

Ch. 7: Land Use Regulation

Note 4, p. 851: Aftermath of Lucas v. South Carolina Coastal Council

Although David Lucas had rejected the state's conclusion that his beachfront property was endangered by sea level rise, it is now right at the edge of the ocean. In an interview on C-Span in March 1992, which is archived online at: <https://www.c-span.org/video/?c4496450/lucas-sc-coastal-council-1992>. David Lucas claimed that the Isle of Palms is "an accreting island" noting that his property was hundreds of yards from the ocean. Following the Supreme Court's decision, the state bought out Lucas and allowed two homes to be built on the lots Lucas had owned. Even though Hurricane Irma passed 200 miles to the west of Charleston in October 2017, these homes were severely damaged by it and were boarded up when visited on October 22, 2017. See photos in the "[Photo Tour](#)" section of this website. Meanwhile the Isle of Palms has been seeking millions of dollars from the Federal Emergency Management Agency (FEMA) for beachfront replenishment projects because the ocean is lapping at the edges of these lots.

p. 855: The Procedural Prerequisites for Bringing a Takings Claim in Federal Court: Knick v. Township of Scott

The U.S. Supreme Court is currently considering whether to streamline the procedure for bringing takings claims in federal court. In the case of *Knick v. Township of Scott, Pennsylvania*, No. 17-647, the Court is hearing arguments that it should reconsider the portion of [Williamson County Regional Planning Commission v. Hamilton Bank](#), 473 U.S. 172 (1985) that requires property owners to exhaust state court remedies in order to ripen federal takings claims (Williamson County is mentioned in the excerpt from the Palazzolo case on p. 855 of the casebook without discussion). In the *Knick* case a township in Pennsylvania enacted an ordinance authorizing officials to enter any property in the township to determine the presence of ancient gravesites and requiring property owners to hold such gravesites open to the public during daylight hours. The owner of property on which ancient grave markets were found sued to challenge the ordinance as a taking for which the government was required to provide just compensation. While describing the ordinance as "extraordinary and constitutionally suspect," the Third Circuit upheld dismissal of the case because the property owner had failed to bring an inverse condemnation action to seek compensation under state law, a prudential requirement established in *Williamson*. *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017)

On October 3, 2018, an eight member Court heard oral arguments in the *Knick* case before Justice Brett Kavanaugh was confirmed. It is possible that the Court deadlocked 4-4, which would have affirmed the Third Circuit decision by an equally divided Court. However, on November 2, 2018 the Court issued an order scheduling the case for reargument and directing

the parties to file letter briefs addressing an alternative argument by the petitioner that was only considered briefly in the first argument. The case was reargued on January 16, 2019, and now will be decided by the full 9-member Court. his case may have significance for environmental practice because reversal of Williamson's exhaustion of requirement would make it easier to bring takings claims in environmental cases.

1. PP.866-874: The "Relevant Parcel" Issue and Murr v. Wisconsin

Wisconsin Legislature Responds to MURR v. WISCONSIN, 137 S.Ct. 1933 (2017)

In Murr v. Wisconsin, 137 S.Ct. 1933 (2017), an excerpt of which is in the 8th edition, the Supreme Court rejected a regulatory takings claim brought by property owners who owned contiguous lots along the St. Croix River. The owners sought to sell the second lot in order to raise money to renovate a home on the first lot. However, a local zoning ordinance, enacted after the properties were purchased, prohibited building on the second lot on the ground that it was not large enough to develop on its own and the two lots had been 'merged' into one that already had a home. The owners claimed that the ordinance constituted a regulatory taking as applied to them because it deprived them of the value of the second lot. In a 5-3 decision authored by Justice Kennedy the Court held that Wisconsin could consider the two lots together as the "parcel as a whole," a concept articulated in Penn Central Transportation Company v. City of New York, 438 U.S. 104, 130-31 (1978).

After losing in the Supreme Court, the Murrs obtained relief from the Wisconsin Legislature, which in November 2017 passed legislation providing that landowners can build on and sell substandard lots if the regulations restricting development were enacted after they purchased the lot. On November 27, 2017, Wisconsin Governor Scott Walker signed the legislation. Bruce Vielmetti, Wisconsin Gov. Scott Walker Signs Bill to Expand Property Rights, Milwaukee Journal Sentinel, Nov. 27, 2017. This is another instance in which the property rights movement was able to turn a defeat in the Supreme Court into victories in state legislatures, as occurred in many states that passed laws restricting the use of eminent domain after the Supreme Court's 2005 decision in Kelo v. City of New London, 545 U.S. 469 (2005).

