

Takings Snapshots, Volume 77, July 19, 2005

Consumer's Union of the U.S., Inc. v. State of New York, 2005 WL 1432208 (NY, June 20, 2005) (in a very complicated and difficult case, brought by health care subscribers and others, the NY Court of Appeals, by vote of 4 to 2, concluded that NY legislation authorizing Empire Blue Cross and Blue Shield to convert to a for-profit entity, on the condition that its non-profit assets be dedicated to various public health and charitable purposes, did not effect a taking of the non-profit assets; the majority concluded that Nolan and Dolan are limited to the land use context and therefore did not apply to this case, and that in any event the legislation satisfied the essential nexus and rough proportionality tests; the dissenters argued that Nolan and Dolan did apply to this case and that the record developed to date did not permit resolution of the plaintiffs' takings claims in favor of the government).

Bronco Wine Company v. Jolly, 29 Cal.Rptr.3d. 462 (Cal.App., May 26, 2005, as modified June 20, 2005) (in a very interesting and valuable decision, the California Court of Appeals rejected a takings claim based on a California consumer protection law restricting wine growers' ability to place misleading information on bottle labels about the geographic origins of different wines; the court rejected the claim that the state law effected a taking of plaintiffs' "certificates of label approval" (COLAs) issued by the U.S. Bureau of Alcohol, Tobacco and Firearms; plaintiffs claimed that the state law destroyed the value of the COLAs, but the court rejected the claim on the ground that the COLAs represented mere permits, not property interests; the court identified several factors to determine whether a permit rises to the level of a property interest, including whether the permit is transferable, the extent to which the government has the right to regulate the underlying activity, or to revoke, suspend, or modify the permit, and whether there has been a legislative or regulatory expression that issuance of the permit does or does not create a property right; the court ruled that, while COLAs grant exclusive rights and are transferable, the applicable federal regulations made clear that they are not property interests; finally, the court rejected the claim that the California statute deprived plaintiffs of the value of their "brand equity," reasoning that the brands continued to have significant value despite the state law).

Arnell v. Salt Lake County Board of Adjustment, 112 P3rd 1214 (Utah Ct.App, April 7, 2005) (in another interesting case, the Utah Court of Appeals reversed a trial court's grant of summary judgment on a takings claim challenging a steep-slope ordinance; the plaintiff claimed that the ordinance, which was in effect at the time plaintiff purchased the property (but about which he was allegedly unaware), barred development of a residential lot; the court of appeals ruled that the record was too undeveloped on the issues of economic impact and investment expectations to support summary judgment for the county and accordingly vacated the trial court ruling and remanded the case for trial).

Palazzolo v. Rhode Island, 2005 WL 1645974 (RI Super., July 5, 2005) (the Rhode Island Superior Court, on remand following the U.S. Supreme Court's 2001 decision in this case, rejected Palazzolo's regulatory takings claim based on the State's denial of his application to fill and develop approximately 18 acres of coastal salt marsh; reaffirming a

conclusion it reached in its original 1997 decision, the court ruled that the takings claim was barred under background principles of state nuisance law because the proposed development would result in increased nitrogen levels in coastal waters and substantially harm wildlife habitat; the court also concluded that the takings claim was barred as to the one-half of the property below the mean-high water mark based on the Rhode Island public trust doctrine; finally, the court ruled, in the alternative, that Palazzolo failed to establish a taking under Penn Central, emphasizing that the costs of developing the site were so high that Palazzolo would derive greater economic benefit from leaving the marsh in a natural condition and developing the single upland site on the property, and that, for multiple reasons, including the fact that he acquired the property only after coastal regulations were in place, Palazzolo only possessed “modest” expectations of developing the property).

Preseault v. City of Burlington, 2005 WL 1400137 (2nd Cir., June 15, 2005) (apparently exemplifying the principle that one good takings suit begets another, the Preseaults, the plaintiffs in the celebrated takings case challenging the federal Rails-to-Trails program, commenced a second takings case against the City of Burlington and the State of Vermont based on the city’s construction of a fiber-optic line in a utility right of way across their property; after the district court granted the defendants’ motion for summary judgment, the Second Circuit, on appeal, decided to certify the case to the Vermont Supreme Court for resolution of the state law question whether the utility right of way (which under state law survived abandonment of the prior railroad right of way) encompassed only existing utility lines or whether it could include new types of lines under the increase-in-burden analysis appropriate for a so-called “common law” easement).

Seven Up Pete Venture v. The State of Montana, 2005 WL 1343587 (Mont., June 8, 2005) (affirming a district court ruling, the Montana Supreme Court rejected a takings claim by mining companies based on a voter-approved initiative barring the use of cyanide leaching from gold and silver mining; the court ruled that since the plaintiffs possessed only leases on state lands and the leases did not entitle plaintiffs to conduct actual mining operations, the plaintiffs lacked a right to mine sufficient to support their taking claims; the court also rejected the plaintiffs claim under the Montana contract clause, reasoning (somewhat incoherently) that the initiative substantially impaired the plaintiffs’ contracts (even though the contracts were subject to “all applicable laws”) but that the regulation was reasonably related to the government’s legitimate interest in protecting the environment; Judge Nelson, in a thoughtful concurring opinion, agreed with the majority’s disposition of the takings claim, but took the position that the contract claims were more properly dismissed on the ground that the initiative did not impair any rights held by the plaintiffs under their lease contracts with the state).

Spoklie v. State of Montana, 2005 WL 1384338 (9th Cir. June 13, 2005) (the Ninth Circuit rejected takings (and other) challenges to a Montana ballot initiative restricting the operation of “alternative livestock ranches” on the ground that plaintiffs’ takings claims based on adverse economic impact were not ripe in federal court under *Williamson County*, and, to the extent the claims were based on the substantially advance

theory, the claims were precluded by the Supreme Court's decision in *Lingle*; since the court concluded that the federal takings claims were either not ripe or invalid, the court declined to address the question of whether the Eleventh Amendment bars a takings claim in federal court against a State).

Cashman v. City of Cotati, 2005 W.L. 1653734 (9th Cir. July 15, 2005) (in another example of the continuing fallout from the Supreme Court's *Lingle* decision, the Ninth Circuit, after initially reversing a district court dismissal of a takings claim challenging a rent control ordinance under the substantially advance theory, granted the city defendant's motion for rehearing, withdrew its prior panel decision and affirmed the district court judgment on the ground that a substantially advance claim is "foreclosed" by *Lingle*).

Consolidated Waste Systems LLC v. Metro Government of Nashville and Davidson County, 2005 WL 1541860 (Tenn.Ct.App., June 30, 2005) (the Tennessee Court of Appeals, affirming a decision of the trial court: (1) ruled that the company which acquired an option to purchase land for use as a landfill had no standing to challenge a new zoning regulation barring the landfill because it had no "vested right" to construct the landfill prior to the zoning change; (2) ruled, on the other hand, that plaintiff had a sufficient property interest to support a substantive due process claim, in part because a property interest is defined more broadly for due process purposes than for takings purposes; (3) rejected, in light of *Lingle*, the city defendant's argument (based on the Ninth Circuit *Armendariz* decision) that the takings clause supplants any potential substantive due process claim; (4) ruled that the Williamson County finality ripeness requirement does not apply to a facial substantive due process claim; and (5) upheld the trial court's ruling, based on an extensive evidentiary record, that the county's requirement of a two mile buffer around a landfill for construction and demolition materials (but not other kinds of landfills) lacked any logical justification and, therefore, violated the substantive due process and equal protection clauses).

Wisconsin Builder's Association v. Wisconsin of Transportation, 2005 WL 1404983 (Wisc.App., June 16, 2005) (reversing a trial court decision, the Wisconsin Court of Appeals rejected a takings claim based on a state highway department rule establishing development setbacks along public highways; the Court ruled that the plaintiffs' substantially advance takings claim had to be rejected in light of the Supreme Court decision in *Lingle*; the Court also rejected the plaintiffs' claim under *Nolan*, ruling that this type of takings claim, as clarified by *Lingle*, is limited to exactions involving physical occupations of private property).

Sacramento Grazing Association Inc. v. United States, 2005 WL 1560473 (Fed.Cl., June 30, 2005) (in an interlocutory decision, in a case involving a takings claim based on Forest Service restrictions on a public lands grazing operation, the court of claims: (1) ruled that plaintiffs pled sufficient facts to survive a motion to dismiss the claim of a taking of their "ranch" (while indicating that plaintiffs would face a "very heavy burden" of proof); (2) dismissed plaintiffs' claim of a taking of their grazing permit and/or "preference right," because neither rises to the level of a property right for the purpose of

the Takings Clause; (3) directed plaintiffs to file an amended complaint specifying in greater detail the water rights they alleged were taken by the government; and (4) dismissed plaintiffs' claim for statutory compensation under 43 USC 1752 on the ground that plaintiffs' grazing permit had not been "cancelled").

Walker v. United States, 2005 WL 1308645 (Fed.Cl., May 31, 2005) (on a motion to dismiss a takings suit brought by a public land rancher whose grazing permit was cancelled for failing to comply with instructions to reduce the number of cattle on the public range, the court of federal claims ruled that: (1) plaintiffs' claim for statutory compensation under 42 USC 1752 was barred by the applicable 6-year statute of limitations; (2) plaintiffs were barred from asserting a claim based on the alleged taking of their grazing allotment, given that the federal district court had previously resolved that they lacked a valid property interest in the allotments, barring their claims of a taking of surface rights on the allotment, including water, forage and access rights; (3) plaintiffs' claim of a taking of their "ranch" survived a motion to dismiss, and (4) plaintiffs could not assert a claim of a taking of their grazing permit because they had no property right in the permit).

Novara v. Kanter Fitzgerald LP, 795 NYS2d 133 (N.Y.AppDiv., May 05, 2005) (in a takings lawsuit arising from the World Trade Center disaster, the New York Appellate Division rejected a takings claim, brought by the mother of decedent's 22 month old daughter, based on a New York statute adopted post-9/11 that awarded a portion of workmen's compensation benefits to domestic partners, which in this case had the effect of reducing payments to the mother for the benefit of decedent's daughter and shifting the benefits to his domestic partner at the time of the disaster; the court ruled that a claimant under the workmen's compensation program cannot claim a vested right protected by the Takings Clause to continue receiving benefits at any particular level).

Doe v. United States, 2005 WL 1540935 (Fed.Cl. June 30, 2005) (the court of claims dismissed a suit by a former Air Force officer alleging that he suffered a taking when the Air Force decided to force him into retirement based on a medical disability; the court ruled that the claim failed at the threshold because, under the applicable regulations, a military officer cannot claim a vested entitlement to continue in military service).

Canal Electric Co. v. United States, 2005 W.L. 1389124 (Fed.Cl., June 9, 2005) (the Court of Federal Claims dismissed a takings claim by an owner of the Seabrook nuclear plant based on the federal government's failure to collect and dispose of spent nuclear fuel as provided for in the Nuclear Waste Policy Act of 1982; the court ruled that plaintiff's claims were based entirely on an alleged breach of a contract with the Department of Energy and, therefore, the plaintiff had to pursue its claim as a breach of contract suit rather than a takings suit).

Kemp v. United States, 2005 W.L. 1415444 (Fed Cl., June 15, 2005) (the Court of Claims dismissed as time-barred under the applicable 6-year statute of limitations plaintiff's claim that her real property was physically taken when Congress passed legislation expanding the boundaries of the Rocky Mountain National Park to add an area

including plaintiff's property).

Fox v. Wardy, 2005 WL 1421514 (W.Dist.Tx., June 16, 2005) (on a motion to dismiss various constitutional challenges to a city's condemnation proceedings involving plaintiff's apartment rental property, the court dismissed the takings claim on the ground that the court lacked subject matter jurisdiction over the claim under Williamson County for failure to pursue state remedies; at the same time, the court declined to dismiss procedural due process, substantive due process, and equal protection claims, basically because the city had not addressed the claims in its motion to dismiss).