High Court's Knick Ruling May Hinder Calif. Public Agencies

By **Gene Tanaka** (October 9, 2019)

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In Justice Elena Kagan's dissenting opinion in the U.S. Supreme Court takings case Knick v. Scott, she stated: "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."[1]

Her words are prophetic not just because the decision allows plaintiffs to file regulatory takings or inverse condemnation lawsuits in federal court instead of state court, but because it may remove the judicial safeguard in California that requires plaintiffs to first obtain a state court decision that the government's action is a taking without just compensation.

Further consideration of Knick illustrates just what that decision could mean to public agencies in California. Until now, a government agency could rescind its action immediately after a judicial declaration that the action was an uncompensated taking to avoid damages. After Knick, the important question is whether this safety valve for government agencies will survive.

Previously, the California Supreme Court held that, prior to filing an inverse condemnation action, a landowner must first exhaust his or her administrative remedies, and then exhaust his or her judicial remedies.[2] In California, judicial remedies have two prongs. The first prong for an as-applied challenge is a petition for writ of mandamus under California Code of Civil Procedure section 1094.5 to "establish that the ordinance, regulation, or administrative action is not lawful or constitutionally valid if no compensation is paid."[3]

This requirement allows the public agency to protect the public purse from large awards of compensation. As the Hensler court explained:

> [I]f no such early opportunity were given, and instead, persons were permitted to stand by in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative actions resulted in a taking for public use, meaningful governmental fiscal planning would become impossible.[4]

The second prong is a petition for administrative mandamus under California Code of Civil Procedure section 1095 for compensation from the taking or, if plaintiff would like a jury trial, then a complaint for inverse condemnation.[5] The second prong arises from constitutional language that a taking only occurs if the government does not provide compensation for its actions:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner has no claim against the Government for a taking.[6]

Clearly, the second prong, requiring a state lawsuit for just compensation, was eliminated by Knick. Knick addressed the very question of whether a plaintiff must file a Pennsylvania state court lawsuit for just compensation before suing in federal court for a takings.[7] In its holding, the U.S. Supreme Court overruled its prior decision in Williamson Planning, and held that the plaintiff could go straight to federal court without first filing a state court

compensation lawsuit.[8]

What is less clear is whether Knick also struck the judicial exhaustion requirement of the first prong: obtaining a California state court decision that the application of the regulation was a taking. On the one hand, the Hensler court grounded its decision for the first prong in Williamson Planning. Furthermore, a state court decision that the application of the regulation to plaintiff's property is not a taking without just compensation must be accorded full faith and credit in federal court, which would bar the federal case. This is the Catch-22 decried by the majority.[9] Viewed this way, since Knick reversed Williamson Planning regarding exhaustion of judicial remedies, the first prong was also eliminated.

On the other hand, the first prong is a creature of California law that provides a process and limitations period to challenge the legality of land use decisions.[10] Interpreting Knick to hold that state courts may not consider whether the action takes property without just compensation would rewrite these California statutes. Therefore, a more measured reading of the Knick holding would not rewrite state law and would not strike down the first prong of Hensler.

Also, eliminating the first prong means a government agency may face two concurrent lawsuits. One action in state court to determine the legality of the government's action except — as it relates to just compensation — and a second lawsuit in federal court to decide whether the action was a taking without just compensation. Two concurrent lawsuits regarding the same government action and the same property raises the specter of inconsistent decisions on issues of fact and the application of law to the facts. It would also be a waste of judicial resources and raise the litigation costs for both sides. These concerns can be avoided with a narrower view of the Knick decision, which preserves the first prong in Hensler.

While this issue remains to be sorted out by state and federal courts, we can already predict immediate consequences of this decision. First, Knick will surely chill agency actions since the potential loss of the second prong requires public agencies to gamble whether the federal court will judicially determine that its action was a taking without just compensation. If the agency gambles and loses, then it could face millions of dollars in takings damages for the years the case is in court and hundreds of thousands of dollars in attorney's fees for pay plaintiff and its own attorneys. The safe way out of this box is for the agency to drop what may be a perfectly legal regulation.

Second, Knick will drive up the cost of doing business for public agencies. Emboldened by this holding, property owners will be more assertive in protecting their rights, which will force the agencies to pay attorneys to consider their exposure. For agencies whose actions are challenged, the exposure and attorney's fees will raise their costs even more. Therefore, in trying to resolve a purported Catch-22 for plaintiffs, the U.S. Supreme Court created another Catch-22 for governments.

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[1] Knick v Township of Scott , __ U.S. __, 139 S.Ct. 2162, 2181 (2019).

[2] Hensler v. City of Glendale, 8 Cal.4th 1, 25 (1994),

[3] Id. at 25.

[4] Id. at 27-28 (quoting Patrick Media Group, Inc. v. California Coastal Com., 9 Cal.App.4th 592, 612 (1992)).

[5] Hensler, 8 Cal.4th at 14.

[6] Id. at 13 (quoting Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985))

[7] Knick, 139 S.Ct. at 2167.

[8] Id. at 2179

[9] Knick at 2167.

[10] Hensler at 22. See, Cal. Gov't Code §§ 65009 (challenge to legislative actions); 66499.37 (challenge to administrative actions).