'Takings' Snapshots Volume 24, September 9, 1999

Because this issue of Takings Snapshots is relatively lengthy, we have starred the most interesting and important cases.

1. *Good v. United States, (U.S. Fed. Cir., August 31, 1999) (after lengthy deliberations, the Federal Circuit Court of Appeals affirmed a ruling that a developer in the Florida Keys failed to present a valid taking claim based on the Army Corps of Engineers* denial of a wetland-fill permit; the court ruled that a taking claim is barred if the owner purchases the property with notice that regulatory review requirements apply, even when as in this case the claimant alleges a Lucas-type total taking; the court also ruled that every property owner holds her property subject to the understanding that policies and standards will change, and therefore the developer could not object that the restrictions on use of the property had grown progressively more stringent over time). (The EPP** filed an amicus brief in support of the United States on behalf of Florida Audubon Society, a copy of which is available on the EPP website, www.envpoly.org).

2. Sebastian v. United States, 1999 WL 592260 (Fed. Cir., August 9, 1999) (a Federal Circuit Court of Appeals affirmed dismissal of a regulatory takings action brought by military retirees alleging that elimination of promised lifetime medical benefits effected a taking; court held that relevant laws and regulations did not create the kind of absolute and unconditional right to medical care sufficient to create a property interest protected by the Takings Clause).

3. *Florida Rock Industries, Inc. v. United States, (U.S. Ct. Cls., August 31, 1999) (in what is likely to be the near final chapter of this long-running takings case, U.S Court of Federal Claims Chief Judge Loren Smith issued a decision finding a taking based on the so-called partial takings theory, ruling that a 70% reduction in property value was sufficient to support a finding of a regulatory taking; more or less tracking Richard Epstein*s novel reading of the Takings Clause, Judge Smith reasoned that essentially any adverse impact on property value effects a taking, unless it is justified by background nuisance principles or the regulations confer a reciprocity of advantage on the claimant and neighboring landowners).

4. B& G Enterprises, Ltd. v. United States, 43 Fed.Cl. 523 (U.S. Ct. Fed Cls., May 4, 1999) (the Court of Federal Claims held that a federal government cannot be held liable for a taking based on a state law restricting cigarette vending machines when law was adopted to comply with conditions of a federal block grant to the state; court ruled that state compliance with terms of grant conditions is not equivalent to the type of coercion of state government necessary to support a finding of federal takings liability for state government actions).

5. *Maine Yankee Atomic Power Co. v. United States, 1999 WL 545254 (Ct. Fed. Claims, July 26, 1999) (applying an apparently expansive reading of the U.S. Supreme Court*s Eastern Enterprises decision (i.e., assuming the plurality opinion represents an authoritative statement of the law), Federal Court of Claims, using 3-factor Penn Central test, rejected a takings challenge to the Energy Policy Act of 1992, which imposed a special, retroactive clean-up fee on all U.S. electric utilities which had purchased enriched uranium from the U.S. government). (Judge Weiss reached identical results in two companion cases issued the same day, Omaha Public Power District v. United States, and Sacramento Municipal Utility District v. United States).

6. Walcek v. United States, 199 U.S. Claims LEXIS 195 (U.S. Ct. Cls., August 11, 1999) (the Court of Federal Claims granted partial summary judgment to the U.S. in a regulatory taking challenge to the application of federal wetlands rules, concluding that plaintiffs failed to demonstrate the kind of extraordinary delay or bad faith sufficient to support a claim for a temporary taking; court declined to grant summary judgment to either party on the permanent taking claim because of open issues about the magnitude of the economic impact and the claimant*s investment expectations).

7. Houlton Citizens* Coalition v. Town of Houlton, 175 F.3rd 178 (1st Cir., April 22, 1999) (First Circuit Appeals Court held that a town*s decision to grant an exclusive license to a company to collect refuse in the community did not effect a taking of the property rights of a competing company thereby excluded from the refuse collection business; the court said that the courts have *steadfastly rejected the proposition that the grant of an exclusive contract for refuse collection constitutes a taking vis-a-vis other (competing) trash haulers*).

8. Parella v. Retirement Board of the Rhode Island Employees* Retirement System, 173 F.3rd 46 (1st Cir., April 16, 1999) (a federal appeals court, after deciding to bypass the state defendants* potential Eleventh Amendment defense and instead dispose of the case on the merits, ruled that retroactive modification of a law governing state legislators* pension rights did not effect a taking because the plaintiffs had no clear-cut contractual right to any particular level of pension benefits and therefore could not point to any property right to support the taking claim).

9. Texas Office of Public Utility Counsel v. FCC, 1999 WL 556461 (5th Cir., July 30, 1999) (in a complicated challenge to FCC rules implementing the 1966 Telecommunications Act, the Fifth Circuit Court of Appeals rejected a takings challenge to FCC regulations opening up a regulated market to competition without simultaneously instituting various subsidy measures to support the companies newly exposed to competition; court ruled that plaintiffs could not demonstrate that net effect of regulatory change was confiscatory under Duquesne).

10. *Wyoming Association of Conservation Districts v. U.S. EPA (U.S. Dist. Ct. D. Colo.) (On June 22, 1999, the Wyoming Association of Conservation Districts, represented by the Budd-Falen Law Offices, filed a blunderbuss complaint challenging the Clinton/Gore Clean Water Action Plan, alleging that federal officials failed to perform the takings impact analysis mandated by the Reagan-era federal executive order on regulatory takings).

11. Chevron v. Cayetano, 1998 WL 1085708 (U.S. Dist. Ct. D. Hawaii) (in a 1988 decision recently posted to Westlaw, the Hawaii Federal District Court, applying the arguably erroneous Agins substantially-advance takings test (applied by the Ninth Circuit in Richardson), held that a Hawaii statute limiting the rent that oil companies may charge its lessee dealers effected a taking because it did not substantially advance a legitimate state interest insofar as it failed in actual practice to achieve the stated legislative goal of benefiting dealers and consumers).

12. Froelich v. City of Newton, 1999 WL 640042 (U.S. Dist.Ct. Kansas, June 17, 1999) (Federal District Court in Kansas rejected taking claim brought by property owners who were previously defendants in an action brought by city to enforce housing code and public nuisance regulations, court dismissed taking claim on the ground that it was not ripe under Williamson County because plaintiffs had not pursued state remedies, and because claim failed as a matter of substance given, among other things, that plaintiffs failed to allege a loss of all economically beneficial use of the property).

13. Superior-FCR Landfill, Inc. v. County of Wright, 1999 WL 592660 (U.S. Dist Ct. D. Minn, August 6, 1999) (exercising supplemental jurisdiction over a state takings claim challenging county zoning regulations barring expansion of a landfill, the Minnesota Federal District Court granted summary judgment to the county on the ground that the plaintiff bought the property with notice of the new restrictions and cannot claim relief for a self-imposed hardship).

14. *National Association of Homebuilders v. State of New Jersey (U.S. Dist. Ct. D.N.J., August 12, 1999) (unpublished) (in an important decision affirming the importance of the concept of background principles of state property law in takings cases, the N.J. Federal District Court held that N.J, law and regulations requiring landowners along the Hudson River to convey an easement and to help construct a public walkway along the river front did not effect a taking of lands that were previously submerged and therefore remained subject to the public trust doctrine;

the court held that the private rights in these lands are and always have been subject to the public*s rights to use and enjoy them for recreational purposes; court declined to grant summary judgment with respect to non-public trust lands affected by the walkway requirement because of the need for further factual development to resolve the reasonableness of the burden on these lands as a way of preserving access to the public trust lands).

15. *Chevy Chase Land Company v. United States, 1999 WL 548734 (Md Ct. Apps., July 29, 1999) (in an important victory for rails to trails advocates, the Maryland Court of Appeals, on certification from the Federal Circuit Court of Appeals, ruled that a 1911 deed granting an easement for the construction of the Georgetown branch railway in northwest D.C. was sufficiently broad to encompass recreational use after railroad operations ceased; the court ruled that easements for public highways are subject to reasonable changes in modes of transportation and that the trail posed no unreasonable burden on the fee owner because recreational use poses less of a burden than a railroad; this resolution of the underlying state law property issue probably means that the pending taking claim in federal court will be dismissed).

16. Burnham v. Monroe County, 1999 WL 542616 (Florida Court of Appeals, July 28, 1999) (court of appeals affirmed rejection of takings claim when owner was denied a building permit under county *rate of growth ordinance,* given that owner only had to make *a few minor changes* to his plans to qualify for a permit but failed to do so; court ruled that plaintiffs failed to show the kind of denial of *all economically beneficial or productive use of land* necessary to demonstrate a taking).

17. *Lambert v. San Francisco (On July 28, 1999, the California Supreme Court, apparently in response to the U.S. Supreme Court*s decision in City of Monterey limiting the scope of the Dolan *rough proportionality* test, dismissed this longstanding appeal as improvidently granted; the court of appeals had rejected a takings challenge to a denial of a permit to convert an SRO hotel to residential use where the claimants alleged that the city had denied the permit only after the owners refused to pay a monetary exaction; the claimants argued that the claim should be evaluated using the heightened standard for exactions established in Dolan and the California Supreme Court;*s Ehrlich decision; the court of appeals ruled that heightened scrutiny did not apply to so-called unsuccessful exactions; the city has petitioned the Supreme Court to reorder publication of the court of appeals decision) (The Environmental Policy Project** amicus brief in support of the City of San Francisco filed on behalf of a coalition of housing advocacy groups is on the EPP website, www.envpoly.org).

18. *Shell Island Homeowners Association. Inc. v. Tomlinson, 1999 WL 506986 (N.C. Ct. Apps., July 20, 1999) (the North Carolina Court of Appeals affirmed dismissal of a takings challenge by a coastal property owner to a state rule prohibiting the construction of permanent erosion control structures, stating, among other things, that an owner has no constitutionally protected property right to construct an erosion-control structure in an environmentally sensitive area, and that the owner*s alleged property loss was due to natural causes and the State*s enforcement of its rules regarding coastal structures was only incidental to these natural events).

19. *Benchmark v. City of Battle Ground, (Wash. Sup. Ct.) (Recently, following the U.S. Supreme Court*s decision in City of Monterey, the Washington Supreme Court granted the city*s petition for review in a case in which the court of appeals had decided that the city*s requirement that a developer provide street improvements effected a taking under Dolan and Nollan (see Takings Snapshots, XX (3/31/99)); the Washington Supreme Court remanded the case to the court of appeals for reconsideration in light of City of Monterey) (the Court of Appeals decision is reported at 972 P.2d 944).

**The Environmental Policy Project (EPP) is the former name of what is now The Georgetown Environmental Law & Policy Institute (GELPI).