

Nailing Down *Knick* and Governmental Takings in Louisiana

By Randall A. Smith



Title 19 of the Louisiana Revised Statutes contains the general expropriation statutes, and it governs takings by public bodies and certain quasi-public entities, such as utilities. La. R.S. 19:2.1 specifically authorizes the state or its political corporations or subdivisions to take private property for public use in accordance with Article 1, § 4 and Article VI, § 21 of the Louisiana Constitution. Expropriating authorities must possess the authority to take needed property and, in all situations, if the right to expropriate exists, under both the Louisiana and United States Constitutions, the government must pay “just compensation” for the taking. La. Const. art. I, § 4(B)(1); U.S. Const. amend. V. Just compensation is required both for physical takings and for inverse condemnations, such as regulatory takings.

The grounds to challenge takings are limited under Louisiana law. An owner who contests the public necessity for the

taking, or contends that more property is sought to be taken than is needed, has a narrow window of opportunity within which to challenge the propriety of the taking, and the statutory time periods vary depending upon the taking authority. To that point, Title 19 is not the only Title that governs takings in Louisiana. Portions of Title 38 govern takings by local levee boards, whereas Title 48 typically comes into play when the taking involves the Department of Transportation and Development. Additionally, some other local governmental bodies have their own takings statutes with entirely different filing deadlines and requirements from Titles 19, 38 or 48.

While the state’s expropriation authority to take is construed broadly by the courts, under La. Const. art. I, § 4, expropriating authorities are required to compensate a property owner to the “full extent of the loss.” The phrase “full extent of the loss” means that the owner must “not only be paid the market value

of property taken and severance damages to his remainder, but also that such an owner be put in as good a position pecuniarily as he would have been had his property not been taken.” *State Through Dept. of Highways v. Constant*, 369 So.2d 699, 701 (La. 1979). Such damages may include compensation for moving costs, relocation, inconvenience and lost profits from the taking of a business enterprise.

Louisiana law, generally, also requires the expropriating authority to attempt, in good faith, to reach an agreement as to compensation with the owner of the property sought to be taken. In most situations, the expropriating authority must provide the property owner with certain information from its appraisals or estimates and must offer as payment an amount not less than the lowest appraisal. If the parties are unable to reach an agreement, under Title 19, the state or its political corporations or subdivisions may then file a petition for expropriation in the district court of the parish in which

the property to be expropriated is located. When the taking authority takes property without filing an expropriation petition, the property owner must file an inverse condemnation suit in order to obtain compensation. In either case, if the property owner is successful, it may recover attorney's fees, costs and expert fees pursuant to Louisiana statutory authority. *See, e.g.,* La. R.S. 19:8 (attorney's fees in general expropriation suits); La. R.S. 13:5111 (attorney's fees in inverse condemnation suits); La. R.S. 19:201 (attorney's fees and costs for abandoned proceedings or those in which the governmental entity lacks authority to take); La. C.C.P. art. 1920 (costs generally); La. R.S. 13:5112 (costs in inverse condemnations).

Louisiana has a long line of cases regarding public use, economic development and deference to a governmental entity's determination of necessity that makes its legal framework consistent with the majority's opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), despite having passed an anti-*Kelo* Constitutional Amendment to outlaw takings "(a) for predominate use by any private person or entity, or (b) for transfer of ownership to any private person or entity." La. Const. art. I, § 4(B)(1). (*Kelo* upheld a taking for economic development purposes.)

Because both the Louisiana and United States Constitutions require the payment of just compensation, one would, therefore, assume that a property owner, as master of its complaint, could choose to pursue its takings claim either in state court, under the Louisiana Constitution, or in federal court, under the Fifth Amendment. Prior to June 21, 2019, a takings plaintiff was effectively barred from bringing a Fifth Amendment takings claim in federal court, unless the plaintiff demonstrated that his/her claim was ripe under a two-prong test established by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), requiring, first, that government regulatory action be final and, second, that a property owner must first exhaust available state law procedures prior to seeking relief in federal

court. That all changed on June 21, 2019, when a 5-4 majority of the United States Supreme Court overruled the state-litigation prong of *Williamson County*. *Knick v. Twp. of Scott, Pennsylvania*, 139 S.Ct. 2162, 2172 (2019).

Breaking Down *Knick*

In *Knick*, the Township passed an ordinance that required Ms. Knick to allow general public access to a small, antiquated graveyard located on her otherwise private property. After first commencing an injunction suit in state court, Ms. Knick then filed a Section 1983 action in federal court, alleging that the Township's attempted enforcement of the ordinance effected a Fifth Amendment taking of her property without just compensation. The federal court dismissed her just compensation claim without prejudice, finding that it was not ripe under *Williamson County* because she had not first sought just compensation through state court inverse condemnation proceedings. The 3rd Circuit affirmed, and the Supreme Court granted certiorari to reconsider *Williamson County*'s rule regarding exhaustion of state procedures.

In the majority opinion, authored by Chief Justice Roberts, the Court determined that "*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." *Id.* at 2173. Under *Williamson County*, the existence of a state remedy "prevented the Fifth Amendment right to just compensation from vesting until exhaustion of the state procedure." *Knick*, 139 S.Ct. at 2171. Noting that there was no state-litigation requirement for vindication of other constitutional rights, the majority opinion held that a property owner must be permitted to bring a Section 1983 takings claim in a federal forum because "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 state court.'" *Knick*, 139 S.Ct. at 2173 (2019). Consequently, "a property owner

may bring a Fifth Amendment claim under § 1983 upon the taking of his property without just compensation by a local government" and need not first seek compensation through state-provided procedures. *Knick*, 139 S.Ct. at 2179.

The Supreme Court expressly declined to address the viability of the finality prong of *Williamson County* because "*Knick* does not question the validity of this finality requirement, which is not at issue here." *Knick*, 139 S.Ct. at 2169. The Court also did not address in any detail how its holding might be applied to challenges to expropriation suits filed by local governmental bodies in state court. However, in response to concerns that property owners might run to federal courts to enjoin state regulations and usurp state governmental authority, the Chief Justice allayed these concerns by stating that, "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." *Knick*, 139 S.Ct. at 2176. Thus, "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*, 139 S.Ct. at 2179.

Testing *Knick* in Louisiana and the 5th Circuit

In the wake of *Knick*, Louisiana federal courts are now tasked with aligning prior 5th Circuit precedent with *Knick*'s pronouncements and defining the extent to which *Knick*'s rationale may be extended beyond its specific factual scenario. Currently pending before the 5th Circuit is a case in which the 5th Circuit has been called upon to determine if *Knick*'s rationale permits a federal court to enforce payment of a state court final judgment awarding tens of millions of dollars in just compensation for an ex-

propriation of private property. *Violet Dock Port v. St. Bernard Port*, No-19-30992, 5th Circuit Court of Appeal. In *Violet Dock Port*, St. Bernard Port filed a quick-taking state court expropriation suit in 2010 and, upon depositing its estimate of just compensation as required under state law, took immediate ownership of Violet Dock Port's private, turn-key, Mississippi River port facility. After over eight years of litigation, final judgment was issued awarding Violet Dock Port just compensation in the amount of \$28,764,685, plus interest. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., L.L.C.*, 16-0096 (La. App. 4 Cir. 9/12/18), 255 So.3d 57, writ denied, 18-1696 (La. 2/11/19), 263 So.3d 435, and writ denied, 18-1692 (La. 2/11/19), 263 So.3d 436.

Just after the Supreme Court rendered its decision in *Knick*, Violet Dock Port filed a Section 1983 claim in the federal district court for the Eastern District of Louisiana, seeking just compensation in the amount of the final state court award. Violet Dock Port averred that St. Bernard Port's failure to pay was a continuing violation of Violet Dock Port's right to payment of just compensation that, pursuant to *Knick*, is viable and properly brought in federal court. St. Bernard Port filed a motion to dismiss, arguing that *Knick* did not support the filing of a Section 1983 action to enforce a state court judgment, likening the just compensation judgment to personal injury judgments that are typically not enforced in federal court. The district court agreed with St. Bernard Port and dismissed Violet Dock Port's complaint with prejudice, explaining that it "recognize[d] that if *Knick's* [sic] had been issued before the expropriation of plaintiff's property, plaintiff could have proceeded directly to federal court. Nevertheless, *Knick* does not convert § 1983 into a tool for collecting payment due on state court judgments that issued prior to initiation of the federal action." *Violet Dock Port v. St. Bernard Port*, 19-CV-11586 (E.D. La. Nov. 23, 2019), 2019 WL 6307945.

Violet Dock Port appealed to the 5th Circuit, arguing that the district court erred in failing to apply the rationale of *Knick* and the Fifth Amendment's guar-

antee of reasonably prompt payment of just compensation — including necessary mechanisms to enforce payment. The significance of the issues raised in Violet Dock Port's appeal is duly noted by the many *amici* briefs filed in the case. The appeal is still pending.

To date, the only 5th Circuit opinion directly addressing and interpreting *Knick* is *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454 (5 Cir. 2019), cert. denied, ___ S.Ct. ___, (March 30, 2020), 2020 WL 1496635. In *Bay Point Properties*, plaintiff first sought just compensation in a Mississippi state court inverse condemnation suit, but the state courts determined that plaintiff's right to compensation was limited by state statute. Plaintiff then filed a takings claim in federal court, which was dismissed by the district court on sovereign immunity grounds before the Supreme Court rendered its decision in *Knick*. On appeal, the 5th Circuit affirmed the dismissal of plaintiff's suit, concluding that the decision in *Knick* had no bearing upon the property owner's appeal because the Court in *Knick* did not consider, and did not alter, the "bedrock principles" of 11th Amendment sovereign immunity that otherwise prohibit federal courts from considering takings claims made against the state. *Bay Point Props., Inc.*, 937 F.3d at 456 (5 Cir. 2019). On March 30, 2020, the Supreme Court denied Bay Point Properties' petition for certiorari. *Bay Point Properties*, 2020 WL 1496635.

In the *Knick* of Time for COVID-19 Claims Against Local Government

As the COVID-19 pandemic continues to unfold, some property owners have been faced with government-ordered shutdowns or regulations that significantly impact their property interests. Additionally, state and local governmental bodies have disclosed severe shortages of real property to house affected individuals or supplies, as well as shortages of personal protective equipment and other supplies. Thus, owners of such property may face a potential governmental taking of their real or personal

property to satisfy a dire public need.

Under *Knick*, as soon as a local governmental body effects a physical or regulatory taking of private property without filing an expropriation suit in state court, a property owner whose property has been taken should be able to pursue a Fifth Amendment takings claim in federal court pursuant to Section 1983, provided that all elements of the cause of action are otherwise met. However, unless the 5th Circuit is called upon to revisit its holding in *Bay Point Properties*, a Section 1983 claim against the state for just compensation for the taking will be barred under the 11th Amendment.

Although *Knick* does not offer specific guidance regarding whether a property owners' federal takings claim could take precedence over a previously-filed state court expropriation proceeding filed by a local governmental body, *Knick* did overrule *Williamson County's* state litigation requirement. The majority opinion in *Knick* assured that there was no basis for a federal court to enjoin a state court expropriation proceeding "[a]s long as an adequate provision for obtaining just compensation exists." *Knick* 139 S.Ct. at 2176. Given that the intent of *Knick* was to eliminate faulty jurisdictional or prudential obstacles to pursuing federal takings claims in federal courts, *Knick's* rationale should be extended to permit federal takings claims that the federal courts had declined to entertain before *Knick*.

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