'Takings' Snapshots, Volume 44, August 21, 2001

1. Verizon Communications, Inc. v. FCC (U.S., cert. granted January 22, 2001) (the U.S. Supreme Court will hear oral argument in this case on October 10, 2001; the case involves, among other issues, a takings question arising from the implementation of the Telecommunications Act of 1996; one of the issues on which the Court granted certiorari is "whether the court of appeals erred in holding that... the Takings Clause... [does not] require[] incorporation of an incumbent local exchange carrier's 'historical' costs into the rates that it may charge new entrants for access to its network elements?")

2. Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (U.S., cert. granted June 29, 2001) (on July 18 the Court granted the petitioner's motion for an extension of time, extending the deadline for the filing of petitioner's opening brief until September 12).

3. Pheasant Bridge Corp. v. Township of Warren, 2001 WL 868015 (N.J., August 2, 2001) (in an important case, the New Jersey Supreme Court upheld the conclusion that a municipal zoning ordinance establishing an environmental protection zone was legally invalid (because the justifications for the restrictive zoning classification were not specifically applicable to the plaintiff's property), but reversed the finding of a taking, principally on the ground that a legally invalid government action cannot support a claim for compensation under the Takings Clause; this represents the second ruling by a state supreme court within the last several months to the effect that a legally erroneous government action cannot support a taking claim, the second case being Sea Cabins on the Ocean IV Homeowners Assn. v. City of North Myrtle Beach, 548 S.E.2d 595 (S.C., June 11, 2001)).

4. East Cape May Associates v. New Jersey, 2001 WL 830684 (N.J., July 25, 2001) (in this long-running takings challenge to state efforts to protect an ecologically significant area along the New Jersey coast, the N.J. Appellate Division, in its second opinion in this case: (1) declined to revisit the question the whether the owner's preacquisition notice of the regulatory restrictions barred the claim, relying on law of the case doctrine; (2) affirmed the trial court's determination that the relevant parcel consisted only of the plaintiff's 100 acres and did not include another 100 acres which were nearby and which were owned and developed by principals of the plaintiff and an affiliated partnership, based on five factors: (a) the different parcels were purchased separately from separate sellers, (b) the two 100-acre tracts were not strictly contiguous; (c) the zoning of the two tracts is and always has been different; (d) the parties affiliated with the plaintiff began developing one tract before they knew that either of the tracts would be subject to development restrictions, and (e) the two tracts were never part of a common development scheme; and (3) affirmed the trial court ruling that the state could not apply its "amelioration statute" in the absence of implementing regulations, but remanded the case to allow the state to promulgate such regulations and apply them in this case) (EPP*, along with the Rutgers Environmental Law Clinic, filed a brief in this case on behalf of the New Jersey Conservation Foundation).

5. Cwynar v. City of County San Francisco, 90 Cal.App.4th 637 (Cal.Ct of Apps., July 10, 2001) (the California Court of Appeals, reversing a superior court judgment dismissing the complaint, ruled that plaintiffs had asserted viable takings claims based on a San Francisco ordinance restricting an owner's ability to reclaim possession of residential property for the owner's personal use or for use by a close family member; the court reasoned that the plaintiff should have been permitted to proceed on the following theories: (1) the ordinance resulted in a per se physical occupation; (2) the ordinance failed to substantially advance a legitimate governmental interest; and (3) the ordinance effected a taking under an ad hoc balancing test).

6. A.T. Massey Coal Co. v. Massanari, 2001 WL 830641 (E.D.Va., July 19, 2001) (in another in the long series of post-Eastern Enterprises litigation, the federal district court rejected takings and due process challenges to retroactive assessments of liability for health care premiums pursuant to the federal Coal Act; first, in view of the fact that a majority of the justices in Eastern Enterprises rejected the taking claim, the court ruled that the same taking argument in this case was "clearly" barred; second, the court reasoned that the plaintiffs were entitled to proceed with their due process claim if they stood in a position "substantially identical" to that of the plaintiffs in Eastern Enterprises, but concluded the claim failed because the plaintiffs in this case were assessed liability on the theory that they were "related parties" under the Coal Act, an issue not raised in Eastern Enterprises).

7. Choate's Air Conditioning & Heating, Inc. v. Light, Gas & Water Division of the City of Memphis, 2001 WL 856957 (6th Cir., June 22, 2001) (in a unpublished decision, the Sixth Circuit affirmed dismissal of constitutional challenges to a city's decision to grant cellular telephone companies a lease to use certain properties in which the plaintiff claimed easement rights; the court rejected the substantive due process claim on the merits; the court also ruled that the claim of a taking was not ripe because the plaintiff had not exhausted state judicial remedies, and rejected plaintiff's effort to circumvent the exhaustion requirement by alleging that the city's action was an invalid taking for a "private use").

8. Shadek v. Monroe County Board of County Commissioners, No. CAP95-398 (Fl. Circuit Court, July 17, 2001) (Florida trial court, following a trial on liability issues, ruled that a series of rolling moratoria in effect from 1982 to 1990, when the owners sold the property to the government for habitat conservation purposes for about $6,000,000, resulted in a compensable temporary taking; without detailed analysis, the court treated a temporary regulatory restriction as indistinguishable from a permanent restriction for liability purposes).

9. Greater Boston Real Estate Board v. Massachusetts Department of Telecommunications and Energy, No. 00- 4909 (Mass. Superior Court, July 27, 2001) (Massachusetts Superior Court struck down as a per se physical- occupation taking a regulation issued by the Mass. Department of Telecommunications and Energy requiring owners of commercial and multifamily residential property, if they decide to grant certain

telecommunications carriers access to their property, to grant access to all carriers on a nondiscriminatory basis). http://www.millervaneaton.com/cts_opinion.pdf

10. Klump v. United States, 2001 WL 776257 (Ct.Fed. Cls., June 8, 2001) (Court of Federal Claims (Allegra, J.) dismissed a takings claim based on the federal government's pursuit of state procedures to establish its entitlement to water rights following cancellation of claimant's public land grazing permit; court reasoned that the government cannot effect a taking simply by asserting an entitlement to a property interest in the same fashion as a private owner would).

11. Coalition for Government Procurement v. Federal Prison Industries, 2001 WL 909896 (W.D. Mich., August 8, 2001) (private manufacturers of office furniture brought suit based on a variety of legal theories challenging Federal Prison Industries, Inc.'s alleged over- production of office furniture at federal prisons; the court rejected plaintiffs' claim that their alleged loss of market share in the office furniture market constituted a compensable taking, reasoning that a mere reduction in the value of private property does not result in a taking and that a diminution in market share does not constitute the kind of direct appropriation of property necessary to support a taking claim).

*The Georgetown Environmental Law & Policy Institute (GELPI) was formerly known as the Environmental Policy Project (EPP).