'Takings' Snapshots Volume 35, August 10, 2000

1. Adams Outdoor Advertising v. City of East Lansing, 2000 WL 1036202 (Mi., July 26, 2000) (the Michigan Supreme Court unanimously reversed a Court of Appeals decision holding that a billboard amortization statute effected a taking; six justices, in two separate opinions, ruled that the claim was barred by a lack of reasonable investment backed expectations, given that the plaintiff purchased the business and entered into new billboard leases after the local ordinance was already in place; four justices also reasoned that there was no taking because a lessee's taking claim must be analyzed in relation to the lessor's entire property interest, and in this case the elimination of the rooftop billboard leases effected only a small portion of the lessor's entire property interest; the seventh justice concurred in the result) (the Environmental Policy Project filed a brief in the case on behalf of Scenic Michigan and Scenic America, which is available on the EPP website).

2. Pettro v. United States, 2000 WL 968676 (Ct.Fed.Cls., July 11, 2000) (in an interesting case reflecting the federal court of claims' expansive approach to takings issues, the court ruled that a government order barring exploitation of a sand and gravel pit for approximately two years effected a temporary taking; court did not address whether the temporary nature of the restriction precluded a finding of a taking; nor did the court consider whether the government's apparent legal error in asserting that it had superior title to the sand and gravel precluded a finding of a taking for a public use).

3. Vokoun v. City of Lake Oswego, 2000 WL 959995 (Oregon Ct. Apps., July 12, 2000) (in an interesting and important case dealing with whether erroneous government actions can give rise to takings claims, the Oregon Court of Appeals, reversing the trial court, held that city's allegedly negligent maintenance of a storm drain system did not support a finding of a taking for a public use under the Oregon Constitution; the court said that a taking can only arise as a consequence of a 'legitimate' government action).

4. State of Florida v. Burgess, 2000 WL 889840 (Fla. App., July 6, 2000) (in a very interesting and useful decision, the Florida Court of Appeals ruled that the denial of a permit to construct a dock and an A-frame shelter on 160 acres of wetlands did not effect a taking; court held there was no total taking under Lucas because the owner could continue to use the property for recreational purposes, as he intended when he purchased the property 35 years earlier; court also held that plaintiff failed to show a sufficient interference with investment-backed expectations to support the taking claim, given that plaintiff's anticipated recreational use could be continued and plaintiff had merely acquired the property 'for investment' with no actual expectation of developing the property). 5. OMYA, Inc. v. Town of Middlebury (Vt., July 25, 2000) (http://dol.state/vt/us/gopher_root3 /supct/current/99-282.eo) (Vermont Supreme Court rejected an appeal from an order by the Vermont Environment Review Board limiting the number of truck trips mining company could make through a village per day; court held that the appellant failed to establish that the regulation 'denies the owner an economically viable use of his land,' as required to support a valid takings claim; because the court rejected the appellant's substantive due process challenge to the order, the court ruled that the appellant's claim of a taking based on the 'failure to substantially advance' theory failed as well).

6. Okemo Mountain, Inc v. Ludlow, 2000 WL 968429 (Vt., July 14, 2000) (Vermont Supreme Court ruled, over a dissent, that the State effected a taking by refusing to allow a landowner to use a state road in the winter in order to access his property; the court rejected the defense that the owner purchased the property knowing that the road's classification provided for seasonal closure of the road) (The State has filed a petition for rehearing, which is currently pending).

7. Kelley v. Story County Sheriff, 611 N.W. 2d 475 (Iowa, June 1, 2000) (The Iowa Supreme Court, in line with the majority rule across the country, but over a strong dissent, held that a county is not liable for a taking as a result of property damage caused by county sheriff exercising

a lawful arrest warrant; court relied on distinction between police power and eminent domain power and fact that police action did not result in government acquisition of a permanent interest in any property).

8. City of Seattle v. McCoy, 2000 WL 974393 (Wash.App.Div., July 17, 2000) (holding that closure of bar for one year pursuant to municipal nuisance abatement ordinance aimed at combating drug activity constituted a temporary taking under First English; court rejected nuisance defense on the ground that the owner did not engage in the illegal activity, was not aware of the illegal activity when it occurred, and took reasonable steps to prevent it; court also ruled that the ordinance was unreasonably oppressive under the second prong of the Washington State Presbytery test).

9. Krupp v. Breckenridge Sanitation District, 1 P.3d 178 (Colo.Ct.Apps., April 1, 1999) (affirming rejection of takings challenge to fee imposed by sanitation district to offset costs of new development, on the grounds that (1) Nollan/Dolan do not apply to fees (as opposed to exactions of property interests), explicitly declining to follow the California Supreme Court's contrary decision in Ehrlich; and (2) Nollan/Dolan were inapplicable because the sanitation district lacked the power to deny development approval and, therefore, had no regulatory authority to use as leverage over the developer in order to exact the fee).

10. Westside Quik Shop v. Stewart, 2000 WL 823346 (S.C., June 21, 2000) (rejecting takings challenge to state law outlawing video gaming machines, on the grounds that (1) the state could properly declare machines contraband subject to forfeiture given the state's broad power over gaming industry; (2) alleged business losses are not compensable under the Takings Clause; and (3) there was no taking of real property where machines were located because property was not reduced to 'absolutely no value' and in any event plaintiff lacked reasonable investment backed expectations given heavily regulated character of gaming business).

11. The Jim Sowell Construction Co, Inc. v. City of Coppell, 2000 WL 968782 (N.D.Tex., June 12, 2000) (in an action challenging as a taking city's refusal to issue a permit for multi-family residential development, court held that plaintiffs were entitled to proceed on the [doubtful] theory that the regulation failed to substantially advance a legitimate government interest but that the city was entitled to summary judgment in the absence of specific facts to support the claim; the court reasoned that the heightened scrutiny of Nollan/Dolan was not applicable to a regulatory decision such as this, but that this type of adjudicative decision should be 'more closely scrutinized' than a legislative enactment).

12. Prewitt v. City of Rochester Hills, 2000 WL 977407 (E.D. Mich., June 19, 2000) (in a takings action arising from the denial of a permit to demolish an historic building, federal district court entered summary judgment for the city, because (1) state historic review board correctly determined that the permit denial did not deny the owner all economically beneficial use of the property; (2) unappealed board decision was res judicata as to takings issues; and (3) attempted relitigation of takings issue in federal court was barred by the Rooker-Feldman doctrine).

13. Shealy v. United Government of Athens-Clarke County, 2000 WL 898094 (Ga.App., July 7, 2000) (Georgia court of appeals, reversing trial court, held that county's direct condemnation of plaintiffs' property allegedly contaminated by county's landfill did not moot plaintiffs' inverse condemnation claim based on earlier contamination of property; in an interesting analysis, court reasoned that direct condemnation only took property remaining at the time of that taking, and if the plaintiffs were asserting that some portion of the property had previously been taken by a regulatory taking, they were entitled to pursue that claim independently).

14. Allustiarte v. United States, 46 Fed.Cl. 713 (Ct.Fed. Cls., May 24, 2000) (in an avowedly 'creative claim,' debtors and other participants in bankruptcy cases alleged that adverse ruling by

bankruptcy judges in cases before them constituted compensable takings (suit was against the United States on the theory that the bankruptcy courts are an arm of the U.S. government); court of federal claims rejected the claim, primarily on the ground that it improperly sought to make the court of claims act as a reviewing court over the bankruptcy courts).

15. Stelpflug v. Town Board, 2000 WL 895065 (Wisc., February 8, 2000) (holding that entry of an order of condemnation for construction of a road to provide access to landlocked property effected a taking, even though the order of condemnation was rescinded after the landlocked property owners obtained alternative access and even though road was never actually laid out across the plaintiffs' property).

16. Largent v. Klickitat County, 2000 WL 896411 (Wash.App.Div., July 6, 2000) (applying Washington State's unique multi-part takings test, Court of Appeals upheld ruling that denial of variance to permit construction of a gravel road rather than a paved road to serve a subdivision did not effect a taking; court ruled that Nollan and Dolan, which generally only apply to physical occupations, were inapposite to this case).

17. R.W. Docks & Slips v. State of Wisconsin, 2000 WL 944742 (Wisc. Ct. Apps., July 11, 2000) (not recommended for publication in official reports) (court of appeals affirmed trial court rejection of takings claim based on state's refusal to grant permit to construct 71 boat slips at a marina; applying parcel as a whole rule, court ruled that because the plaintiff was permitted to construct its marina with 201 slips (but not the 272 it had originally planned), it could not claim a denial of 'all or substantially all practical uses of [its] property' sufficient to support a taking claim; court also ruled that plaintiff could not assert a takings claim based on fact that it commenced marina development thinking it would construct 272 slips, because owner commenced development knowing that not all necessary permits were in place).

18. Quality Towing, Inc. v. City of Myrtle Beach (S.C., April 3, 2000) (South Carolina Supreme Court affirmed dismissal of a takings suit brought by a towing service operator challenging a city ordinance limiting the maximum rates for wrecking services; the court held that plaintiff failed to allege a deprivation of 'all economically beneficial use of the property,' as required to make out a valid takings claim).

19. Commonwealth v. Blair, 2000 WL 875903 (Mass.Super., June 6, 2000) (in an action challenging the enforcement of the state watershed protection act (which prohibits, with certain exceptions, alterations within 200 feet of surface waters in certain watersheds), Massachusetts trial court rejected facial and as applied takings challenges by homeowners who expanded their beach area adjacent to a lake without authorization; court ruled that setback requirement easily survived review under 3-factor Penn Central test and declined to interpret Massachusetts takings clause as going beyond the federal takings clause).

20. Burnham v. City of Salem, 101 F.Supp.2d 26 (D.Mass., May 25, 2000) (in a complicated case arising from a long running dispute between a business and local regulators, the federal district court ruled that local officials had not effected a taking either by removing an illegal mooring from a waterway or by temporarily placing several jersey barriers on plaintiffs' property).