'Takings' Snapshots Volume 23, July 19, 1999

1. Eberle v. Dane County Board of Adjustment , 1999 Wisc. LEXIS 104 (Wisc. S.Ct., July 7, 1999) (expressly disagreeing with the California Supreme Court's decision in Landgate, the Wisconsin Supreme Court, over a strong dissent, held that a county board of adjustment's erroneous denial of a special exception permit, where the denial was subsequently overturned in court, could support a claim for compensation for a temporary regulatory taking under the Wisconsin takings clause; the court also ruled that because the plaintiff could pursue his remedies under the Wisconsin takings clause, a section 1983 claim for compensation under the federal takings clause was not ripe, but the court left open the possibility that a section 1983 federal taking claim, including reimbursement of attorneys fees under section 1998, might be pursued in the case later). (Michigan Homebuilders and Realtors participated as amici)

2. Purdie v. Attorney General, 1999 WL 417915 (N.H., June 24, 1999) (in an interesting case, the New Hampshire Supreme Court held that the state legislature effected a taking under the federal and state constitutions when it passed a law establishing the 'high water line' as the limit of public rights in coastal tidelands; the court ruled that the geographical limit of public rights in tidelands is set by the common law, that the Court did not and could not delegate the responsibility for defining the limit of these common law rights to the legislature, and the established common law rule is that public rights extend only to 'mean high water') (The Conservation Law Foundation, the Audubon Society of New Hampshire and others participated as amici).

3. Brown v. Thompson, 1999 WL 455744 (Hawaii, July 7, 1999) (the Hawaii Supreme Court ruled that State impoundment of a sinking vessel effected a due process violation, but did not result in a taking because the vessel represented a nuisance).

4. McKeighan v. Grass Lake Township Supervisor, 593 N.W.2d 605 (Mich.Ct.Apps., decided 7/31/99, released for publication 5/19/99) (in another interesting and ironic case, a special panel of the Michigan Court of Appeals ruled, over a dissent, that the Michigan Opening of Private Roads and Temporary Highways Act did not result in a taking; under the Act, a landlocked owner may apply to a township supervisor to have a private road laid out across another's property, and the supervisor must convene a civil jury to determine the necessity of the proposed road and appraise the owner's damages; the dissent concluded that the owner seeking to block his landlocked developer neighbor from building a road over his property presented a valid claim that the Act did not serve a public use as required by the takings clause, but the majority ruled that the Act rested not on the eminent domain power but rather on the police power, that it was a legitimate police power regulation, and that the Court did not need to resolve whether or not the Act served a public use).

5. Dowerk v. Charter Township of Oxford, 592 N.W. 724 (Michigan Court of Appeals, decided 12/4/98, released for publication 3/12/99) (The Michigan court of appeals affirmed rejection of a takings claim based on a town's refusal to approve 4-lot subdivision because existing private access road was not adequate to serve the development; the court reasoned that there was no taking because the owner retained the option of using the 10 acres for 1 house and therefore could not show elimination of all of the property's economic vitality).

6. Texas Natural Resource Conservation Commission v. Accord Agriculture, Inc., 1999 WL 394818 (Texas Court of Appeals, June 17, 1999) (in another ironic takings case, the Texas court of appeals affirmed a trial court ruling that Accord (a nonprofit organization formed to protect property owners in the Texas panhandle from pollution from CAFOs, confined animal feeding operations) lacked standing to challenge as a taking new rules governing CAFOs adopted by the Texas Natural Resources Conservation Commission (because participation of individual members would be required to adjudicate damages), but the court reversed dismissal of the facial

challenge to the constitutionality of the Texas Right to Farm Act's creation of immunity for nuisance-producing activities).

7. GTE Southwest Incorporated v. Public Utility Commission of Texas, 1999 WL 495597 (Texas Ct. Apps., July 15, 1999) (Texas court of appeals ruled that Texas Public Utility Commission effected a per se physical taking by requiring GTE to allow the owner of multi-unit buildings to purchase certain of the company's cables and facilities, and that the order was invalid because the Commission lacked the authority to take GTE's property; a dissenting judge concluded that the Commission possessed both the constitutional and statutory authority to issue the order).

8. Rohaly v. State of New Jersey, 1999 WL 459555 (N.J. App. Div., June 22, 1999) (N. J. appellate division held that installation of groundwater monitoring wells on plaintiff's property effected a per se taking, even though wells were in place at the time plaintiff purchased the wells and notwithstanding the fact that the plaintiff's loss was de minimis).

9. Greystone Hotel Co. v. The City of New York, 1999 U.S. App. LEXIS 14960 (2nd Cir., June 23, 1999) (in an unpublished decision, a federal appeals court affirmed rejection of a hotel owner's takings challenge to the N.Y. rent stabilization law and rent stabilization code, on the grounds that (1) there was no physical occupation, (2) there was no per se regulatory taking, because the plaintiff conceded the property retained some value, and (3) regulations that do not render property valueless will only result in a taking if they do not substantially advance legitimate state interests, a standard not met in this case).

10. Rainey Bros. Construction Co. v. Memphis & Shelby County Board of Adjustment, 1999 WL 220128 (6th Cir., April 5, 1999) (in an unpublished per curiam opinion, a federal appeals court affirmed that rejection of a takings claim by a state court was res judicata and barred relitigation of the takings claim in federal district court, where the state trial court had refused (apparently incorrectly) to grant the plaintiff leave to amend its complaint to assert its takings claim).

11. Rith Energy, Inc. v. United States, 1999 WL 428008 (Ct. Fed. Cl., June 25, 1999) (Court of federal claims rejected takings challenge to Office of Surface Mining denial of coal mining permit; court concluded that the administrative finding of a high likelihood that proposed mining operation would lead to acid drainage pollution indicated that owners would not be entitled to a permit under the Tennessee Water Quality Control Act and therefore the taking claim was barred under principles of state nuisance law).

12. Montecino v. State of Louisiana, 1999 WL 447300 (E.D.La, June 28, 1999) (operators of video poker machines, who were unconstitutionally prohibited from making financial contributions in connection with state referendum on video poker, brought a series of constitutional challenges to the referendum vote in 33 parishes to prohibit video poker; court rejected takings challenge on the ground that the Louisiana state legislature had expressly declared that gaming licenses do not create property interests; court also rejected due process challenge).

13. United States Fidelity & Guaranty Co. v. McKeithen, 39 F.Supp.2d 747 (M.D.La., March 5, 1999) (applying 3- factor test employed by plurality in U.S. Supreme Court's Eastern Enterprises decision, a Louisiana federal district court held that change in method for assessing contributions to workmen's compensation fund did not effect a taking).