'Takings' Snapshots Volume 68, April 8, 2004

1. Chevron USA, Inc. v. Lingle, 2004 WL 720175 (9th Cir, April 1, 2004) (in this second round of appeal, the Ninth Circuit affirmed, in a two to one decision, a district court ruling that Hawaii's gas station rent-control legislation effects a taking because it fails to "substantially advance" the State's goal of controlling gasoline prices; the court addressed three separate arguments presented by the State, disposing of the first two based on the "law of the case" doctrine; first, the court rejected the State's argument that a substantially advance claim does not raise a legitimate takings issue and instead raises an issue properly considered under the Due Process Clause; second, the court rejected the State's argument that if this were an appropriate takings test, it should be applied using a deferential rational basis standard; finally, the court rejected the State's argument that, even if the district court applied the correct legal test and standard, the judgment was erroneous because the legislation in fact substantially advanced Hawaii's interest in controlling gasoline prices; the dissenting judge, William Fletcher, argued that the court should have applied a more deferential standard of "reasonableness" and that the statute is not unconstitutional under that standard).

2. Sheffield Development Co. v. City of Glenn Heights, 2004 WL 422594 (the Texas Supreme Court unanimously reversed a Texas Court of Appeals ruling under the Texas Takings Clause that a suburb of Dallas effected a taking by imposing a fifteen-month moratorium on development and by reducing the permitted density of development through rezoning; the court rejected claims that the city's actions failed to substantially advance legitimate government interests or effected a taking under Penn Central; as to the substantially advance claim, the court acknowledged that the U.S. Supreme Court has "equivocated somewhat" on the continuing validity of this test, but declined to accept the City's suggestion that it repudiate the test; on the merits, applying a relatively deferential standard, the court concluded that both the moratorium and the rezoning substantially advanced legitimate government interests; applying Penn Central, the court concluded that a 50% reduction in property value was not sufficient to support a finding of a taking, given that the property (subject to the revised zoning) was still worth more than the developer had paid for it, the

investment was "speculative," and the rezoning was general and not targeted at a single landowner).

3. In re Property Located at 14255 53rd Avenue, 86 P.3d 222 (Wash., March 22, 2004) (in an important and comprehensive decision, the Washington Court of Appeals, reversing the judgment of the Superior Court, ruled that the state Department of Agriculture's destruction of healthy trees within a one-eighth mile radius of the site of the escape of citrus long-horned beetles did not effect a taking; the court ruled that the Department's actions to prevent the introduction of a dangerous new agricultural pest into the United States were immunized from a takings claim on the ground that the State was acting "to avert a public calamity;" the court relied heavily on the U.S. Supreme Court's landmark 1928 decision in Miller v. Shoene, in which the Court ruled that the destruction of cedar trees by Virginia officials to save the apple industry from an agricultural pest did not effect a taking).

4. Dakota, Minnesota & Eastern Railroad Corp. v. State of South Dakota, 2004 WL 555655 (8th Cir., March 23, 2004) (in an interesting case, partly involving the interplay between the Takings Clause and the Eleventh Amendment, the Eighth Circuit ruled that the federal district court properly enjoined the Governor from implementing a provision of the state eminent domain law that violated the Dormant Commerce Clause of the U.S. Constitution; the court also vacated and remanded a ruling of the district court that the state had effected an "illegal exaction" in the course of exercising its eminent domain authority, on the ground that the district court had not properly addressed either aspect of the ripeness analysis mandated by Williamson County).

5. Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 2004 WL 718954 (D. Nev., March 29, 2004) (the federal district court granted Tahoe Regional Planning Agency's motion to dismiss a complaint alleging, among other things, that adoption of a new Scenic Review Ordinance effected a facial taking; the court ruled that the complaint could not be read to support a viable Penn Central claim, especially in view of the heavily regulated nature of the Lake Tahoe basin; the court also dismissed the plaintiff's "substantially advance" claim, although the court accepted

the plaintiff's theory that the substantially advance test involves a heightened standard of judicial review).

6. Smith v. Town of Mendon, 771 NYS2d 781 (NY App. Div., February 11, 2004) (the New York Supreme Court Appellate Division affirmed a trial court decision rejecting a taking challenge based on a municipal planning board order approving a site plan on the condition that the owner place a conservation restriction on the portions of the site within designated "environmental protection overlay districts;" the court ruled that while the trial court reached the right result, it erred in concluding that the Dolan rough proportionality test applied and, instead, the trial court should have applied a more deferential reasonable relationship standard).

7. John R. Sand & Gravel Co. v. United States, 2004 WL 725212 (Ct.Cls. April 2, 2004) (in an exhaustive opinion, the Court of Federal Claims recognized that the "background principles" defense recognized in Lucas applies to physical-occupation takings claims on the same basis as it applies to regulatory takings claims; however, in this particular case, arising from the actions by EPA officials to implement a superfund remedial order on plaintiff's property, the court ruled that it could not determine, on a motion for summary judgment, whether any of a variety of Michigan common law or statutory provisions would support a nuisance defense in this case).

8. Merkur Steel Supply, Inc. v. City of Detroit, 2004 WL 434297 (Mich. Ct. App., March 9, 2004) (in what the Michigan Court of Appeals called a case of "blight by planning," the Michigan Court of Appeals affirmed a trial court judgment that the City of Detroit effected a taking by publishing an airport layout plan and taking other actions designed to discourage the plaintiff landowner from expanding the development on its property adjacent to the Detroit airport).

9. Greenfield Mills v. Macklin, 2004 WL 541153 (7th Cir., March 19, 2004) (the Seventh Circuit affirmed a district court order dismissing a taking claim based on the theory that government officials effected a taking of riparian property owners' rights by draining a water supply pond and allowing silt-laden water to flow down the river below the pond; the court ruled that a taking claimant relying on a physical-occupation theory

automatically satisfies the Williamson County finality requirement; however, the court ruled that the state exhaustion requirement of Williamson County still applies in a physical-occupation case; because the plaintiff had not satisfied the state-exhaustion prong, the court ruled that the claim was properly dismissed as not ripe).

10. City of Olympia v. Drebick, 83 P.3d 443 (Wash. Ct App., January 22, 2004) (the Washington Court of Appeals ruled that, under Washington statutory law, a municipality could not impose a traffic impact fee based on city-wide average figures, but instead had to base the assessment on a property-specific calculation; the court reasoned that this interpretation of the statute was consistent with and mandated by the U.S. Supreme Court's Dolan decision).

11. Milton v. Williamsburg Tp. Bd. of Zoning Appeals, 2004 WL 549583 (Ohio App., March 22, 2004) (the Ohio Court of Appeals affirmed a trial court judgment rejecting a takings challenge to zoning amendments that changed the minimum lot-size requirement for residential development from approximately one-half acre to 1.5 acres; the court ruled that because plaintiffs could combine three non-conforming lots, they were not denied economically beneficial use of the property; the court also rejected the argument that the zoning change failed to substantially advance a legitimate government interest, observing that reduced density of development can serve a variety of proper public purposes).

12. Johnson v. City of Shorewood, 360 F.3d 810 (8th Cir. March 5, 2004) (in a broad-ranging case in which the plaintiff landowner challenged a series of federal, local and private actions that allegedly adversely affected the plaintiff's 20-acre property, the Eighth Circuit affirmed dismissal of the takings claims, ruling, among other things, that (1) the taking claim against the United States rested within the exclusive jurisdiction of the U.S. Court of Federal Claims, and (2) the claims against the local communities were barred either by the Rooker-Feldman doctrine (because they had previously been litigated in state court) or because they should have been initially raised in state court and had not been and therefore were not ripe under Williamson County).