'Takings' Snapshots Volume 46, December 4, 2001

1. Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency (U.S.) (addressing the constitutionality of planning moratoria under the Takings Clause; oral argument before the Supreme Court is scheduled for January 7, 2001).

2. Verizon Communications, Inc. v. FCC, (U.S.) (addressing the constitutionality of cost recovery formulas for communications equipment under the Takings Clause; oral argument was held October 10, 2001; no decision has been issued).

3. Washington Legal Foundation v. Legal Foundation of Washington, 2001 WL 1412787 (9th Cir., Nov., 14, 2001) (in a 7 to 4 en banc decision, the Ninth Circuit ruled that the Washington State IOLTA program did not result in an unconstitutional taking of the interest earned on client funds held in lawyers' IOLTA accounts; first, the court ruled that the alleged taking should not be analyzed using a per se analysis, given the monetary nature of the property, the public character of the program, and the highly-regulated nature of the banking industry; applying the Penn Central three-factor analysis, the court had little difficulty concluding there was no taking; second, the court concluded, in the alternative, that there was also no uncompensated taking in violation of the Fifth Amendment because, even if the IOLTA rules "took" property, the clients would not be entitled to any compensation given that they suffered no actual financial loss as a result of the IOLTA program).

4. Washington Legal Foundation v. Texas Equal Access to Justice Foundation, 2001 WL 1222105 (5th Cir., Oct. 15, 2001) (in a 2 to 1 ruling, the Fifth Circuit, reversing the District Court, ruled that the Texas IOLTA program effected a per se physical-occupation taking of the interest earned on funds held in lawyer IOLTA trust accounts; TEAJF has filed an application for rehearing and on November 26 the court asked WLF to respond by December 11, specifically asking WLF to address the 9th Circuit's en banc decision).

5. Phillip Morris v. Reilly, 2001 WL 1215365 (1st Cir, October 16, 2001) (the First Circuit, in an opinion by Senior District Judge Schwarzer, reversing the circuit court's prior ruling in this case on an appeal from a preliminary injunction, ruled that the Massachusetts tobacco products ingredient disclosure law does not effect a taking, violate the Due Process Clause, or create an unreasonable burden on interstate commerce; the court ruled that the Massachusetts law merely imposed a condition on the companies' voluntary decision to sell tobacco products in the state in the future, and that the law did not effect a taking because the condition was rationally related to the legitimate public interest in protecting public health; in the latest twist in this convoluted case, on November 9, the court granted the tobacco companies' application for rehearing en banc on the takings and due process issues and set the case down for reargument on January 7 – the third oral argument before the First Circuit in this single case!)

6. Rith Energy, Inc. v. United States, 2001 WL 1380899 (Fed.Cir., November 5, 2001) (in an important post- Palazzolo ruling, the Federal Circuit (per Bryson, J.) denied an application for rehearing on its prior ruling that the Department of the Interior's revocation of a surface coal mining permit did not effect a taking; the court ruled that the plaintiff could not establish a Lucas categorical claim where the regulatory action only reduced the amount of coal the plaintiff could

exploit by 91% (observing that in Palazzolo the Lucas claim failed where the owner was allegedly denied the opportunity to exploit 94% of the property's value); applying the parcel as a whole rule, the court rejected the argument that the coal remaining to be exploited should be considered separately from the coal the plaintiff already extracted from the property; with respect to the notice issue, the court interpreted Palazzolo (and Nollan) as authorizing consideration of the fact that the owner purchased the property after the regulatory restrictions were already in place (the court addressed the argument in the context of a Penn Central claim but its analysis suggests that preacquisition notice may be a relevant factor in all regulatory takings cases); the court rejected the Penn Central claim, reasoning that (under the economic impact factor) the owner was not denied the opportunity to make profitable use of the property and (under the character factor) the regulation was an exercise of the police power designed to protect the public health, safety, and welfare; finally, the court ruled that the plaintiff's allegation that the permit revocation was based on improper political factors was not supported by the facts and in any event was irrelevant to the takings issue).

7. Wyatt v. United States, ___ WL _____ (Fed. Cir., November 19, 2001) (in rare example of the Federal Circuit overturning a Court of Federal Claims finding of a taking, the court (per Gajarsa, J.) rejected a taking claim based on the Office of Surface Mining's ten-year long processing of a permit application, which culminated in denial of a permit to develop coal resources; the court ruled that the claimants could only assert a temporary taking, not a permanent taking, because it voluntarily relinquished its coal lease during the course of the application process; the court also concluded that the ten- year application process did not represent a sufficiently extraordinary delay to constitute a taking, given the lack of agency bad faith, the complexity of the environmental issues raised by the application, and the claimant's own contributions to the delay).

8. Commonwealth Edison Co v. United States, ___ WL ___ (Fed. Cir., November 20, 2001) (in an important and well reasoned decision, the Federal Circuit issued an en banc ruling (per Judge Dyk), rejecting, by a vote of 8 to 3, takings, contract, and due process challenges to clean-up fees imposed under the Energy Policy Act of 1992 on private electric utilities supplied with uranium from federal enrichment facilities; the court rejected the taking claim on the ground that a simple assessment of financial liability (such as taxes) is outside the scope of the Takings Clause, following the views of the majority of the justices in Eastern Enterprises; the court rejected the Winstar contract claims based on the authority of the court's prior panel ruling in Yankee Atomic; finally, the court rejected the due process challenge to the fees on the ground that the utilities benefited from the government's enrichment services which led to the contamination problem and the imposition of the liability was not contrary to the utilities' reasonable expectations; the court's discussion of the expectations issue is especially cogent and appears readily transferable to the analysis of the same issue in a takings case; the court's framework for analyzing expectations focuses on whether the claimant is operating in a highly regulated industry, whether the claimant knew of the problem when it engaged in the activity, and whether the claimant could reasonably have anticipated the liability at the time it engaged in the activity.)

9. Maine Yankee Atomic Power Company v. United States, ____WL _____ (Fed. Cir, November 20, 2001) (in a companion case to Commonwealth Edison, the Federal Circuit (in a

per curiam decision) rejected the claim that the assessment of fees on certain utilities to pay for the clean up of uranium enrichment facilities constituted a violation of the Equal Protection Clause (because it allegedly discriminated arbitrarily between foreign and domestic purchasers of uranium; between those who purchased uranium and resold it and those who purchased uranium for their own use, and between purchasers during different periods); two concurring judges, while agreeing with the rejection of the equal protection claim, stated that, but for the en banc ruling in Commonwealth Edison, they would have ruled that the fees violated the Due Process Clause, because there was an insufficient causal connection between the utilities' actions and the uranium contamination).

10. Nationsbank of Texas v. United States, 2001 WL 1327078 (Fed.Cir., October 30, 2001) (the Federal Circuit rejected takings (and other constitutional) challenges to moderately retroactive changes in federal estate tax rates; the court said the plaintiff could not meet the standard for a taking by showing that the retroactive feature was "so arbitrary and capricious as to amount to confiscation;" Judge Plager dissented on the ground that the retroactive tax should be held unconstitutional as an ex post facto law, echoing Justice Thomas' position in Eastern Enterprises that the Supreme Court should reconsider a 200-year old precedent narrowly interpreting the ex post facto clause).

11. City of Glenn Heights v. Sheffield Development Co., Inc., 2001 WL 1299437 (Texas. Ct. Apps., October 24, 2001) (based on the Texas Takings Clause (which the court assumed to have the same meaning as the federal Takings Clause for the purpose of this case), the Texas Court of Appeals held that a 15-month development moratorium effected a taking because it failed to substantially advance a legitimate state interest, given that the City Council extended the moratorium for a longer period than was necessary to consider a proposal to revise the community's zoning; the court of appeals also ruled that the rezoning substantially advanced a legitimate government interest in controlling the intensity of development, but effected a taking because it "unreasonably interfered with the landowner's right to use and enjoy its property;" this latter inquiry, the court said, turned on the economic effect of the rezoning and the extent to which it interfered with distinct investment expectations; the court held that at least a 38% decline in the value of the property, based on an increase in minimum lot size from 6500 square feet to 12,000 square feet, satisfied the economic prong of the court's test, and the city's change in the zoning in the face of the developer's reliance on the prior zoning satisfied the expectations wrong).

12. Schmid v. Department of Transportation, 2001 WL 1333421 (Cal.App., Oct. 29, 2001) (unpublished decision) (California court of appeals affirmed California rule that trial by jury is not available to resolve liability issues in an inverse condemnation action; court explained that the ruling by the U.S. Supreme Court on the jury issue in Del Monte Dunes did not affect the established rule in the California courts).

13. Custer County Action Assn v. Garvey, 256 F.3d 1024 (10th Circuit, July 19, 2001) (the Tenth Circuit Court of Appeals affirmed rejection of myriad challenges to FAA orders approving various changes in the rules governing use of airspace over Colorado for military purposes; the court rejected the plaintiffs' request for an injunction against the FAA under the Takings Clause on the ground that compensation, not an injunction, is ordinarily the proper remedy for a taking;

the court also rejected the plaintiffs' "unauthorized taking theory," on the ground that the FAA's orders were lawful; the court also said: "Arguably, if a government agency errs, i.e., exceeds its jurisdiction, violates a statute, or acts arbitrarily or capriciously, it should not be liable for a 'taking' under the Fifth Amendment, See, e.g., John D. Echeverria, Takings and Errors, 51 Ala. L. Rev. 1047, 1047-48 (2000). We find intriguing the notion that takings involving erroneous government actions cannot be takings for 'public use' within the meaning of the Takings Clause, see id.; however, we need not debate or decide the issue here.")

14. Rick's Amusement, Inc. v. State of South Carolina, 2001 WL 1167790 (S.C., Sept 10, 2001) (the South Carolina Supreme Court affirmed trial court's rejection of a taking claim based on state law (subsequently struck down as unconstitutionally invalid special legislation) authorizing counties to ban "non-machine cash payouts for video gaming;" the court ruled that the trial court did not err by rejecting the taking claim without specifically analyzing the claim under the Penn Central test; addressing the merits of the taking issue, the court ruled that mere involvement in a heavily regulated industry does not preclude a taking claim, but that the plaintiffs lacked a sufficient property right to support their claim, because their rights were "completely dependent upon regulatory licensing," citing Mitchell Arms).

15. Anhalt v. Cities and Villages Mutual Insurance Co., 2001 WL 1271957 (October 24, 2001) (Wisconsin Court of Appeals rejected a taking claim based on flooding damage which allegedly resulted from municipality's negligent failure to expand public sewer capacity; court reasoned that there was no taking where flooding did not result in a permanent physical occupation of private property and the municipality had not collected the water and directed it onto the plaintiffs' property).

16. Mients v. United States, 2001 WL 1455968 (Fed.Ct. Cls., October 30, 2001) (Court of Federal Claims rejected convoluted pro se complaint based in large part on government foreclosures of plaintiff's property; the court said, among many other things, that the allegations that the government's actions were "unlawful, fraudulent, and constituted theft" did not state a claim for a taking for public use under the Takings Clause).

17. Jones v. City of Philadelphia, 2001 WL 1295648 (E.D. Pa., October 23, 2001) (in an interesting if oddly reasoned decision, federal district court declined to dis- miss claim for compensation under the Takings Clause for personal physical injuries sustained during the course of the execution of a search warrant by the police).

18. Van Horn v. Town of Castine, 2001 WL 1246617 (D.Me., Oct. 18, 2001) (federal district court rejected takings (as well as due process and equal protection) challenge to historic district designation under which the plaintiff was denied the opportunity to reconstruct a porch on his house; court ruled that there was no taking because the ordinance "clearly" furthered a legitimate public purpose and the plaintiff failed to allege any economic injury).