'Takings' Snapshots Volume 38, December 5, 2000

1. Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000), affirmed on rehearing, No. 99- 5030, 2000 WL 1665135 (Fed. Cir., Nov. 6, 2000), and rehearing en banc denied, No. 99-5030, 2000 WL 1693725 (Fed. Cir. Nov. 13, 2000) (on November 6, in response to an application for rehearing filed by the United States, a panel of the Federal Circuit issued an order and opinion supplementing its prior opinion in this case; in its first opinion the panel ruled that, under governing Federal Circuit precedent, an owner's lack of investment-backed expectations does not bar a taking claim brought under Lucas; in its supplemental opinion the panel concluded that no Federal Circuit decision definitively resolved the issue but that the reasoning in the Supreme Court's Lucas decision mandated the conclusion that investment expectations are irrelevant in a Lucas-type case; on November 13, the Federal Circuit issued an order declining the United States' application for rehearing en banc; Judge Gajarsa filed a dissent from the denial of rehearing, arguing that a lack of investment expectations should be a defense in a Lucas case, and also arguing that the initial panel ruling disregarded the property as a whole rule and improperly applied the defense based on the federal navigational servitude by requiring a factual determination that the government's regulatory action was actually based on a desire to protect navigation rather than to protect the environment; Judge Gajarsa noted that the expectations issue was pending before the U.S. Supreme Court in the Palazzolo case, and pointedly suggested that the Supreme Court might wish to review the decision in Palm Beach if procedural barriers prevented the Court from resolving the expectations issue in Palazzolo) (EPP has filed two briefs in this case, which are available on the EPP webpage).

2. Manufactured Housing Communities of Washington v. State of Washington, 2000 WL 1678419 (Wash.S.Ct., November 9, 2000) (in a dramatic new ruling, the Washington Supreme Court ruled that state legislation granting mobile home park tenants a right of first refusal when park owners decide to sell their property abrogates a fundamental attribute of property ownership and therefore effects taking; the court further ruled that the taking was for a private rather a public use and therefore was properly enjoined; the court rested its decision exclusively on the takings clause of Washington State Constitution; two justices filed strong dissents, principally arguing that the court was contradicting the property as a whole rule, i.e. that a right of first refusal is only one stick in the bundle of sticks, without explanation or justification).

3. United States Fidelity & Guaranty Co. v. McKeithen, 226 F.3d 412 (5th Cir., September 15, 2000) (relying on Eastern Enterprises, the Fifth Circuit (per Judges Edith Jones) held that Louisiana legislation which imposed retroactive liability on insurers to pay workers compensation benefits effected a taking under the 3-factor Penn Central test).

4. Greenspring Racquet Club, Inc. v. Baltimore County, 2000 WL 1624496 (4th Cir, October 31, 2000) (this is an appeal from an unusual court ruling dismissing a takings claim and concluding that the claim was so frivolous that it warranted an assessment of attorneys fees in favor of the county; the Fourth Circuit affirmed, based on the two-part Agins test, dismissal of the owner's facial takings claim challenging the county's refusal to rezone the property to permit more intensive development; the court of appeals vacated the dismissal of the as applied takings challenge, on the ground that the trial court lacked jurisdiction under Williamson County because the plaintiff had not exhausted available state compensation remedies; finally, the appeals court ruled that the award of attorneys fees was plainly warranted based on the assertion of the frivolous facial takings (and other) claims, but vacated the award of attorneys fees for recalculation in light of the court*s disposition of the as applied claim).

5. San Remo Hotel, LP v. City and County of San Francisco, S.Ct. No S091757 (on November 21, the California Supreme Court granted review in a case in which the Court of Appeals applied heightened Dolan- type scrutiny to legislatively mandated fees imposed on developers in order to preserve low-income housing opportunities).

6. Mannatt v. United States, 2000 U.S. Claims Lexis 230 (Ct.Fed.Cls., November 6, 2000) (refusing to dismiss a takings claim based on erroneous resurvey of Indian reservation lands which allegedly led to

encroachment on plaintiff*s property; court held that owner could pursue takings claim in the court of federal claims and was not limited to pursuing relief under the Quiet Title Act; court also ruled that takings claim was viable notwithstanding the fact that the resurvey was allegedly illegal (the decision appears inconsistent with another recent court of federal claims decision, in A-1 Amusement, ruling that the unlawfulness of the government action does preclude a takings claim)).

7. Carolina Power & Light Co v. United States, 48 Fed.Cl.,35 (Ct.Fed.Cl.,October 17, 2000) (in line with other decisions by the Court of Federal Claims, and based on an application of the 3-factor Penn Central test, court concluded that fee imposed on utilities that purchased government uranium enrichment services pursuant to Energy Policy Act to help pay for environmental clean up costs did not amount to a Fifth Amendment taking).

8. Granite Beach Holdings v. State of Washington, 11 P.2d 847 (Wash.Ct.Apps., October 30, 2000) (Washington intermediate court of appeals affirmed dismissal of takings claim brought by owner of land surrounded by state trust (and other private) lands who sought and was denied an easement across the state lands in order to reach his property; court first ruled that plaintiff had no demonstrated common law or statutory basis for claiming a right of access across state lands; absent a property right to access the property by crossing state lands, no taking occurred when state exercised its discretionary authority to deny access).

9. Schneider v. United States, 2000 WL 14811228 (D.Neb., July 21, 2000) (affirming magistrate's recom- mendation in favor of certification of class action in a suit challenging rail-trail conversions as an unconstitutional taking; court defined class as consisting of all persons holding land in Nebraska occupied or controlled for trail use pursuant to the National Trails System Act and who are seeking compensation of less than $10,000 under the little Tucker Act).

10. Kitt v. United States, 47 Fed.Cl. 8231 (Ct.Fed.Cl., October 6, 2000) (federal legislation which retroactively plugged inadvertent legislative loophole in federal tax provisions governing individual retirement accounts did not violate due process or effect a taking; court ruled that under implicit ruling by a majority of the U.S. Supreme Court in Eastern Enterprises, takings clause does not apply to financial assessments under any circumstances, and in any event the tax did not have as great an impact, nor was it so retroactive, as the financial assessment held unconstitutional in Eastern Enterprises).

11. Doenz v. Sheridan County, 2000 WL 1678037 (10th Cir., November 8, 2000) (holding that where owner previously asserted federal and state takings claims in state court, subsequent suit in federal court asserting the same claims again was barred by res judicata; the court reserved the question of whether a plaintiff could preserve an opportunity to litigate a federal takings claim by formally reserving the claim in the state court).

12. Milligan v. City of Red Oak, 230 F.3d 355 (8th Circuit, October 16, 2000) (affirming denial of claim that acquisition of agricultural land next to municipal airport to promote public safety did not satisfy Fifth Amendment's "public use" requirement).

13. Castle v. United States, 2000 WL 1690248 (Ct. Fed.Cl., November 9, 2000) (in a Winstar-type savings and loan contract case, following an assessment of contract damages, court of federal claims rejected separate takings claim, reasoning that opportunity for plaintiffs to pursue contract remedies precluded parallel suit seeking compensation under the Fifth Amendment).

14. Dover v City of Jackson, 2000 WL 1577561 (Ga.Ct.App., October 24, 2000) (affirming rejection of Fifth Amendment takings claim by owner who sought and was denied commercial rezoning of his property in order to construct a motel; court held there was no taking because denial of rezoning did not deprive owner of "all use" of property).