Petitioners own two adjacent lots—Lot E and Lot F—along the lower portion of the river in the town of Troy, Wisconsin. For the area where petitioners’ property is located, state and local regulations prevent the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development. A grandfather clause relaxes this restriction for substandard lots which were in separate ownership from



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11 IN AND FOR THE COUNTY OF MARIPOSA

12 JACK BANKHEAD,

13 Petitioner and Plaintiff,

14 v.

15 MARIPOSA COUNTY; MARIPOSA
16 COUNTY BOARD OF SUPERVISORS; KRIS
17 SCHENK, acting in his official capacity as
18 Mariposa County Planning Director; DOES 1 to
19 20, Inclusive,

20 Respondents and Defendants.

FILED
MARIPOSA SUPERIOR COURT
DEC 16 2011
LILY GRACE PHILLIPS
COURT CLERK

CASE NO.

10077

WRIT OF MANDATE PURSUANT TO
CODE OF CIVIL PROCEDURE §§ 1085 &
1094.5; COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND DAMAGES FOR TAKINGS
WITHOUT JUST COMPENSATION

FILED BY FAX

Writ of Mandate Pursuant to CCP 1085 & 1094.5 and Complaint for Declaratory



QUESTIONS OF STATE LAW



HOW WILL FEDERAL COURTS ADDRESS THE STATE LAW ISSUES?

A. Certification

- reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts.
- deference to the state court on significant state law matters

(*Kremen v. Cohen*, 325 F.3d 1035 (9th Cir. 2003))

HOW WILL FEDERAL COURTS ADDRESS THE STATE LAW ISSUES?

B. Pullman Abstention Doctrine

When “a federal constitutional issue ... might be mooted or presented in a different posture by a state court determination of pertinent state law”

- touches a sensitive area of social policy
- constitutional adjudication can be avoided
- issue of state law is doubtful.

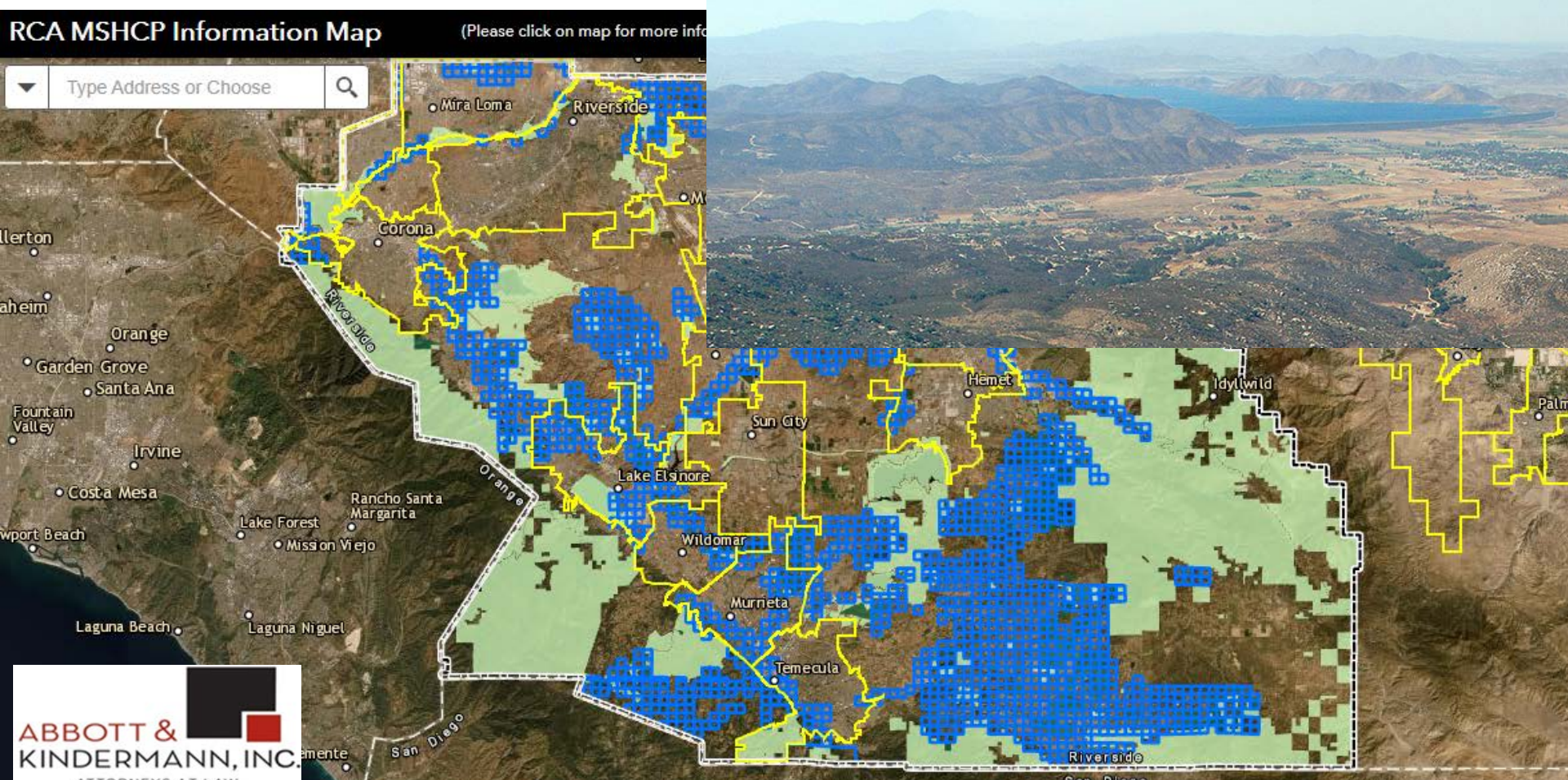
(Sinclair Oil Corp. v. County of Santa Barbara,
96 F.3d 401, 409 (9th Cir. 1996)

PULLMAN EXTENSION DOCTRINE

EHOF Lakeside II, LLC v.

Riverside County Transportation Commission

(Central District of California, Eastern Division – Riverside, case no. 5:19-cv-01693)



PULLMAN EXTENSION DOCTRINE

*EHOF Lakeside II, LLC v.
Riverside County Transportation Commission*

U.S. District Judge Jesus G. Bernal:

1. Compliance with a land use plan touches a sensitive, area of social policy.
2. If California state court agrees with Plaintiff's interpretation Plan, there may not be a federal takings claim.
3. Uncertain what rights and obligations a California court would determine the Plan confers.



REACTION TO JUDGE BERNAL'S RULING

*EHOF Lakeside II, LLC v.
Riverside County Transportation Commission*

Attorney Michael M. Berger:

“[I]t is outrageous that this district judge decided he could undo” all of that which the U.S. Supreme Court did in *Knick* “by the simple expedient of abstaining.”

ON APPEAL TO THE NINTH CIRCUIT

EHOF Lakeside II, LLC v. County of Riverside, et al.,
Ninth Circuit Court of Appeals case no. 19-56451

Plaintiff/Appellant (Property Owner):

- “[T]he district court's interpretation of Pullman abstention has the effect of nullifying *Knick*. ”
- Under the district court’s reading, “*Pullman* will ensure that virtually any takings plaintiff who accepts *Knick*'s invitation and enters the federal court will be promptly tossed back out.”

ON APPEAL TO THE NINTH CIRCUIT

EHOF Lakeside II, LLC v. County of Riverside, et al.,
Ninth Circuit Court of Appeals case no. 19-56451

Defendants/Respondents (Local Agencies):

- Implementation of the Plan involves an interpretation of the Plan. That implicates *Pullman*.
- *Pullman* abstention does not require that a ruling on the state issue by a state court could moot the federal constitutional issue.

ON APPEAL TO THE NINTH CIRCUIT

EHOF Lakeside II, LLC v. County of Riverside, et al.,
Ninth Circuit Court of Appeals case no. 19-56451

Plaintiff/Appellant (Property Owner):

- “[T]he Supreme Court would not have bothered removing the *Williamson County/San Remo* trap if the Court anticipated that takings plaintiffs would then immediately be ensnared in a *Pullman* trap.”

SEVERAL KEY FACTORS ON APPEAL

EHOF Lakeside II, LLC v. County of Riverside, et al.,
Ninth Circuit Court of Appeals case no. 19-56451

- Does the local rule/regulation require an interpretation (i.e., an interpretation of state law)?
- How much uncertainty must there be in the state law issues in order for Pullman Abstention to apply in in land use cases?
- Does the existence of a parallel state court proceeding change matter?
- Is it “obvious” that state courts are not neutral on takings claims against local agencies?

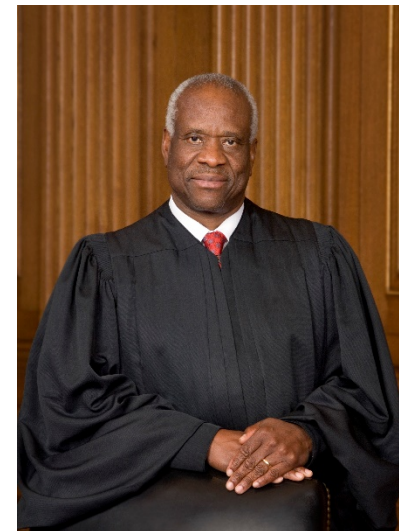
IMPLICATIONS OF THE *KNICK* DECISION:

3. Will federal courts enjoin
local land use regulations?

INJUNCTIVE RELIEF IN A FEDERAL TAKINGS CLAIM?



- Agencies “need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional”
- “As long as **just compensation remedies are available** ... injunctive relief will be foreclosed.”
- “Injunctive relief is not available when an **adequate remedy exists at law.**”



“One sensible route for a project proponent wanting to, say, challenge a law imposing such unconstitutional takings in the permit process is to sue for that law’s invalidation in federal court.”

Paul Beard, II, “‘High Court’s Knick Ruling Is a Big Win for Property Rights,’ *Law260*, June 28, 2019, found at <https://www.alston.com/en/insights/publications/2019/06/high-courts-knick-ruling-is-a-big-win> (last accessed August 8, 2019)

“... just compensation remedies are available ...”

- What is a sufficient ...
 - “post-taking compensation”
 - “some way to obtain compensation after the fact”
 - “adequate remedy at law” ?

IMPLICATIONS OF THE *KNICK* DECISION:

4. Are there substantive differences in takings claims between state courts and federal courts?

SUBSTANTIVE DIFFERENCES?

- Will the “normal” regulatory delays defense be valid in federal court, as it has been in California under *Landgate v. California Coastal Commission*?

SUBSTANTIVE DIFFERENCES?

- Will the *Penn Central* factors test be applied differently?

Factored analysis in *Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)*



- The economic impact of the regulation on the claimant.
- The extent to which the regulation has interfered with distinct investment-backed expectations.
- The character of the governmental action.

Additional Penn Central Factors (California Courts):

- Whether the regulation interferes with interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute “property” for Fifth Amendment purposes;
- Whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's primary expectation;
- The nature of the State's interest in the regulation and whether the regulation is reasonably necessary to the effectuation of a substantial public purpose;
- Whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader;
- Whether the government is acquiring resources to permit or facilitate uniquely public functions, such as government's entrepreneurial operations;
- Whether the regulation permits the property owner to profit and to obtain a reasonable return on investment;
- Whether the regulation provides the property owner benefits or rights that mitigate whatever financial burdens the law has imposed;
- Whether the regulation prevents the best use of the land;
- Whether the regulation extinguishes a fundamental attribute of ownership; and
- Whether the government is demanding the property as a condition for the granting of a permit.

IMPLICATIONS OF THE *KNICK* DECISION:

5. Is there a difference between legislative exactions and adjudicatory exactions? Why does that matter?

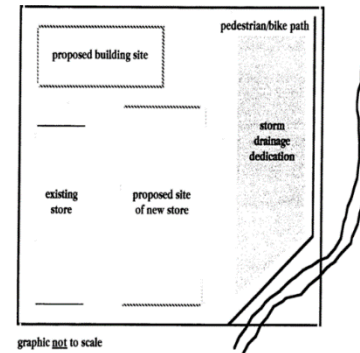
HEIGHTENED STANDARD OF REVIEW FOR REGULATORY TAKINGS

Nollan v. California Coastal Commission,
483 U.S. 825 (1987); and

Dolan v. City of Tigard, 512 U.S. 374 (1994).



Essential Nexus



Rough Proportionality
“*individualized determination*”

THE TWO-PART *NOLLAN/DOLAN* TEST

“...[In *Nollan* and *Dolan*] we 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 Management District, 570 U.S. 595, 599 (2013).

IN CALIFORNIA...

Before *Koontz*:



- *Nollan/Dolan* governs adjudicative (*ad hoc*) fees.
(*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.)
- Legislatively prescribed and generally applied fees are *not* governed *by Nollan/Dolan*.
(*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643.)

IN CALIFORNIA:



After *Koontz*:

Repeated that adjudicative fees are governed by the *Nollan/Dolan* test, but legislative fees are not.

(California Building Industry Assn. v. City of San Jose
(2015) 61 Cal.4th 435)

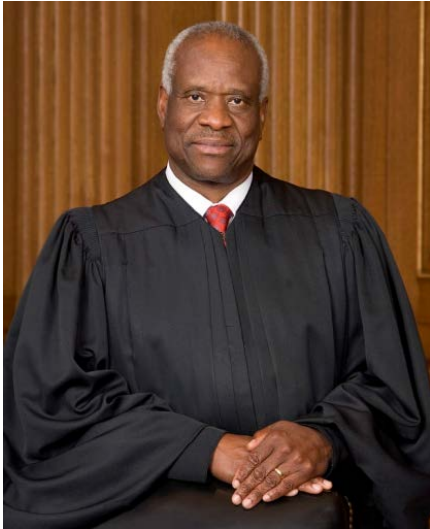
IN FEDERAL COURTS...



Before and after *Koontz*, Ninth Circuit cases have followed California's approach.

See Building Industry Association - Bay Area v. City of Oakland, 775 Fed.Appx.348, 9th Cir. 2019, affirming *Bldg. Indus. Assn. - Bay Area v. City of Oakland*, 289 F.Supp.3d 1056 (2018).

IN FEDERAL COURTS...



Supreme Court Has Not Addressed The Issue:

“... property owners and local governments are left uncertain about what legal standard governs legislative ordinances and *whether cities can legislatively impose exactions that would not pass muster if done administratively.*”

California Building Industry Assn. v. City of San Jose,
136 S.Ct. 928 (2016) (J.Thomas, concur. in den. cert.)



PACE
ENVIRONMENTAL
LAW REVIEW

Let's Be Reasonable: Why Neither *Nollan/Dolan* nor
Penn Central Should Govern Generally-Applied
Legislative Exactions After *Koontz*
Glen Hansen

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Volume 34/Number 2/Spring 2017

So after *Knick*,
Local agencies should try to
shift their exactions more to
legislative exactions with
fixed criteria and no
administrative discretion,
rather than adjudicatory
(ad hoc) exactions.

***KNICK v. TOWNSHIP OF SCOTT:
SUBSTANTIAL CHANGES COMING IN
MUNICIPAL TAKINGS LITIGATION***

***League of California Cities
City Attorneys' Department Webinar***

**Q & A,
DISCUSSION**



THANK YOU

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