Takings Snapshots, Volume 54, November 26, 2002

1. Alabama Power Company v. FCC, 2002 WL 31525336 (11th Cir., November 14, 2002) (the 11th Circuit rejected a utility's challenge under the Fifth Amendment to an FCC order setting the rate the utility could charge a cable company for use of its utility poles; the court started from the premise that the mandate if the Telecommunications Act of 1996 that the utility grant the cable company access to its poles constituted a per se physical-occupation taking and, therefore, the utility was entitled to just compensation; in fixing the amount of compensation the court started with the principle that just compensation is measured based on the value of what the owner has lost, not what the taker has gained, and ruled that, at least absent evidence that space is limited on the utility poles and that there are competitors for the available space, the just compensation standard is satisfied so long as the utility receives reimbursement of at least the marginal cost it incurs in providing access to the poles, a standard which the FCC satisfied in this case.)

2. Schism v. United States, 2002 WL 31549178 (Fed. Cir., November 18, 2002) (en banc) (the Federal Circuit, sitting en banc, voted 9 to 4 to affirm a district court decision rejecting claims by military veterans for compensation for the value of the free lifetime medical care they allegedly were promised by military recruiters in the 1950's and which was subsequently withdrawn; the court rejected the claims on the grounds that (1) the rights of military personnel to pay and other benefits are defined exclusively by congressional legislation, rather than traditional contract rules, and no statute created a lifetime guarantee of healthcare benefits, and (2) assuming plaintiffs could assert contract rights, the military recruiters who allegedly made the contracts lacked the legal authority to do so and their actions had never been ratified by subsequent congresses; the dissenters argued that the plaintiffs had valid contract claims and, in addition, the plaintiffs were entitled to seek compensation under the Fifth Amendment for a government taking of their vested contract rights.)

3. Cumberland Farms, Inc. v. Town of Groton, 2002 WL 31501283 (Conn., November 19, 2002) (in an important

decision, the Connecticut Supreme Court, based on a thorough analysis, concluded that an inverse condemnation claimant has no right to a jury trial; the court principally relied on the fact that inverse condemnation cases are similar to eminent domain proceedings, which are equitable in nature and in which no jury trial is available; the court discussed the U.S. Supreme Court's ruling in Del Monte Dunes and distinguished that decision principally on the ground that it involved a taking claim in federal court where the state had failed to provide a compensatory remedy for a regulatory taking; the court also ruled that findings made by a zoning board of appeals in denying a request for a hardship variance, subsequently upheld on judicial review, do not have collateral estoppel effect in an inverse condemnation action subsequently brought by the owner.)

4. Bass Enterprises Production Co. v. United States, 2002 WL 31526504 (Ct. Fed. Cls., November 13, 2002) (in an interesting post-Tahoe decision, the court of federal claims, upon the government's motion for reconsideration, reversed its earlier finding of a compensable temporary taking; the court of claims previously ruled that the Bureau of Land Management had effected a Lucas-type taking by denying applications to exploit oil and gas leases for 45 months pending a determination by the Environmental Protection Agency about whether oil and gas operations could proceed consistent with use of the area for nuclear waste disposal; upon reconsideration, the court concluded that the Supreme Court's rejection in Tahoe of the Lucas claim based on a moratorium required rejection of the essentially identical Lucas claim in this case; applying the Penn Central test, the court concluded that BLM's action interfered with the plaintiffs' reasonable investment-backed expectations, but that the Penn Central claim ultimately failed because the regulation was "in the public interest" and the adverse economic effect of the delay was "negligible.")

5. Cashman v. City of Cotati, No. C 99-03641 SBA (N. D. Cal., September 4, 2002) (applying the 9th Circuit's "substantially advance" takings test, the federal district court held that the city's mobile home rent control and vacancy control ordinance did not effect a taking because

the plaintiffs failed to demonstrate that the ordinance did not substantially advance a number of legitimate public purposes, including preventing excessive rent increases for occupants of mobile home parks.)

6. Loewenstein v. City of Lafayette, 2002 WL 31520424 (Cal. Ct. App., November 13, 2002) (following the California Supreme Court decision in Landgate, the California Court of Appeals rejected a taking claim based on delay of development caused by a city's legally erroneous determination to reject a proposed lot line adjustment.)

7. Hensley v. City of Columbus 2002 WL 1584279 (S.D. Ohio, May 23, 2002) (in an interesting federal district court takings case (which likely should have been dismissed at the threshold under Williamson County, Rooker-Feldman doctrine, and/or principles of claim preclusion), the court rejected a claim that the city effected a taking by constructing a sewer line next to the claimants' property and causing the wells on their property to become dry; the court ruled that the taking claim failed because, even though the owners had a right to make reasonable use of the water under their property, they lacked a property interest in the water sufficient to support a takings claim.)

8. Vellequette v. Town of Woodside, 2002 WL 1614358 (Cal. Ct. App., July 23, 2002) (in an unpublished decision, the California Court of Appeals affirmed a superior court decision, after a trial, rejecting a taking claim based on the town's rejection of the plaintiff's application for additional sewer connections to serve two lots he owned adjacent to a third lot on which he maintained a residence; based on a complicated factual record, the court rejected both the Lucas and Penn Central claims; the court declined (ostensibly following Lucas rather than Tahoe) to define the relevant parcel as consisting of all three lots, but nonetheless considered the total value of the lots if they were developed as a unit; the court also justified rejection of the taking claim by observing that the property had more than doubled in value relative to the original purchase price.)

9. Holy Land Foundation for Relief and Development v.

Ashcroft, 2002 WL 1818485 (D.D.C., August 8, 2002) (federal district court ruled that U.S. government order blocking assets of muslim charitable foundation on the ground that it was a terrorist organization did not effect a taking because, on the record before the court, the property deprivation was only temporary and therefore did not rise to the level of a taking.)

10. Covington v. Jefferson County 53 P. 3d 828 (Id., August 16, 2002) (Idaho Supreme Court affirmed trial court ruling that county's operation of landfill adjacent to the plaintiffs' residence did not effect a taking of their property, because operation of the landfill did not result in a physical occupation of the plaintiffs' property and did not deny the owners all economic uses of their property.)

11. McPherson Landfill, Inc. v. Board of County Commissioners of Shawnee County, 49 P.3d 522 (Ks., July 12, 2002) (Supreme Court of Kansas affirmed trial court's ruling that county's refusal to grant a conditional land use permit for a landfill did not effect a taking; the court rejected both a Lucas claim and a Penn Central claim, stating that under Penn Central "a regulation does not amount to a taking merely because it significantly diminishes the value of the property.")

12. 520 E. 81st Street Associates v. State of New York, 2002 WL 31520716 (N.Y., November 14, 2002) (the New York Court of Appeals held that when a regulatory taking delays the sale of a property just compensation is properly determined by calculating the interest that the owner would have received from the proceeds of the sale of the property from the time the taking occurred.)

13. Osceola County v. Best Diversified Inc., 2002 WL 31127176 (Fl. Ct. Apps., September 27, 2002) (Florida Court of Appeals dismissed an appeal from a trial court ruling that the county and the state DEP had violated the plaintiffs rights under the Florida property rights legislation, the Bert Harris Act, by denying them permission to operate a landfill; the court ruled that the provision of the Bert Harris Act granting government entities the right to pursue interlocutory appeals from liability determinations under the Act was unconstitutional because the Florida Constitution does

not permit the legislature to expand the appellate jurisdiction of the Florida courts unless the Florida Supreme Court has incorporated the legislative measure into the appellate rules, which the Court has not done in this instance.)

14. Grasso v. City of New Bedford, 2002 WL 31039718 (Mass. App. Ct., September 12, 2002) (in an unpublished decision, the Massachusetts Court of Appeals affirmed a trial court judgment rejecting a takings claim against the City of New Bedford and the Massachusetts Executive Office of Environmental Affairs based on their alleged interference with plaintiffs' waterfront development; the court ruled that the claim against the EOEA was barred by the statute of limitations; the court affirmed the judgment in favor of the city on the ground that the city's refusal to rezone the property to permit the proposed development did not fail to substantially advance a legitimate state interest or effect a taking under Lucas or Penn Central.)

15. Mays v. Board of Trustees of Miami Township, 2002 WL 1396008 (Ohio App. Ct., June 28, 2002) (Ohio Court of Appeals rejected regulatory taking claim based on agricultural zoning classification (20-acre minimum lot size), stating that "in order to constitute a regulatory taking the measure involved must be permanent in nature and of such a character and effect that the owner is deprived of all or substantially all economic use of his land that is feasible.")

16. Manke Lumber Company, Inc. v. Central Puget Sound Growth Management Hearings Board, 53 P. 3d 1011 (Wash. Ct. App., May 17, 2002) (Washington Court of Appeals rejected taking claim based on designation of property under the Growth Management Act as rural residential rather than urban growth area, stating that "a takings claim requires some indication that the regulatory scheme is so onerous as to render the property completely without economic viable use.")

17. Jordan v. Landry's Seafood Restaurant, 2002 WL 31385943 (Tex. App. Ct., October 17, 2002) (Texas Court of Appeals rejected takings claim based on city's restriction of traffic on road abutting claimant's property;

court ruled that plaintiff had failed to demonstrate that the "interference of use and enjoyment" of the property was "substantial.")