Takings Snapshots, Volume 65, December 3, 2003

1. Avenal v. State of Louisiana, 2003 WL 22501685 (La. Ct. Apps., October 15, 2003) (the Louisiana Court of Appeals, in a 3 to 2 decision, affirmed a trial court ruling that a class of oyster fishermen operating in Breton Sound, Louisiana, were entitled to an estimated $1.3 BILLION in compensation on the theory that a joint federal-state coastal restoration project effected a taking of the plaintiffs' leases with the state under the Louisiana Takings Clause by altering the salinity of the water above the plaintiffs' lease areas thereby rendering them unsuitable for oyster propagation; another trial court judge in Louisiana has reportedly relied on the same theory to support an award of $661 million to another group of Louisiana oystermen; in its 1996 decision in Avenal v. United States, the Federal Circuit affirmed rejection of an identical takings claim under the federal Takings Clause by some of the same plaintiffs against the United States on the ground that the plaintiffs failed to demonstrate any interference with any legitimate investment-backed expectations).

2. Friedenburg v. NY Department of Environmental Conservation, 2002 WL 32310111 (NY App. Div., November 24, 2003) (the New York Supreme Court Appellate Division affirmed a trial court ruling that the Department of Environmental Conservation's denial of a wetlands permit to construct a single-family residence on a 2.5 acre property, almost all of which consisted of tidal wetlands, effected a taking; the court ruled that there was no per se taking because the Lucas test, as clarified in the Supreme Court's Tahoe-Sierra decision, only applies to cases involving complete destruction of property value; applying the Penn Central analysis, the court ruled that a 95% reduction in value (or 92.5% under the state's version) established a taking given that the plaintiff acquired the property prior to the enactment of the Tidal Wetlands Act of 1973; surprisingly, the Appellate Division did not address the two major issues raised in the state's appeal brief: the parcel as a whole rule (the lot at issue was one of four contiguous lots purchased at the same time for investment purposes), or

background principles of N.Y. nuisance law and the public trust doctrine).

3. Twin Lakes Development Corp. v. Town of Monroe, 2003 WL 22725440 (NY, November 20, 2003) (the New York Court of Appeals, the state's highest court, affirmed lower court rulings rejecting a Dolan-type takings challenge to a requirement that a developer pay $33,000 for "in lieu of parkland" fees as a condition of subdivision approval; the court accepted the parties' agreement that the case was governed by Dolan (although the applicability of Dolan was arguably contestable on the grounds that the exaction was imposed by general legislation and/or because this exaction involved a requirement to pay money, not to transfer real property); nonetheless, the court ruled that the plaintiff had not established a taking because (1) plaintiff offered no proof to demonstrate that the $1500 per-lot fee was not roughly proportional to the impact of the proposed development, and (2) "we are unpersuaded that Dolan precludes municipalities from establishing fixed fees to ensure that adequate recreational facilities can be provided").

4. Greater Atlanta Homebuilders Association v. DeKalb County, 2003 WL 22532675 (Ga., November 10, 2003) (the Georgia Supreme Court rejected a facial takings claim based on a comprehensive tree ordinance adopted by the county requiring various tree planting and conservation measures as a condition of development approvals; the court ruled that the ordinance (1) did not deprive landowners of all economically viable use of their properties and therefore did not constitute a taking based on economic impact, and (2) Dolan did not apply because the suit involved a facial as opposed to an as applied challenge and, in addition, Dolan does not govern a takings claim based on a general legislative measure).

5. Hair v. United States, 2003 WL 22805336, (Fed. Cir., November 26, 2003) (the U.S. Court of Appeals for the Federal Circuit (Plager, J.) affirmed the court of claim's rejection of takings claims on behalf of a class of people injured or killed as a result of Japan's war against the United States; the plaintiff's theory was that the United States effected a taking by entering into 1951 peace treaty abrogating U.S. nationals' rights to sue Japan and

instead providing that they could seek compensation from a War Claims Fund created by Congress; the court dismissed the claim based on the six-year statute of limitations, first rejecting the theory that a statute of limitations defense cannot apply to a claim based on the Constitution, pointing to Supreme Court precedents ruling that a statute of limitations can properly be applied to all types of claims; the court also rejected the theory that a taking claim accrues only when the government has made a clear announcement of its refusal to pay compensation for a taking; in discussing the first issue, the court stated in dictum that "sovereign immunity does not protect a government from a Fifth Amendment Takings claim because the Constitutional mandate is 'self-executing'" a proposition which is contradicted by various Supreme Court precedents recognizing that the United States would not be liable for a taking claim absent the waiver of sovereign immunity in the Tucker Act).

6. Lion Raisins Inc. v. United States, 2003 WL 22508080, (Ct. Fed. Cls., October 23, 2003) (the U.S. Court of Federal Claims rejected takings claims based on the actions of the Raisin Administrative Committee, established under the Agricultural Marketing Agreement Act of 1937, on the ground that the committee was a Non-Appropriated Fund Instrumentality whose actions cannot support a claim for compensation under the Tucker Act in the Federal Court of Claims).

7. Bay-Houston Towing Co. v. United States, 2003 WL 22753428 (Ct. Fed. Cls, November 13, 2003) (in a complex case arising from the long-standing dispute over the Minden Bog in Michigan, the U.S. Court of Federal Claims (1) rejected permanent taking claims on the ground that the claimants either still had a Clean Water Act section 404 application pending or had not pursued other applications to completion, and (2) rejected a temporary taking claim on the ground that the extensive permitting delays by the Army Corps of Engineers were neither in bad faith nor so egregious as to support a temporary taking claim.)

8. Duszak v. United States, 2003 WL 22751577 (Ct. Fed. Cls., November 18, 2003) (the U.S. Court of Federal Claims dismissed a taking claim based on the seizure of

personal effects by U.S. Marshals pursuant to a civil bench warrant on ripeness grounds because the claimant had not first sought return of the property pursuant to Federal Criminal Rule 41(g) in the federal district where the property was seized.)

9. Innovair Aviation, Ltd. v. United States, 2003 WL 22838768 (Ct. Fed. Cls., November 25, 2003) (the Court of Federal Claims (Smith, J.) ruled that it had subject matter jurisdiction to hear a taking claim based on a federal district court order substituting a bond for personal property seized under the Controlled Substances Act; the claimant was eventually determined to be the actual, innocent owner of the property and the amount of the bond turned out to be less than the actual value of the property seized; the Court of Federal Claims ruled that it had jurisdiction to entertain a takings claim against the United States for the amount by which the value of the property exceeded the amount of the bond.)