Takings Snapshots, Volume 47, February 27, 2002

1. Harbours Pointe of Nashotah, LLC v. Village of Nashotah, 278 F.3d 701 (7th Cir., Jan. 28, 2002) (federal appeals court affirmed district court dismissal of takings challenge to village's assessment of a special sewer fee on development on the ground that the owner failed to pursue available state statutory remedies, although the statute afforded the owner only 90 days to challenge the fee; the court ruled that the plaintiff, having failed to pursue its statutory remedies in timely fashion, forfeited its right to sue for just compensation under either the U.S. or state constitutions).

2. United States v. Kornwolf, 276 F.3d 1014 (8th Cir., January 16, 2002) (relying on the U.S. Supreme Court's Allard v. Andrus decision, the federal appeals court rejected a takings challenge to a criminal conviction for selling artifacts containing eagle feathers in violation of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act; the court extended Andrus to cover the situation where the defendant became the owner of the feathers before the federal laws prohibiting sale of eagle feathers went into effect).

3. Perkins v. Board of Supervisors of Madison County, 636 N.W.2d 58 (Iowa, November 15, 2001) (Iowa Supreme Court affirmed district court ruling rejecting claim that county effected a taking of the property of adjacent landowners by enacting a zoning ordinance which permitted operators of fair grounds to operate automobile race track; while recognizing that the race track represented a nuisance for certain adjacent property owners, the court ruled that the ordinance did not effect a taking, essentially because it did not constitute a denial of all productive use of the neighbors' property or constitute a permanent invasion of their property).

4. Town of Flower Mound v. Stafford Estates Limited Partnership, 2002 WL 221096 (Tex.App., Feb. 14, 2002) (Texas appeals court affirmed a $425,000 takings award based on a takings challenge under Dolan to a municipal requirement that a developer pay 100% of the cost of rebuilding and expanding a public road adjacent to the development; the court rejected the

argument that Dolan did not apply on the theory that Dolan is limited to conditions involving dedications of real property; the court declined to address whether Dolan would apply to a legislatively mandated exaction, because the court believed that this exaction was clearly imposed in an adjudicatory proceeding; the court concluded that damages should be calculated by subtracting from the amount actually exacted the amount that would have been exacted if the owner had only been required to pay his proportionate share of financing the road project; finally the court ruled that the plaintiff was not entitled to reimbursement of attorneys fees under 42 USC 1988 because, given that the plaintiff prevailed on its Texas constitutional claim, the federal constitutional claim would never mature and, therefore, the owner would not be able to recover fees under the statute awarding fees for successful prosecution of federal constitutional claims).

5. Swisher International, Inc. v. United States, 178 F.Supp.2d 1354 (U.S. Ct. Intl. Trade, December 11, 2001) (in a suit seeking payment of prejudgment interest on fees paid under the export provisions of the Harbor Maintenance Tax, which the court of international trade previously declared to be in violation of the Export Clause of the U.S. Constitution, the court rejected the argument that the plaintiff was entitled to recovery on a takings theory, ruling that monies paid in taxes do not represent property protected by the Takings Clause and, in any event, an unauthorized use of Congress' taxing power cannot provide the basis for a valid taking claim).

6. Maritrans Inc. v. United States, 51 Fed.Cl. 277 (Ct.Fed.Cls.,December 21, 2001) (in this longstanding challenge to federal legislation requiring that tanker ships be retrofitted with double hulls or be removed from service, the court of federal claims rejected the Lucas claim, observing that the phase-in of the regulation allowed the claimants to make profitable use of their existing ships for at least 15 years and that this opportunity to use the ships free from the restriction precluded a finding of a total taking; the court also rejected the Penn Central claim, despite the fact that the court concluded that the owner had a reasonable investment-backed expectation of not being subject to the double-hull requirement, given the character of the

regulation (i.e., that it served the important public purpose of controlling oil pollution and the restriction did not apply solely to Maritrans) and the regulation only reduced the value of the claimant's property by 13%; the court observed that "[s]everal Supreme Court decisions suggest that diminutions in value approaching 85 to 90 percent do not necessarily establish a taking").

7. Kottschade v. City of Rochester, 2002 WL 91641 (D. Minn., January 22, 2002) (federal district court dismissed regulatory takings challenge to city land use decision on the ground that the plaintiffs had not pursued available state compensation procedures; court also carefully analyzed and rejected the argument that the Supreme Court's decision in *Chicago Surgeons* overruled *Williamson County's* requirement that a takings claimant must pursue available state compensation procedures before attempting to litigate a taking claim in federal court)

8. Cole v. County of Santa Barbara, 2001 WL 1613856 (Cal. Ct. Apps., December 17, 2001) (not officially published) (in a takings challenge to a condition attached to a coastal development permit requiring the owner to offer to dedicate an access easement to the public, the court ruled that the claim was barred by res judicata, where the original owner proceeded with the development and did not challenge the condition and the plaintiff successor in interest brought the takings challenge 20 years later after the county decided to accept the offer).

9. JSS Realty Co. LLC v. Town of Kittery, 177 F. Supp.2d 64 (D. Maine, December 11, 2001) (court rejected takings challenge to application of revised zoning ordinance which restricted permitted intensity of development; court said that allegation that rezoning made specific project economically infeasible did not support a claim that owner was denied all economically viable use of the property; court also ruled that allegation that zoning change was designed to block one specific project was insufficient to support a taking claim based on the theory that the rezoning served no legitimate government interest).

10. Hage v. United States, 2002 WL 122918 (Ct.Fed. Cls., January 29, 2002) (more than three years after

issuing a "preliminary opinion" defining the nature of the Hages' property interests in this case, the court of federal claims (Judge Loren Smith) issued a final opinion essentially restating the conclusions in the preliminary opinion; the court ruled that the plaintiffs had no property rights in either their grazing permits or the public lands on which they run their cattle; on the other hand, the court ruled that the plaintiffs possessed property interests in various water use rights established in connection with the grazing operation; the court deferred resolution of the question whether any of these rights had actually been taken.)

11. Coast Range Conifers, LLC v. State of Oregon, Letter Opinion (Oregon Circuit Court, January 30, 2002) (in a comprehensive opinion, an Oregon circuit court rejected the latest challenge to the Oregon Board of Forestry's rules protecting endangered species, ruling (1) that the court lacks subject matter jurisdiction and the case was barred by claim and issue preclusion because the Board properly addressed the taking issue during its administrative proceedings and therefore any appeal should have been brought in the Court of Appeals, (2) restrictions on logging to protect wildlife on the property do not represent a Loretto physical occupation, and (3) both the Lucas and Penn Central claims failed because the restrictions only affected 9 acres out of the entire contiguous 40-acre property, which represented the relevant parcel for the purpose of takings analysis).

12. Page v. United States, 51 Fed.Cl. 328 (Ct.Fed.Cls., December 28, 2001) (court of federal claims rejected a taking claim brought by owner/operators of an avian quarantine station based on a regulatory change increasing the square footage that a facility must contain per bird egg held in the facility; the court ruled that since the plaintiffs' business existed only because of a governmental regulatory scheme, they lacked a compensable property interest sufficient to support a taking claim; in the alternative, the court ruled that the claim failed under the 3-factor Penn Central test).

13. Outdoor Systems v. Cobb County, 555 S.E.2d 689 (Ga., November 19, 2001) (Georgia Supreme Court ruled that county's revocation of a permit for an

outdoor advertising sign after the sign was destroyed by a tornado violated the provision of the Georgia Constitution requiring payment of just compensation when a county acquires an owner's rights in a non-conforming advertising sign).

14. Bradfordville Phipps Limited Partnership v. Leon County, 804 So.2d 464 (Fl.Ct. Apps., November 26, 2001) (the court of appeals rejected a Lucas-type takings challenge to a 22-month moratorium on development, ruling that the claim was not ripe because the plaintiff failed to test what development might be permitted under the moratorium; in the addition, following the 9th Circuit ruling in Tahoe (and distinguishing the Florida Supreme Court decision in Keshbro), the court ruled that the restriction did not rise to the level of a taking; the opinion concludes by stating, "Close regulation by local government that is merely expensive or time consuming for developers does not rise to the level of a taking. Such regulation presumably expresses the will of local citizens who have elected governing boards such as county and city commissioners. Thus, the question of regulation in situations such as the one now before us presents a political rather than a justiciable issue).

15. Brace v. United States, 2002 WL 243761 (Ct.Fed.Cls., Feb. 11, 2002) (in a largely incoherent opinion, the court of claims rejected the government's motion for summary judgment in a taking suit based on an order requiring the owner to cease maintenance and operation of a drainage system that adversely affected a wetland area; the court raised the issue of whether the wetlands were subject to federal jurisdiction after SWANCC, suggesting at different points in the opinion that lack of federal jurisdiction might support a finding of a taking and that it also might preclude a finding of a taking; the court also said that disputed issues of fact precluded identifying the relevant parcel at this stage of the case).

16. Oaks v. Montague Township, 2001 WL 1512033 (Mich.Ct.Apps., November 27, 2001) (Michigan court of appeals affirmed dismissal of taking claim challenging township's moratorium on development based on lack of

clean drinking water supplies; court ruled that denial of permission to carry out development on an 18-acre property did not rise to the level of a taking because the owner could still utilize the single existing residence on the property).

17. Baker v. City of Galt, 2001 WL 1521973 9 (Cal.Ct.Apps., November 30, 2001) (not officially published) (in a suit apparently involving a takings challenge against a city and its contractor based on business losses caused by nearby road reconstruction, the California court of appeals affirmed a judgment for the city; the court of appeals also imposed a $20,000 sanction on the plaintiff's attorney because the court concluded that the appeal was frivolous and brought in bad faith; the court described in some detail the incoherent arguments presented in the plaintiff's brief and, using language that could easily be applied in other cases, said: "'Legal merit, at least in our society, is established by reasoning, not rant.')

18. City of Lakewood v. Olson, 2001 WL 1346792 (Wash.Ct.Apps., November 2, 2001) (reversing a superior court ruling, the Washington Court of Appeals rejected a takings challenge to a municipal order which required an owner to remove nonconforming signs upon a change in the type of business or a change in the name or ownership of the business or property; the court based its ruling on the fact that the order did not deprive the owner of all beneficial use of the property).

19. Byron Dragway, Inc. v. County of Ogle, 759 N.E.2d 595 (Ill.App.Ct., November 14, 2001) (Illinois Court of Appeals reversed trial court's dismissal of takings challenge to county ordinance reducing hours of operation of automobile raceway; court ruled that material issues of fact precluded a determination that operation of raceway constituted a nuisance, and concluded that the fact that the case involved a challenge to a business licensing scheme did not preclude a finding of a taking).

20. Auxier Trucking v. Tate Township Board of Trustees, 2001 WL 1652078 (Ohio Ct. Apps., December 24, 2001) (Ohio court of appeals upheld decision rejecting challenge to township's refusal to rezone land from

agricultural to commercial, ruling that (1) plaintiffs failed to show denial of all economically viable use, and (2) "[a]pplication of existing zoning regulations can hardly be a confiscatory taking when the landowner purchases a property with full knowledge of the existing zoning classifications and the difficulties in modifying the zoning").

21. Seventh Regiment Fund v. Pataki, 179 F.Supp.2d 356 (S.D.N.Y., Jan., 18, 2002) (in a suit by organizations claiming property rights in New York City armory, federal district court rejected takings challenge based on state's issuance of requests for proposals from other firms to redevelop the armory; the court ruled that the State's action was not a final decision which supported a ripe taking claim and, in any event, suit had to be dismissed because plaintiff failed to pursue available state compensation procedures).