Takings Snapshot, Volume 49, May 21, 2002

1. Verizon Communications, Inc. v. FCC, 2002 WL 970643 (U.S., May 13, 2002) (in a long and complicated decision upholding the FCC's methodology for implementing the Telecommunications Act of 1996, the purpose of which is to promote competition in local telephone service, the U.S. Supreme Court declined to apply the policy of "constitutional avoidance" in interpreting the statute in order to avoid addressing a takings issue; the court concluded that it had no reason to consider the applicability of this rule of statutory construction because the case did not raise a serious takings question, given that the plaintiffs were challenging the FCC's basic methodology rather than any specific rate order, the FCC methodology will not have a substantial adverse economic effect on incumbent telephone carriers, and the plaintiffs did not demonstrate that the FCC methodology was adopted for a confiscatory purpose).

2. State ex rel. Shemo v. City of Mayfield Heights, 95 Ohio St.3d 59 (Ohio, April 10, 2002) (proceeding on a writ of mandamus, the Ohio Supreme Court directed an Ohio city to institute appropriation proceedings to determine the amount of compensation to which a landowner is entitled for a temporary regulatory taking based on the theory that the residential zoning restriction applied by the city failed to substantially advance a legitimate government interest under the first prong of the Agins test; in an earlier phase of the litigation, the Ohio Supreme Court had declared the zoning unreasonable and arbitrary in violation of the Due Process Clause under Nectow and Euclid and the Court ruled, in effect, that this earlier determination established the owner's entitlement under Agins to compensation under the Takings Clause; this decision effectively overrules the Ohio Supreme Court's 1998 decision in which the Court declared that a valid regulatory taking claim requires proof that the regulation deprives the owner of all economically viable use of the property).

3. Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township, 2002 WL 978798 (N.D., May 14, 2002) (North Dakota Supreme Court held that condemnation action brought by a resource district to

acquire 1.43 acres from the Turtle Band of Chippewa Indians was not barred by sovereign immunity, where the land had been in private ownership for over 100 years and a non-Indian transferred the land to the tribe in an effort to block the water resource district from proceeding with a dam project).

4. Rogers Machinery, Inc. v. Washington County, 2002 WL 921856 (Or.App., May 8, 2002) (Oregon Court of Appeals, in a comprehensive decision discussing relevant case law from around the country, ruled that the Dolan rough proportionality test does not apply to generally applicable legislatively imposed development fees; because the court resolved the case on this "narrow" basis, the court reserved the question of whether, in light of the U.S. Supreme Court's Del Monte Dunes decision "and other later jurisprudential developments," Dolan could be applied to development fees under any circumstances).

5. Schneider v. County of San Diego, 285 F.3d 784 (9th Cir., March 21, 2002) (the U.S. Court of Appeals for the Ninth Circuit ruled that, in a successful taking action, the claimant is entitled to pre-judgment interest from the date of the alleged taking to the date the judgment is paid; the court also ruled that in a section 1983 takings action, for the purpose of calculating the rate of prejudgment interest, the Takings Clause's just compensation mandate requires the court to examine "what a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal" would receive).

6. Kitt v. United States, 271 F.3d 1330 (Fed.Cir., May 2, 2002) (on a petition for rehearing, the U.S. Court of Appeals for the Federal Circuit affirmed its earlier decision that 1998 federal legislation changing the tax treatment of withdrawals from IRA accounts did not effect a taking; following the Federal Circuit panel ruling in Commonwealth Edison, 271 F.3d 1327, the court stated that it was obligated to follow the 5-justice majority in Eastern Enterprises rejecting the taking claim in that case rather than the plurality in that case which would have found a taking).

7. Prater v. City of Burnside, 2002 WL 857061 (6th Cir., May 7, 2002) (federal appeals court affirmed district court rejection of claim that city effected a taking of church's property by constructing a road on a previously dedicated right of way; court ruled under Minnesota law that city had acquired a valid easement over the right of way and therefore the city was not infringing on any private property right by constructing the road).

8. Smith-Johnson v. Murray, 2002 WL 731693 (D.Kan., April 16, 2002) (federal district court dismissed takings suit based on plaintiff's failure to prosecute the litigation, and also rejected the claim on the merits, stating "the court was unable to find any support for the proposition that damage to private property caused by nearby construction, even if 'caused' by the issuance of a construction permit by the state, would constitute a taking").

9. Johnson v. Oakland County Department of Human Services, 2002 WL 737796 (Mich.Ct.Apps., April 23, 2002) (unpublished) (in a classic little takings case, the Michigan Court of Appeals rejected a takings challenge based on the county's denial of a permit to construct an on-site sewage disposal system on a residential lot, where the county's denial was based on the fact that the soil was unsuitable for such a system; despite the fact that the denial rendered the property unbuildable, and absent any evidence that the property had any actual use or value for any other purpose, the court rejected the Lucas taking claim, stating that the plaintiff 'had not conclusively demonstrated that all other alternative uses not requiring an on-site disposal system had been precluded;" the court also rejected a Penn Central claim on the ground that soil suitability requirements served a legitimate government purpose, the plaintiff had not established the property was "unusable or unmerchantable," and the plaintiff had purchased the lot knowing the land would not perk and paid a deeply discounted price for the property based on that fact).

10. Morrison v. O'Hair, 2002 WL 978145 (S.D.Ind., March 29, 2002) (federal district court dismissed complaint insofar as it alleged that county and town officials' efforts to abate an alleged nuisance on plaintiffs'

property constituted a taking; court stated that plaintiffs did not allege that they had availed themselves of state procedures for obtaining compensation and been denied just compensation under such procedures and, therefore, the taking claim was not ripe under Williamson County).