'Takings' Snapshots, Volume 43, July 17, 2001

1. Palazzolo v. Rhode Island, 121 S. Ct. 2448 (U.S., 2001) (on June 28, 2001, the U.S. Supreme Court, by a vote of 5 to 4, reversed the judgment of the R. I. Supreme Court rejecting the taking claim and remanded the case for further proceedings; the U.S. Supreme Court concluded that the case was ripe for review under Williamson County, rejected the R.I. Supreme Court's ruling that Palazzolo's preacquisition notice categorically barred the claim (but recognized that preacquisition notice is a relevant factor in takings analysis), and ruled that Palazzolo failed to demonstrate a denial of all economically viable use sufficient to establish a claim under Lucas, but remanded for consideration of a claim under Penn Central).

2. Simi Investment Co. v. Harris County, 2001 WL 726428 (5th Cir., June 28, 2001) (the Fifth Circuit denied rehearing and rehearing en banc from its prior decision (reported at 236 F.3d 240) upholding a determination that the county violated a property owner's substantive due process rights by relying upon the existence of fictitious parkland to deny the owner lawful access to an abutting street; on rehearing, addressing the relationship between the Due Process Clause and the Takings Clause, the court said that "the majority of cases involving landowner complaints" should be addressed under the Takings Clause rather than the Due Process Clause; "[e]xcept in the rare cases of deprivations of property based on, for example, illegitimate and arbitrary governmental abuse, vague statutes, or retroactive statutes," the court said, "the takings analysis... should control constitutional violations involving property rights that have been infringed by governmental action").

3. Commonwealth Edison Co. v. United States, 2001 WL 697871 (Fed. Cir., June 13, 2001) (the Federal Circuit, following oral argument before a three-judge panel, sua sponte issued an order indicating that the court sitting en banc would resolve this appeal from a ruling by the court of federal claims (46 Fed Cl. 29); the court of claims had rejected a challenge to the special financial assessment imposed on utilities pursuant to the Energy Policy Act of 1992 to help clean up the government's uranium enrichment facilities; the court of claims said that a financial assessment in the nature of a tax cannot effect a taking under the Takings Clause, following the view expressed by a majority of the justices in Eastern Enterprises; the court also said it had jurisdiction to hear the claim that the assessment resulted in an "illegal exaction" in violation of the Due Process Clause, but rejected the claim on the merits because the assessment was "not disproportionate").

4. A.A. Profiles, Inc. v. City of Fort Lauderdale, 2001 WL 609013 (11th Circuit, June 5, 2001) (the Eleventh Circuit ruled that district court erred in awarding zero damages following a finding of a regulatory taking; the court of appeals rejected the district court's reasoning that no compensation was due because the plaintiff company was so undercapitalized that it would have failed financially in any event; the court of appeals said that following a finding of a temporary regulatory taking the plaintiff is ordinarily entitled to compensation based on lost income; in this case, however, the court said, where the owner lost the property following the taking, the damages must be measured based on the reduction in market value on the date of the taking; in an interesting footnote

(no. 7), the court observed that there cannot be a "taking" for public use if the government action was not enacted "in furtherance of the public health, safety, morals or general welfare," whereas the Due Process Clause is available to recover for losses due to "invalid uses of the police power.")

4. Roedler v. Department of Energy, 2001 WL 761282 (Fed.Cir., July 6, 2001) (the Federal Circuit affirmed rejection of a class action taking claim brought by electric utility customers whose rates included charges designed to pay the federal government's costs of storing and disposing of spent nuclear fuel and other nuclear waste; the federal government failed to meet the statutory deadline for accepting nuclear waste, spawning this and a slew of other litigation; the court rejected the taking claim on the ground the charge was a reasonable economic burden imposed on the ultimate beneficiaries of nuclear power and the ratepayers could not meet the injury in fact requirement for asserting a constitutional violation based on the federal government's nonperformance if its statutory obligations).

5. Building Owners & Managers Association International v. FCC, 2001 WL 754910 (D.C. Cir., July 6, 2001) (in a case involving a challenge to the FCC's implementation of a provision of the 1996 Telecommunications Act prohibiting local government restrictions on over-the-air television reception devices, the D.C. Circuit refused to apply its approach of adopting a narrowing interpretation of a statute in order to avoid a potential takings issue, on the ground that FCC's statutory interpretation did not raise a serious takings question; in a concurring opinion, Judge Randolph argued that the D.C. Circuit should reject its traditional approach of adopting a narrowing interpretation of a statute to avoid potential takings issues because it is inconsistent with the Supreme Court's Riverside Bayview decision, which explicitly rejected this approach).

6. Skamania County v. Columbia River Gorge Commission, 2001 WL 721220 (Wash., June 28, 2001) (the Washington Supreme Court, in a well publicized case involving a house built in the Columbia River Gorge Natural Scenic Area, ruled that the gorge commission lacked the authority to commence administrative proceedings one year following county approval of the development because the commission, like any other party challenging a county land use action, was required to file its administrative appeals within 20 or 30 days of the decision and failed to do so; a concurring opinion (per Ireland, J.) suggests that the commission could have (and perhaps still can) file administrative proceedings to compel the county to enforce the conditions attached to the permit authorizing the construction; the court noted that the plaintiffs asserted inverse condemnation claims which are still pending).

7. Sanderson v. Town of Candia, 2001 WL 754817 (N.H., July 6, 2001) (the N.H. Supreme Court affirmed rejection of a taking claim based on a town planning board's denial of cluster subdivision approval; the town rejected the application because the property did not front on a state- or town-maintained road, as required by the town zoning ordinance for cluster subdivisions; the Court concluded that the town's requirement did not effect a taking because it advanced the legitimate public purpose of facilitating access

by emergency vehicles and because the owner purchased the property knowing of the ordinance's frontage requirements (the decision does not mention Palazzolo)).

8. Keshbro, Inc. v. City of Miami, 2001 WL 776555 (Fla., July 12, 2001) (in this long-pending case, the Florida Supreme Court reached a mixed result on the issue of whether nuisance abatement laws effect a taking; first, the court held that a temporary closure of a motel or apartment complex to control drug and prostitution activity effects a Lucas-type taking, on the ground that a prospectively temporary restriction prohibiting all use of a property is indistinguishable from a retrospectively temporary restriction, as in First English (however, the Court indicated that this analysis would not apply to land use planning moratoria, "where an entirely different set of considerations are implicated"); second, the Court said that temporarily shutting down a motel or apartment complex could be justified under the Lucas nuisance exception where the nuisance activity was "part and parcel" of the facility's operations (but not where just a few illegal actions were reported)).

9. R.W. Docks & Slips v. Department of Natural Resources, 2001 WL 722122 (Wisc., June 28, 2001) (the Wisconsin Supreme Court rejected a taking claim where a marina developer was denied permission to construct an additional 71 boat slips at a marina on Lake Superior in order to avoid damaging an "emergent weedbed;" the court concluded that the owner could not establish a denial of all economically viable use under Lucas, because the developer retained use of 201 existing boat slips and related recreational facilities; the Court also ruled that the developer failed to demonstrate the type of "severe economic impact or interference with investment-backed expectations" necessary to establish a taking under Penn Central, particularly because the developer's riparian right to construct boat slips was subordinate to the long- standing public trust rights in submerged lands).

10. United States v. Orr Water Ditch Co., 2001 WL 747603 (9th Cir., July 5, 2001) (in a complex water rights case arising from conflicting claims to the flow of the Truckee River in Nevada, the Ninth Circuit (per Fletcher, J.) offered, as an interesting aside, that a 1913 Nevada statute changing the standards governing "forfeiture" of water rights was probably made prospective only because retroactive application of such a statute "could even be unconstitutional, for its removal of one stick from the bundle of sticks comprising a water right could be seen as an unconstitutional taking of property").

11. Henry v. Jefferson County Planning Comm'n, 2001 WL 726017 (N.D.W.Va., June 26, 2001) (Federal District Court rejected takings claims based on denial of permission to reconstruct a restaurant that burned down or construct a multifamily project on the site, (1) given that plaintiff was not denied all economic use of the property, and (2) plaintiff lacked investment-backed expectations in obtaining conditional zoning approval and decision served legitimate public purposes identified in applicable state statutes).

12. Satellite Broadcasting & Communications Association of America V. FCC, 2001 WL 770371 (E.D.Va., June 19, 2001) (federal district court rejected takings challenge to federal Satellite Home Viewer Protection Act (which requires satellite television carriers,

as a condition of receiving a royalty-free license to broadcast any local broadcast station, to carry all local television stations upon request of the stations); the court ruled that the regulation effected neither a physical occupation-type taking nor a regulatory taking, emphasizing the fact that a satellite television a carrier can avoid these FCC requirements entirely simply by refusing the royalty-free license).