'Takings' Snapshots Volume 31, March 9, 2000

1. Wyer v. Board of Environmental Protection, 2000 WL 264202 (Maine Sp.Ct., March 10, 2000) (denial of permission to construct single-family residence on a coastal building lot did not effect a taking given that the property could continue to be used for recreation or parking and trial court found that lot had value of $50,000 in potential sale to abutters; court specifically rejected the "partial" regulatory takings theory). (EPP amicus brief on behalf Maine Audubon Society is on EPP website.)

2. SDS Lumber Co v. State Department of Natural Resources (Wash. Super. Ct., March 8, 2000) (trial court denied state's motion for summary judgment in a suit claiming a taking of plaintiffs' property as a result of the application of state regulations protecting Northern Spotted Owl habitat; court ruled that relevant parcel was the 232 acres that the plaintiffs planned to log out of their 5000 acre ownership, ostensibly because this narrow definition of the parcel conformed to accepted industry practices and based on other factors such as access, geography, productivity of the timber stand and the age and type of trees; court rejected argument that claim was not ripe because plaintiffs had not sought an incidental take permit). (EPP amicus brief in this case on behalf of the Washington Environmental Council is on the website.)

3. Greenspring Racquet Club, Inc. v. Baltimore County, 77 F.Supp.2d 699 (D.Md., November 30, 1999) (in a decision likely to delight opponents of expansive takings claims, a federal district court entered an order requiring the land owner to reimburse Baltimore County's attorney fees on the ground that the plaintiff's takings and other constitutional claims were ¡"frivolous, unreasonable, and without foundation;" as to the regulatory takings claim in particular, the court held that the owner's challenge to the enforcement of a zoning restriction barring the conversion of racquet club into an office building necessarily failed because the plaintiff "failed to allege (and it could not allege) any facts supporting the well-established element of a takings claim that it had been deprived of ¡substantially all' economic value of its affected property.").

4. Commonwealth Edison Co. v. United States, 2000 WL 137033 (Ct.Fed.Cls., February 3, 2000) (in a very thoughtful and well reasoned decision, the court of federal claims (per Judge Allegra) rejected a takings challenge to the Energy Policy Act of 1992, which imposed a financial assessment on utilities to help pay for the clean up of federal uranium enrichment facilities; the court ruled that a government-imposed obligation to pay money is not within the scope of the takings clause; the court also ruled that the plaintiffs improperly sought to invalidate the act as unlawful under the takings clause, which is only designed to provide compensation as a result of the imposition of an "otherwise proper" regulatory restriction).

5. Lincoln City Chamber of Commerce v. City of Lincoln City, 164 Or.App. 272 (Or.Ct.Apps., December 8, 1999) (court of appeals affirmed rejection by Land Use Board of Appeals of facial takings challenge to municipal ordinance requiring developer, if it intends to challenge the imposition of development exactions under Dolan, to submit a so-called rough proportionality report to assist the municipality in determining the facts necessary to make a rough proportionality determination in accord with Dolan).

6. Kinross Copper Corp. v. State of Oregon (Or., Feb. 29, 2000) (Oregon Supreme Court denied review in this case (see takings snapshots XXVI, XXII), leaving in place a court of appeals ruling rejecting a takings challenge to the denial of a permit to discharge wastewater into a river on the ground that the claimant had no protected property interest to discharge wastewater into a public waterway).

7. Palazzolo v. State of Rhode Island, 2000 WL 2255743 (R.I., February 25, 2000) (Rhode Island Supreme Court, in a complex case, affirmed the trial court's rejection of a takings claim based on denial of permission to develop wetlands, holding that the (1) the claim was not ripe

because the plaintiff never sought permission to pursue a less ambitious proposal to develop the property, (2) the per se claim failed because the plaintiff could realize 20% of the value of the property and in any event the plaintiff purchased the property subject to the regulations, and (3) the Penn Central claim failed based solely on the fact that the owner lacked reasonable investment-backed expectations; the decision contains the useful statement that the plaintiff "was unable to cite a single case in which a court has ordered compensation for a regulatory taking when the claimant became the owner of the property after the regulation because effective").

8. Woodland Manor III Associates v. McLeod, (R.I. Super. Ct., March 2, 2000) (Limited partnership which acquired real property did not have standing to assert regulatory takings claim because it was not the owner of the property at the time of the alleged taking, and a so- called Assignment Agreement did not result in an effective assignment of the seller's regulatory taking claim to the plaintiff).

9. Bradshaw v. United States, No. 98-708L (U.S.Ct. Fed.Cls., February 29, 2000) (in a virtual replay of the Hage grazing takings suit, the court granted summary judgment to the government on a number of issues but denied summary judgment for the government on plaintiffs' claim of a taking of their water rights and their ditch rights on public lands and on plaintiffs' claim of a taking based on elimination of the economic viability of the ranch property as a whole).

10. Davis v. United States, 2000 WL 246276 (D.R.I., February 28, 2000) (magistrate order recommending dismissal of takings claim against former Rhode Island Attorney General based on allegedly illegal forfeiture of personal property, because (1) a taking claim must be based on a "rightful" exercise of government power and the plaintiff claimed his property was seized illegally; and (2) a taking claim must be directed against the government but this claim was asserted against a government official).

11. Evac, LLC v. Pataki, 2000 WL 246417 (N.D.N.Y., March 3, 2000) (dismissing takings claim brought by operator of a medical air transport service based on State's commencement of competing service, because (1) plaintiff lacked a protected property interest in desire to be free from competition, and (2) even if plaintiff had a protected property interest, the State did not effect a taking "because the state did not physically invade, permanently appropriate, or nullify all economically viable uses of [the plaintiff's] property").

12. Kraus v. County of Placer, No. CIV-S-99-961 (E.D.Cal., Feb. 25, 2000) (rejecting county's motion to dismiss takings claim based on county's assertion of public title to beachfront land formerly regarded as private; based on 9th Circuit decision in Dodd, court ruled that plaintiffs were not required to pursue state compensation procedures before asserting section 1983 federal takings claim in federal court).

13. GTE Southwest Inc. v. PUC, 10 S.W.2d (Tx. Ct. Apps., July 15, 1999, rehearing granted in part and overruled in part, February 17, 2000) (holding, over strong dissent, that PUC's order requiring telephone company to grant competitors access to their lines constituted a per se physical occupation of private property and was invalid as beyond PUC's statutory authority).