Takings Snapshots, Volume 53, October 29, 2002

1. League of California Cities v. State of Oregon, 2002 WL 31235582 (Or., October 4, 2002) (the Oregon Supreme Court unanimously struck down Oregon's Measure 7, the sweeping property rights measure adopted at the ballot box in November 2000, as unconstitutional; the court ruled that Measure 7 violated the "separate-vote" requirement of the Oregon Constitution, which bars ballot measures that require voters to cast a single vote that would amend two separate provisions of the State Constitution; the court ruled that Measure 7 violated the separate vote requirement by both expanding the circumstances when government would be liable for regulatory takings and by limiting the protection provided by the Oregon Free Speech Clause; the Court reasoned that Measure 7 effectively authorized discrimination on the basis of speech by barring pornography businesses from recovering compensation under the measure's expansive definition of a regulatory taking).

2. Daniels v. The Area Plan Commission of Allen County, 2002 WL 31018822 (7th Cir., September 11, 2002) (in a novel and interesting case, the U.S. Court of Appeals for the Seventh Circuit (Manion, J.) upheld a district court ruling that a county agency's decision to vacate a residential-use-only restrictive covenant in order to encourage commercial development along a busy road was a taking of private property for "private use," in violation of the constitutional rights of a neighboring land owner who was a legal beneficiary of the restriction and opposed its removal; the court first concluded that the claim was ripe in federal court, despite the general rule in the Seventh Circuit that a claim of a private taking is subject to the Williamson County ripeness requirements, on the ground that the plaintiff could show no monetary loss and was therefore not entitled to compensation, and thus it would have been "futile" for the plaintiff to seek relief under the state compensation procedures; on the merits, the court ruled that while the rational basis test applies in a challenge to a legislative determination that an exercise of eminent domain satisfies the Taking Clause's "public use" requirement, the more demanding "substantially advance" test applies when, as in this case, an administrative agency makes the public use

determination; applying this stringent standard of review, the court determined that the public use requirement was not satisfied in this case because the primary effect of the county's action was to benefit a commercial developer rather than to advance the public interest; finally, the court reversed the district court's ruling that the Indiana ordinance authorizing the vacation of restrictive covenants was unconstitutional on its face, reasoning that in some circumstances the statute could be applied in accordance of the requirements of the Fifth Amendment).

3. Walcek v. United States, 2002 WL 31027444 (Fed Cir. 2002) (in an important decision interpreting the Supreme Court's Tahoe decision, the Federal Circuit ruled that the court of claims properly treated a claimant's entire 14.5-acre property (part of which was restricted wetlands and part of which was developable uplands)as one parcel, relying on Tahoe's reaffirmation of the parcel as a whole rule; the court also ruled that in calculating the value of a restricted property relative to its original purchase price, the purchase price should not be adjusted for inflation, effectively overruling the contrary approach adopted by Loren Smith, former Chief Judge of the Court of Claims, in the Florida Rock litigation).

4. Swartz v. Beach, 2002 WL 31259995 (D. Wyo., October 4, 2002) (in a potentially important and fascinating case, the federal district court in Wyoming has issued an order denying a motion to dismiss a takings suit brought by a rancher against officials of the Wyoming Department of Environmental Quality, and reaching two important conclusions: (1) that while a claim against state officials in their official capacity would be barred by the Eleventh Amendment insofar as plaintiffs sought monetary relief in federal court, the plaintiffs were entitled to seek an injunction against an alleged taking by the officials in federal court under Ex Parte Young; and (2) that the plaintiffs stated a claim for a per se physical occupation taking and a regulatory taking (on a "substantially advance" theory) based on the officials' issuance of an NPDES permit to a coal bed methane producer authorizing the release of discharge water through the stream on plaintiff's property, allegedly rendering the water unsuitable for irrigation and causing permanent damage to the soil on plaintiff's property).

5. Rose Acre Farms, Inc. v. United States 2002, WL 2018674 (Ct. Fed. Cls., August 29, 2002) (in a very extreme decision, the Court of Federal Claims (Futey, J.) awarded $6 million (plus interest) in compensation for a taking based on Department of Agriculture orders, directed at the control of salmonella in eggs, barring the claimant from selling eggs produced at its infected facilities and requiring the destruction of salmonella-infected hens; without specifically addressing the parcel as a whole rule, the court evaluated the regulation by focusing separately on the eggs and the hens; the court found a Penn Central taking of the eggs and a Lucas taking of the hens, primarily on the ground that the court concluded that the entire regulatory regime was "misguided" because it focused on whether the hens were infected without requiring direct testing of the eggs themselves).

6. Esplanade Properties, LLC v. City of Seattle, 2002 WL 31190846 (9th Cir., October 3, 2002) (in an important public trust ruling, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court judgment dismissing a takings challenge to the City of Seattle's rejection of an application to build waterfront homes on pilings above coastal public trust lands; the court ruled that the claim was barred under Lucas background principles of property law based on the longstanding Washington state public trust doctrine; without expressly stating that an owner's investment expectations are relevant in a Lucas takings case, the Court also rejected the Lucas claim on the basis that the owner had only paid $40,000 for the property and had purchased the property in the face of extensive federal, state and local regulations limiting development of tidelands; finally, applying the Ninth Circuit's extreme theory on substantive due process challenges to regulation, the Court ruled that the plaintiff's taking claim completely pre-empted the due process claim which the plaintiff attempted to present).

7. State ex rel. Shemo v. City of Mayfield Heights, 775 N.E. 2d 493 (Ohio, October 2, 2002) (on application for rehearing) (in an extreme application of the substantially advance takings test, the Ohio Supreme Court reaffirmed its prior determination that the the city effected a taking; the court ruled that the city's refusal to

rezone the property from residential use to commercial retail use failed to substantially advance a legitimate state interest, and ruled that neither Palazzolo nor Tahoe-Sierra altered this result; the court also ruled, in the alternative, that a finding of a taking was justified under Penn-Central, reasoning, in perfunctory fashion, that "restricting relators' land to residential use on property that was held to be unsuitable for residential use had an obvious adverse economic impact on relators, which necessarily interfered with their reasonable investment-backed expectations").

8. Seiber v. United States, 53 Fed.Cl. 570 (Ct. Fed. Cls., September 4, 2002) (in a significant takings case involving restrictions imposed on commercial logging in Oregon under the ESA, the Federal Court of Claims ruled that: (1) the claim was not ripe because the claimants, after filing one unsuccessful application with the FWS, and receiving an indication from the FWS that a modified proposal might be granted, failed to file a second application; (2) the physical occupation taking claim had to be rejected because the regulations involved only restrictions on the use of private property; (3) the Lucas claim failed because the restrictions only affected 40 acres out of a 200-acre property; (4) the claim under Agins failed because the restrictions were only in place for a limited period (8 years) and the government had not adopted the permit program in bad faith; (5) and the Penn Central claim failed, based primarily on the parcel as a whole rule, citing the Supreme Court's Tahoe decision.

9. Vokoun v. City of Lake Oswego, 2002 WL 31387735 (Or., October 24, 2002) (ruling in favor of a takings claimant, the Oregon Supreme Court reversed an Oregon Court of Appeals decision vacating a jury award in favor of landowners suing a city in inverse condemnation based on property damage caused by a municipal storm drain; the supreme court affirmed the court of appeals decision insofar as the court ruled that the city's alleged negligence in failing to maintain the storm drain could not provide the basis for a takings claim; but the supreme court also ruled that the plaintiffs had presented a viable takings claim (apparently based on a physical-occupation theory) insofar as they alleged that the city constructed the storm drain with the foreseeable consequence that there would be flooding and resulting property damage).

10. W. J. F. Realty Corp. v. Town of Southampton, 2002 WL 31005911 (E.D.N.Y., September 4, 2002) (federal district court ruled that plaintiff could proceed with regulatory taking claim under the Fifth Amendment in federal court, when plaintiff had previously litigated a taking claim under the New York Constitution in state court and had filed an "England reservation" to preserve the opportunity to litigate the federal taking claim later in federal court; the court also ruled that issue preclusion did not apply because the standard of proof in a taking action under New York law is different than the standard of proof in taking cases under the Fifth Amendment; finally, the court ruled that the Rooker-Feldman doctrine did not bar the plaintiff from pursuing its federal takings claim, given its England reservation filed in state court).

11. Massingill v. Department of Food and Agriculture, 125 Cal.Reptr. 2nd 561 (Cal. Ct. App. September 26, 2002) (California Court of Appeals ruled that California statute requiring service station owners to provide air and water to consumers at no charge did not effect a taking under Lucas or Penn Central).

12. Blue Ribbon Properties, Inc. v. Hardin County Fiscal Court, 2002 WL 1893515 (6th Cir., August 15, 2002) (unpublished decision) (U.S. Court of Appeals for the Sixth Circuit affirmed trial court ruling rejecting taking claim by owner denied permission to establish a landfill on 590 acres, which the owner purchased for this specific purpose; court ruled that denial of permission to establish a landfill did not mean that the owner was left with "no productive use" of the property, as required to establish a taking; the court also emphasized that the plaintiff purchased the property knowing that he could not operate a landfill on the property unless he succeeded in obtaining a permit from the county).

13. Paradissiotis v. United States, 304 F.3d 1271 (Fed. Cir., September 13, 2002) (Federal Circuit affirmed trial court ruling that Treasury Department did not effect a taking of stock options held by an agent of the Libyan government by freezing the claimant's property and preventing him from exercising the options before they expired; the court primarily relied on the broad authority of the United States to adopt regulations to protect

national security which adversely affect contract-based interests and expectations without effecting a taking; the court also ruled that the claimant lacked reasonable investment-backed expectations because he became a director of a Libyan-controlled corporation, thus subjecting himself to possible regulatory sanctions, after the Libyan sanctions program had already been put in place).

14. Cane Tennessee, Inc. v. United States, 2002 WL 31194518 (Fed. Ct. Cls., October 2, 2002) (on cross motions for summary judgment, in a takings case brought by owners of land and mineral interests challenging the regulatory actions of the Department of the Interior's Office of Surface Mining, the court of claims deferred resolution of most of the issues in the case, but ruled as to one plaintiff that it could not claim a denial of all economically viable use because, based on the parcel as a whole rule, the plaintiff's fee interest in the real property encompassed more than the restricted mineral interests; the court distinguished Whitney Benefits, in which the Federal Circuit held that mineral interests were taken, on the ground that the plaintiff in that case essentially owned only mineral interests).

15. Pearce v. City of Round Rock, 78 S.W.3^{d} 642 (Tx. Ct. Apps., May 23, 2002) (Texas Court of Appeals affirmed a trial court ruling rejecting a takings challenge to a municipal prohibition against certain advertising signs, ruling that plaintiff's case failed for lack of proof on the critical issues of economic impact and investment-backed expectations; following the Court's own extreme ruling in the Glenn Heights case (now on appeal to the Texas Supreme Court) the court stated in dictum that losses of potential profits, though not relevant in assessing economic impact, are relevant in determining whether a government action interferes with investment-backed expectations).

16. Barefoot v. City of Wilmington, 2002 WL 31027948 (4th Cir., September 12, 2002) (U.S. Court of Appeals for the Fourth Circuit affirmed a district court ruling rejecting a challenge to a municipal annexation based on, among other things, the Takings Clause, stating that it was "obvious" that the annexation did not effect a per se

taking and, with respect to the Penn Central claim, stating that "[t]his is simply not the type of regulation that 'goes too far' and is consequently a taking under the Fifth Amendment").

17. Recreational Developments of Phoenix, Inc. v. The City of Phoenix, 2002 WL 31006130 (D. Ariz., August 29, 2002) (federal district court upheld ordinance prohibiting sex-related businesses against, among other things, a taking challenge; the court ruled that the facial demand for compensation was not ripe in federal court, but that the plaintiff's claim that the ordinance failed to substantially advance a legitimate government interest was ripe; the court expressed serious doubt about the plaintiff's contention that the city carried the burden of proof on the substantially advance issue, but concluded that, even if the city did have the burden of proof, it was entitled to judgment in its favor because the city demonstrated that the ordinance was substantially related to the government's legitimate interest in controlling sexually transmitted diseases).

18. Berwind Corp. v. Commissioner of Social Security, 2002 WL 31194313 (3rd Cir., October 2, 2002) (in another in the long series of post-Eastern Enterprises cases, the U.S. Court of Appeals for the Third Circuit reversed a district court judgment relieving a company of liability for health care expenses under the Coal Act; the court ruled that the plaintiff could not rely on Eastern Enterprises because the plaintiff was not in a "substantially identical" position to the company in Eastern Enterprises and the imposition of liability did not violate plaintiff's due process rights; though the Third Circuit did not discuss the takings issue at length, it reaffirmed the statement in its earlier Unity Real Estate decision that "we are bound to follow" the 5-4 vote against the takings claim in Eastern Enterprises).

19. A.T. Massey Coal Company, Inc. v. Massanari, 2002 WL 31064378 (4th Cir., September 18, 2002) (in another post-Eastern Enterprises case, the U.S. Court of Appeals for the Fourth Circuit, following the reasoning of the Third Circuit in Unity Real Estate, ruled that a claimant can rely on Eastern Enterprises to avoid an assignment of liability under the Coal Act only if the claimant is in a

"substantially identical" position to the claimant in Eastern Enterprises; based on the facts of this case, the court affirmed the conclusion of the trial court that the claimant was not in a "substantially identical" position).

20. Shenango Inc. v. Apfel, 2002 WL 31111819 (3rd Cir., September 24, 2002) (in another post-Eastern Enterprises case, the Third Circuit, applying the analysis it developed in Unity Real Estate, concluded that the plaintiffs could not avoid liability for health care expenses under the Coal Act because they were not in "substantially identical" position to the plaintiffs in Eastern Enterprises, and the Act did not violate a plaintiff's due process rights).

21. Nell Jean Industries, Inc. v. Barnhart, 2002 WL 31013029 (D. D. C. , September 10, 2002) (in another post-Eastern Enterprises case, the federal district court, following the reasoning of the Third and Fourth Circuits, ruled that the plaintiff company was not entitled to avoid liability under the Coal Act because it was not in "substantially identical" situation to the claimant in Eastern Enterprises).