Takings Snapshots, Volume 59, June 4, 2003

1. McQueen v. South Carolina Coastal Council, 2003 WL 1957496 (S.C., April 28, 2003) (the South Carolina Supreme Court, on remand from the U.S. Supreme Court, reinstated its prior decision rejecting McQueen's claim that the state coastal council's denial of permission to bulkhead and fill two coastal lots effected an unconstitutional taking; because the shore had eroded and the lots had become subject to the ebb and flow of the tides, the Court ruled that the property was subject to the South Carolina public trust doctrine and, therefore, the taking claim was barred under background principles of South Carolina property law; having resolved the case based on the public trust doctrine, the court expressly reserved judgment on whether this Lucas-type claim also might be barred based on the claimant's lack of reasonable investment-backed expectations, simply noting that the courts are split on whether a lack of reasonable investment expectations represents a relevant factor in a Lucas case).

2. Key Outdoor, Inc. v. City of Galesburg, 327 F.3d 549 (7th Cir., April 24, 2003) (the Sixth Circuit (Easterbrook, J.) vacated a district court order dismissing a takings suit based on a city sign ordinance which the plaintiff had initially filed in state court and which the defendant city subsequently removed to federal court; the appeals court ruled that while the defendants was entitled to remove the case to federal court, the plaintiff should have been permitted to proceed with its state taking claim in state court, on the theory that the defendant, by removing the case to federal court, "logically either surrendered the benefit of Williamson or consented in advance to the remand of state-law theories, so that the process required by Williamson could run its course;" in dictum, the court offered a brief, disparaging assessment of the argument that amortization provisions can defeat a takings claims, contradicting the overwhelming weight of authority supporting the conclusion that reasonable amortization provisions bar takings claims).

3. Cooley v. United States, 324 F.3d 1297 (Fed.Cir., April 1, 2003) (in a striking demonstration of the narrowness of the Lucas test after Tahoe-Sierra, the

Federal Circuit vacated a Court of Claims finding of a Lucas taking based on a showing that a denial of a Section 404 permit reduced the value of the property by 98.8% and prohibited development of the entire property; at the same time the court affirmed the conclusion that the plaintiff had presented a ripe claim as a result of a wetlands permit denial and that in any event further administrative proceedings would have been futile; finally the court indicated that the Army Corps' issuance of a permit to the applicant after the taking claim had already ripened, and on the eve of trial, would not bar a finding of a taking, but might affect the determination of whether the taking (if any) was permanent or temporary, and remanded the case to the Court of Federal Claims to apply the Penn Central analysis).

4. Sandy Creek Investors, Ltd. v. City of Jonestown, 2003 WL 1469455 (5th Cir., March 24, 2003) (Fifth Circuit, on appeal from a takings judgment against the city, entered after the city removed the case to federal court, raised sua sponte the question of ripeness and concluded that the case was not ripe because the plaintiff had not exhausted available state remedies before filing its federal takings claim; the court of appeals therefore concluded that the district court was barred from exercising jurisdiction in the case and accordingly vacated the district court judgment).

5. Dudek v. Umatilla County, 2003 WL 21100803 (Or.Ct.App., May 15, 2003) (in a significant case, the Oregon Court of Appeals upheld a ruling by the State Land Use Board of Appeals that Dolan applied to a city's requirement that a land use applicant purchase an easement for transportation purposes and then dedicate the property to public use; the court first rejected the argument that Dolan did not apply because the requirement was legislative in character, ruling that, in practice, the measure required case-by-case evaluation; second, while suggesting that an exaction requiring payment of money would not ordinarily be subject to Dolan, the court ruled that Dolan did apply in this case because the owner was required to expend money to purchase private property and to then dedicate it to public use).

6. Robertson v. City of Turner, 2003 WL 21100819 (Or.Ct.App., May 15, 2003) (the Oregon Court of Appeals affirmed rejection of a regulatory takings claim based on a city's closure of an unsafe public bridge which provided the sole access to plaintiff's property, on the grounds that (1) the city's action involved no taking within the meaning of the Takings Clause, because it represented a restriction on the use of public property for private use, and (2) the city's action represented an exercise of the police power to address a public hazard rather than an exercise of the eminent domain power).

7. Folden v. United States, 56 Fed.Cl. 43 (Ct.Fed.Cls., March 28, 2003) (Court of Federal Claims held that disappointed applicants for FCC cellular licenses failed to state a takings claim because they failed to establish a contractual or other basis for a property right to the benefit of any specific selection procedure by the FCC; even if they did possess a protected property right, the court also ruled, the plaintiffs could not establish a taking given the highly regulated nature of the industry in which they were participating).

8. Sinclair v. United States, 2003 WL 21076834 (Ct.Fed.Cls., April 18, 2003) (Court of Federal Claims rejected regulatory takings claim by investor in small national bank based on the theory that certain regulatory enforcement steps by the office of the Comptroller of the Currency constituted a taking, stating that "the Federal Circuit has repeatedly rejected the proposition that regulatory activity in the banking industry, even when more financially devastating than that suffered by plaintiff, constitutes a taking").

9. Buena Park Motel Association v. City of Buena Park, 2003 WL 21040650 (Cal.Ct.App., May 4, 2003) (providing an example of the unquestioning application of the problematic "substantially advance" takings test, the California Court of Appeals upheld a trial court judgment rejecting a takings claim based on a city ordinance barring long-term stays in residential hotels; the court ruled that the takings claim failed because the ordinance did not deprive the motel owners of all economically viable use of their property and the ordinance "substantially advanced" the city's legitimate

interest "in maintaining sanitary, pest-free conditions at the motels").

10. Detroit Edison Company v. United States, 2003 WL 21076922 (Ct.Fed.Cls., April 24, 2003) (Court of Federal Claims rejected motion to dismiss taking claim based on government's failure to remove nuclear waste from utility property as required by the Nuclear Waste Policy Act, the court ruled that at this early stage of the litigation it could not determine whether the breach of contract claim in the case superseded any potential takings claim.)

11. Encinitas Country Day School, Inc. v. California Coastal Commissions 2003 WL 21026779, (Cal.Ct.App., May 8, 2003) (California Court of Appeals, in an unpublished decision closely following the California Supreme Court's Landgate decision, ruled that construction delays resulting from the California Coastal Commission's legally erroneous assertion of jurisdiction over a project did not result in a taking; the court invoked the general rule in California that a legally erroneous assertion of jurisdiction does not result in a taking so long as the government "is proceeding from a legally tenable position rather than acting arbitrarily and capriciously without a legitimate basis and seeking only to delay or discourage development").

12. Holman v. City of Warrenton, 242 F.Supp.2d. 791 (D.Or., September 25, 2002) (applying the extreme (and problematic) Ninth Circuit rule, the federal district court dismissed with prejudice a substantive due process claim based on the city's allegedly biased denial of a building permit, on the ground that any potential due process claim was completely preempted by the Takings Clause).

13. Ramey v. City of Chicago, 2003 WL 21196239 (N.D. Ill., May 19, 2003) (building owner brought takings suit seeking compensation for business losses caused by city officials' erroneous refusal to issue business licenses to claimant's existing and prospective tenants, an error caused by the officials' mistaken understanding that the property had been rezoned for residential uses only; without addressing the merits of this "error-as-taking" claim, the federal district dismissed the case for lack of subject matter jurisdiction since the claimant had not

exhausted state compensation procedures as required by Williamson County).