Takings Snapshots, Volume 78, August 8, 2005

1. K&K Construction, Inc. v. Department of Environmental Quality, 2005 WL 1753805, (Mich.Ct.Apps., July 26, 2005) (in a wonderful decision in a 17 year old takings case based on the Michigan Department of Environmental Quality's denial of a permit to fill wetlands for development, the Michigan Court of Appeals reversed a trial court takings award (including fees, costs, and accumulated interest) of $16.5 million and remanded the case with instructions that judgment be entered for the state; this case already has resulted in a celebrated 1998 Michigan Supreme Court decision overruling an initial takings award by the Michigan Court of Claims based on the court's failure to follow the "parcel as a whole" rule; the present decision reverses a decision by the claims court reinstating its initial judgment for plaintiffs; the case involves several contiguous properties totaling approximately 83 acres, of which about one-third are wetlands; the Court of Appeals ruled that the claims court committed several errors, in defiance of the Supreme Court mandate, including (1) failure to factor in developed and developable parts of the property in its analysis; (2) failure to apply the parcel as a whole rule by not aggregating the various different properties into a single parcel for the purpose of determining the value of the denominator; and (3) failure to properly apply the 3-factor Penn Central test; based on its own analysis, the appeals court concluded that all three Penn Central factors weighed against the takings claim; the most interesting part of the opinion is the Court's discussion of the "character" factor, which the court defines in terms of whether the regulation "singles out" a landowner to bear a burden or involves a "comprehensive, broadly-based scheme;" expressly equating state (as well as federal) wetlands regulation with zoning, the court ruled that the Michigan wetlands law creates a significant "reciprocity of advantage" because it provides various public benefits, and stated, "All property owners in this state share these benefits relatively equally, and all property owners, and, importantly, all prospective owners, are relatively equally subject to the burdens placed on much of the property in this state by the wetlands regulation;" indeed, the court observed that "compensating" plaintiffs for the lost development opportunity imposed by the regulation would confer a windfall on them: "were we to uphold the trial court's award, we would, in effect, single out plaintiffs to their benefit [in original], because compensating plaintiffs for the loss of value of their property, especially when it has a significant amount of value and development potential remaining, would be tantamount to making the plaintiffs exempt from the regulation of wetlands, to the detriment of others who bear the burdens of wetland regulations throughout the state') (Interestingly, the opinion's author, Judge Henry Saad, is currently a nominee for U.S. Court of Appeals for the Sixth Circuit) (GELPI filed an amicus brief in the case for a broad coalition of Michigan conservation groups, which is available on the GELPI website.)

2. Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754, 2005 WL 1713944 (July 26, 2005) (in another very important wetlands takings case, involving facts somewhat similar to those in the Lucas case, the Massachusetts Supreme Judicial Court (Marshall, C.J.) affirmed rejection of a federal takings claim based on the establishment of a coastal conservancy district by the Town of Chatham on Cape Cod that had the effect of barring residential development of a 1.8 acre coastal property within a flood hazard area; the court ruled that to the extent plaintiff claimed that the regulation constituted a

taking because it allegedly failed to substantially advance a legitimate state interest, the court's opinion in Lopes v. Peabody, 417 Mass. 299 (1994), recognizing the validity of that test, had been "overruled" by Lingle, and the claim therefore had to be rejected; the court also rejected a Lucas claim because the property retained a value of at least $23,000 for private open space; finally, the court rejected the Penn Central claim, despite an alleged 88% reduction in value, reasoning that the economic impact was not "outside the range of normal fluctuation in the value of coastal property," the fact that the claimant inherited the property rather than purchased it undermined the claim of an interference with investment-backed expectations; and the character of the regulation weighed against the claim because the law was designed to "prevent harmful private land use;" the court considered the questions of whether the claim might also fail under background principles of Massachusetts law (cf. the recent Palazzolo trial court decision, from the neighboring State of Rhode Island, relying heavily on the background principles concept), or whether the relevant parcel should be defined more broadly than 1.8 acre acres).

3. Glass v. Goeckel, 2005 WL 1793731 (Mich., July 29, 2005) (in another important Michigan case, the Michigan Supreme Court, by a vote of 5 to 2, ruled that the Michigan public trust doctrine extends along the Great Lakes to the ordinary high water mark (defined as the point on the bank or shore where the water leaves a distinct mark), meaning that members of the public have the right to walk in the public trust area between the high water mark and the water's actual edge; the dissenters would have limited the public trust doctrine to wet areas starting at the water's edge; though not a takings case, the majority affirmed, without dispute from the dissent, that the exercise of rights covered by the public trust doctrine (whatever its scope) cannot effect a taking: "[T]he state has an obligation to protect the public trust. The state cannot take what it already owns.")

4. Lion Raisins, Inc. v. United States 2005 WL 1705511 (Fed.Cir., July 22, 2005) (in two consolidated takings cases, one brought by a raisin producer, and another brought by a raisin processor, challenging the implementation of marketing orders issued under the Agricultural Marketing Agreement Act of 1937, the Federal Circuit reversed the court of claims's dismissal of the cases based on the so called "non-appropriated fund instrumentality doctrine;" the court ruled that this doctrine, which holds that certain types of government-related entities cannot generate liability on the part of the United States, does not apply in takings cases such as these in which the entity is acting as an "agent" of the United States; the court nonetheless affirmed dismissal of the takings claims, ruling that (1) the claim by the producer was based on the alleged illegality of the marketing order and such an allegation cannot provide the basis for a proper takings claim, and (2) the claim of the producer had to be dismissed because Congress has established a special administrative and judicial review process for dealing with invalid orders under the agricultural marketing legislation).

5. Reed Island-MLC, Inc. v. United States, 2005 WL 1712462 (Ct.Fed.Cls., July 22, 2005) (in a takings case based on the U.S. military's temporary restriction on use and occupancy of private property within a certain distance of military operations, the Court

of Federal Claims ruled that the claim accrued not at the beginning, but at the end, of the period of the alleged temporary taking and, therefore, denied the government's motion to dismiss based on the statute of limitations).

6. Illig v. United States, 2005 WL 1793412 (Ct.Fed.Cls., July 27, 2005) (the Court of Federal Claims decision in this rails-to-trails takings case indicates the significance of the Federal Circuit's 2004 Caldwell decision, which established a new, blanket rule that a taking claim under the Trails Act accrues upon issuance of a Notice of Interim Trail Use by the Interstate Commerce Commission (now the Surface Transportation Board), rather than later, upon the railroad's entry into an Interim Trail Agreement; in this case, the claims court, reversing its prior ruling on the statue of limitations issue, based on the Caldwell decision, ordered dismissal of this seven-year old proceeding in which liability had already been determined and the plaintiffs were on the verge of recovery).

7. City of Marion v. Howard, 2005 WL 1836903 (Ind. App., August 4, 2005) (on appeal from a $170,200 takings award based on a municipality's refusal to grant land owners zoning approval for an automobile storage facility, the Indiana Court of Appeals reversed, ruling, sua sponte, that the trial court lacked jurisdiction over the case given that plaintiffs failed to satisfy the final order requirement of Williamson County since they had not sought a special exception from, or an amendment to, the zoning regulation; interestingly, the court read the Supreme Court's recent San Remo Hotel decision as resolving that a state court can simultaneously hear a state inverse condemnation claim and a parallel federal takings claim; the court also read San Remo Hotel as having no effect on Williamson County's finality requirement, though it recognized that the Supreme Court decision raises a question about the validity of the state-compensation prong of Williamson County).

8. Wilmington Hospitality, LLC v. New Castle County, 2005 WL 1654024 (Del.Super.Ct., May 24, 2005) (on an application to amend complaint to assert a revised taking claim, a Delaware court rejected the application to assert a Penn Central claim; the case arose from a developer's construction of a large hotel in gross violation of permits and applicable law, the county's refusal to grant post-hoc variances and a certificate of occupancy, and the eventual foreclosure on the property; the court ruled that plaintiff failed to present any facts that would support a prima facie case that the county's refusal to waive its regulations interfered with legitimate investment-backed expectations or that the character of the regulation supported a taking claim).

9. Stardust Mobile Estates LLC v. City of San Buenaventura, 2005 WL 1793207 (Ninth Cir. July 29, 2005) (unpublished) (the Ninth Circuit, in a brief memorandum order, affirmed dismissal of a substantially advance takings challenge to a rent-control ordinance on the ground that the Supreme Court's Lingle decision precludes this type of claim; to the extent plaintiff claimed a taking without just compensation, the court dismissed the claim as unripe under Williamson County, because plaintiff had not pursued available state compensation remedies; the court also dismissed plaintiff's section 1983 procedural due process claim for failure to pursue available state remedies).

10. John R. Sand & Gravel Co. v. United States, 2005 WL 1706135 (Fed Cir., July 22, 2005) (unpublished decision) (the Federal Circuit affirmed, as a reasonable exercise of trial court discretion, the Court of Federal Claims's rejection of a motion to intervene; the trial court dismissed the motion on the ground that it was untimely filed, given that the putative intervener sought intervention 16 months after receiving notice of the suit, after threshold motions had been resolved, after some discovery had been taken, and when only five months remained before trial)

11. Los Altos El Granada Investors v. City of Capitola, 2005 WL 1774247 (N.D. Cal, July 26, 2005) (unpublished) (in a complex constitutional challenge to a municipal rent control ordinance, the federal district court ruled that plaintiff's "substantially advance" claim was precluded by the Supreme Court's Lingle decision; that plaintiff's other takings claims were not barred by the applicable statute of limitations; that plaintiff's takings claims were ripe for adjudication because plaintiff had obtained an adverse decision from the state trial court under state law and, the court ruled, plaintiff was not obligated under Williamson County to exhaust state appellate opportunities before proceeding in federal court; applying the Supreme Court's 2005 Exxon decision, the court ruled that the Rooker-Feldman doctrine (as opposed to straightforward claim or issue preclusion) does not apply to the situation where the state court previously resolved the same claims pending in federal court; finally the court deferred resolution of the remaining takings and other constitutional claims based on Younger abstention).