'Takings' Snapshots Volume 34, June 29, 2000

1. GTE Service Corp. v. FCC, 120 S.Ct. 2214 (on June 5, 2000, the U.S. Supreme Court granted a petition for a writ of certiorari to the Fifth Circuit in this case, reported below at 183 F.3d 393, in which the appeals court, in addition to rejecting numerous other legal challenges to the FCC's implementation of the 1996 Telecommunications Act, rejected Fifth Amendment takings challenges to various FCC orders which allegedly had the effect of reducing the revenues and imposing new fees on local telephone carriers; the case raises specific questions under the Supreme Court decisions addressing the takings issue in the context of government rate-making, but the Supreme Court's decision might well have broader implications for regulatory takings doctrine).

2. Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 2000 WL 770512 (9th Cir., June 15, 2000) (in a major decision, the 9th Circuit, reversing a trial court ruling, held that a multi-year planning moratorium on development in the Lake Tahoe basin did not effect a compensable taking; the court's opinion provides a very cogent and sophisticated discussion of the Supreme Court's First English decision and the so-called 'temporary takings' issue) (The Environmental Policy Project filed an amicus brief in this case on behalf of the American Planning Association and the League to Save Lake Tahoe, which is available on the EPP website, www.envpoly.org).

3. Pacific Bell v. City of San Diego, 2000 WL 760699 (Cal. Ct. Apps., June 13, 2000) (in an interesting case addressing the frequently litigated intersection between takings and tort theories of municipal liability, the California court of appeals, reversing the trial court, ruled that city was liable in an inverse condemnation action for property damage caused when one of the city's cast iron water-supply pipes burst; rather than replacing all its older cast iron pipes, the city adopted a-replace- when-they-break policy; the court ruled that the city was liable on the theory that government is responsible under the Takings Clause for property losses proximately caused by a public improvement as deliberately designed and maintained; the court also ruled that the city was liable on a strict liability basis, without regard to the reasonableness of its conduct).

4. Casman v. City of Coatati, No. C-99-3641 (N.D.Cal, June 21, 2000) (unpublished decision) (applying the 9th Circuit's Richardson precedent, a federal district court enjoined a mobile home rent control ordinance because the ordinance failed to substantially advance a legitimate governmental interest and therefore effected a facial taking; the court reasoned that the ordinance failed this test because nothing in its language 'prevented' a mobile home owner from subverting the rent control goal by capitalizing below-market rents; the district court completely ignored the issue of whether this ostensible test really raises a legitimate takings issue at all, as well as the language in the various opinions in Del Monte Dunes questioning the validity of the substantially advance takings test).

5. United States v. Land, 2000 WL 702412 (5th Cir., May 31, 2000) (in an interesting if somewhat special case, the United States brought a direct condemnation action to acquire wetlands to be included in a protection zone around a new national park in Louisiana; reversing the trial court, the 5th Circuit held that the landowners were not entitled to compensation based on the development value of the property where the owners had been denied a section 404 fill permit sixteen years earlier and their claim for compensation in the court of claims for an alleged regulatory taking had been dismissed on statute of limitations ground; the court reasoned, in effect, that the subsequent, unrelated condemnation action did not provide the owners an opening to revive their failed inverse condemnation claim).

6. The John Corporation v. City of Houston, 2000 WL 758347 (5th Circuit, June 21, 2000) (the Fifth Circuit Court of Appeals held that a regulatory takings claim based on a city's demolition of a building which the plaintiff planned to rehabilitate was not ripe because the plaintiff had failed to exhaust state procedures; the court held that related due process and equal protection claims

were ripe; decision contains an extensive discussion of the relationship between the Takings Clause and the Due Process Clause and concludes that the Takings Clause does not completely subsume any Due Process claim relating to an alleged deprivation of a property interest; the court did not resolve whether the plaintiff's allegation that the alleged taking did not serve a lawful public purpose precluded compensation under the Takings Clause, but observed that in Eastern Enterprises a majority of the justices suggested that the Takings Clause does presuppose a legitimate governmental action).

7. Home Builders Association v. City of Beavercreek, 2000 WL 621955 (Ohio, June 14, 2000) (in a 4 to 3 decision, the Ohio Supreme Court upheld a municipal ordinance imposing impact fees on new development; while acknowledging that physical exactions are different from monetary fees, the court did not ascribe any legal significance to this difference; the majority ruled that a variant of the Nollan-Dolan two-part analysis applied and that the ordinance (at least on its face, apparently) met this test; the dissenters questioned whether development fees could be imposed at all consistent with the Ohio constitution (other than in the form of a general, uniform tax), argued for application of the specially and uniquely attributable test, and concluded that the ordinance in any event failed the second branch of the majority's test; while a victory for local government, the majority appears to have adopted an unusually strict test for development fees, one that ignores the distinctive nature of monetary fees (as opposed to physical exactions) as well as the legislative character of this ordinance).

8. Briarcliff v. Town of Cortlandt, 2000 WL 670064 (N.Y.App.Div., May 22, 2000) (New York appellate decision, reversing a trial court finding of a taking, concluded that the town did not effect a taking by rezoning property, after plaintiff purchased the property, in order to bar mining on the property (while still allowing residential development); the court ruled that the plaintiff failed to demonstrate that it would be unable to install a septic system to support residential development and therefore failed to establish a taking; the court said that the proper test for a taking is whether a regulation destroys 'the economic value, or all but a bare residue of the value, of the parcel')

9. Kelley v. Story County Sheriff, 2000 WL 765962 (Iowa, June 1, 2000) (following the clear majority rule across the country, the Iowa Supreme Court ruled that a county cannot be held liable under the Takings Clause for property damage caused by law enforcement officers while executing a search warrant; two justices dissented)

10. BSW Development Corp. v. City of Dayton, 1995 WL 1612533 (S.D.Ohio, March 23, 2000) (in a case involving application of the Williamson County doctrine, the defendant city removed from state court to federal court this case (involving takings and many other legal claims) challenging the City of Dayton's denial of permission to demolish an historic building; shortly after the removal, the city moved for summary judgment on the ground that the takings claim was not ripe because the plaintiff had not exhausted procedures available in the Ohio courts for obtaining compensation for a taking, which motion the district court granted).

11. Chalmers v. Winston, 2000 WL 553210 (ED Va., May 4, 2000) (district court rejected takings claim brought by inmate in state prison based on state's failure to pay interest on prisoner's bank account; court held that per se physical occupation takings test did not apply because money is fungible; court also held there was no taking under the Penn Central test, particularly since the cost of tracking and allocating the interest earned would exceed the value of the interest; the court avoided the issue of the State's possible 11th Amendment immunity by construing the complaint as asserting a claim against officers in their official capacities; finally, the court ruled that even if the officers had 'breached' the Takings Clause they would have been immune from liability based on good faith immunity).

12. Kingsport Horizontal Property Regime v. United States, No. 94 145L (Ct.Fed.Cls., May 16, 2000) (holding United States liable for bank erosion caused by wave action produced by boat traffic in the intracoastal waterway; the court said that the United States would not ordinarily be

liable for erosion caused by the effects of boat traffic in a navigable waterway, but said the rule is different where, as in the case, the segment of navigable waters was artificially created).

13. Del-Rio Drilling Programs v. United States, No, 569-86L (May 16, 2000) (on remand from the Federal Circuit (concluding that the illegality of BLM's denial of access to oil and gas leases did not bar a finding of a taking), court of federal claims concluded that BLM was liable for a taking; court deferred ruling on various affirmative defenses; the Federal Circuit remand was based on the premise that the legal invalidity of the BLM's action did not preclude a finding of taking; whether that conclusion is correct (or at least requires reexamination) in light of the conclusion by five justices in Eastern Enterprises that a valid takings claim presupposes a legitimate government action (see Fifth circuit John decision discussed above) is open to question).

14. Residual Associates v. United States, No. 98-99l (Ct.Fed.Cls., June 20, 2000 (in an odd little case, the court of federal claims ruled that claim for an alleged taking of mineral interests as a result of the construction of federal dam was barred by res judicata as a result of court's prior dismissal of the same action as unripe on the ground that the plaintiff had not filed a mining plan with the federal government; although the plaintiff subsequently filed a mining plan, the second suit was still barred because in this action the plaintiff only challenged the same government actions at issue in the first suit, and did not specifically challenge the denial of the mining plan, which decision was based on the plaintiff's decision to allow its site permit to construct a tunnel to the planned mine to lapse).