Takings Snapshots, Volume 79, November 22, 2005

1. Cienega Gardens v. United States, and Chancellor Manor v. United States, 67 Fed.Cl. 434 (Ct.Fed.Cls., August 29, 2005) (in a massive opinion in these two consolidated cases, both on remand from the Federal Circuit, both involving takings claims by developers of low-income housing under a federal program that provided development subsidies in exchange for rent limitations, the Court of Federal Claims upheld the takings claims; the claims arose when, faced with imminent expiration of the housing program and an increase in rent levels, Congress passed legislation effectively blocking developers from prepaying their mortgages and exiting the program; the Court of Federal Claims concluded that all of the plaintiffs had suffered a taking under Penn Central, (1) given the relatively targeted character of the legislation, (2) the fact that the right to prepay was a major inducement to the developers in the first place and the legislation directly interfered with their expectation that they could prepay, and (3) the legislation imposed a serious economic burden on the owners if the impact was measured, not by looking at the "before and after" values of the properties, but by looking at the reductions in return on equity experienced by the plaintiffs during the period they were barred from renting their properties at market rents).

2. Texas State Bank v. United States, 423 F.3d 1370 (Fed. Cir. September 21, 2005) (the U.S. Court of Appeals for the Federal Circuit affirmed a Court of Claims decision rejecting a takings claim by the Texas State Bank seeking compensation for the interest earned on monies that the bank was compelled by federal law to keep on deposit with the Federal Reserve; the appeals court rejected the trial court's reliance on the "non-appropriated funds instrumentality" doctrine because the requirement that the funds be held by the Federal Reserve was directly mandated by the U.S Congress; however, the court ruled, by a vote of 2 to 1, that the taking claim failed on the merits because the funds were held as part of the Federal Reserve's general deposits and not as a segregated account; the court reasoned that the plaintiff bank had no property interest for Fifth Amendment takings purposes in any interest earned on the funds held by the Federal Reserve distinguishing this case from the U.S. Supreme Court case of Phillips v. Washington Legal Foundation, in which the court ruled that interest earned on IOLTA accounts was the property of lawyers' legal clients; in dissent, Judge Newman agreed that the non-appropriated funds instrumentality doctrine did not apply, but argued that the appeals court should not have reached the merits of the takings claim and in any event the majority erred in concluding that the bank could not claim a property interest in the interest earned on the monies held by the Federal Reserve).

3. Air Pegasus of DC Inc. v. United States, 424 F.3d 1206 (Fed.Cir, September 21, 2005) (the United States Court of Appeals for the Federal Circuit affirmed a court of claims decision rejecting a taking claim based on the FAA's closure of the commercial air space in the vicinity of the U.S. Capitol following 9/11, which had the effect of terminating plaintiff's business of operating a helicopter facility near the Capitol; the appeals court ruled that (1) plaintiff could not claim a taking because it was essentially seeking recovery for consequential damages, a type of claim outside of the scope of the Takings Clause, and (2) the claim failed because plaintiff did not possess a protected right of

access from the area it was leasing to the publicly owned navigable airspace; Judge Newman dissented, arguing that the government's action effected a taking).

4. Norman v. United States 2005 WL 307850 (Fed.Cir. November 18, 2005) (in a complicated case, the U.S. Court of Appeals for the Federal Circuit affirmed a court of claims decision rejecting a taking claim based on an Army Corps of Engineers wetlands permit requiring the permittee to create or restore nearly 200 acres of wetlands in mitigation for extensive wetlands destruction; in a highly fact-intensive analysis, the court rejected the applicability of Nollan-Dolan and, in the alternative, concluded that the Nollan-Dolan nexus requirement was satisfied in this case; in addition, applying the parcel as a whole rule to the entire approximately 2,000-acre property, the court rejected Lucas per se and Penn Central claims).

5. Manufactured Home Communities v. City of San Jose, 420 F.3d 1022 (9th Cir., August 23, 2005) (the U.S. Court of Appeals for the Ninth Circuit affirmed a district court order dismissing a takings challenge to a mobile home rent control ordinance, ruling that (1) the claims were barred by the U.S. Supreme Court's decision in Lingle insofar as they rested on the substantially advances takings theory; (2) the claims could have been raised in a prior state court action and therefore were barred by res judicata; and (3) the claims were not ripe because they were not based on a final administrative action; however, the court of appeals reversed the district court's reliance on the Rooker-Feldman doctrine, on the ground that the doctrine only applies when the second federal court suit represents an effort to appeal from a prior state court judgment).

6. Wild Rice River Estates Inc. v. City of Fargo, 2005 WL 3029438 (N.D. November 14, 2005) (the North Dakota Supreme Court affirmed rejection of a taking claim by a residential developer based on a 21-month moratorium on building in a floodway pending preparation by FEMA of a new floodplain map; the court rejected the per se taking claim based on Tahoe-Sierra; the court also rejected the plaintiff's Penn Central claim given, among other things, that building lots on the property were selling very slowly before the moratorium was put in place, the lots sold for a much higher price after the moratorium was lifted, and the moratorium did not apply only to plaintiff's land, but also applied to other property owners along the river).

7. OFP LLC v. State of New Jersey 2005 WL 3058157 (N.J. Super. November 15, 2005) (in apparently the first constitutional challenge to the landmark New Jersey Highlands Water Protection and Planning Act, a state Superior Court rejected a facial takings claim, relying on the public purpose served by the Act as well as the numerous opportunities included in the Act for waivers and exemptions from regulation; the court also rejected due process and equal protection challenges to the Act on the ground that the law rationally advanced a legitimate public purpose; finally the court rejected the plaintiff's as applied takings challenge as premature under Williamson County).

8. Walker v. United States, 2005 WL 2853770 (Ct.Fed.Cls. October 31, 2005) (in a potentially important water rights case, the Court of Federal Claims, upon a motion for reconsideration, reversed a previous order dismissing most of plaintiff's takings claims

based on cancellation of grazing permits on public lands in New Mexico; the court ruled that plaintiff's claims of a taking of water and access rights created under New Mexico law were sufficient to survive a motion to dismiss because these claims were distinct from the issue of whether plaintiff had any property interest in the surface estate; as to the question of whether a water right under New Mexico law includes any right to use of the surface of the land for foraging purposes, the court certified the question to the New Mexico Supreme Court so that it could resolve this state law issue; finally, the court rejected the United States' motion to dismiss the entire case based on the applicable 6-year statute of limitations).

9. Cane Tennessee Inc. v. United States, No. 96-237L (Ct.Fed.Cl. October 27, 2005) (in another decision in a very complicated set of litigations arising from regulation of coal mining under the Surface Mining Control and Reclamation Act, the Court of Federal Claims rejected a claim that a designation of a large area as unsuitable for mining under SMCRA effected a taking under Penn Central; in a previous order, the court had determined that the plaintiff's investment-backed expectations were unreasonable as a matter of law, but that consideration of the "character" of the government action neither hurt nor supported the claim; following a full trial on economic impact, the court found that, despite the prohibition on mining activity, the property retained a value of approximately $4 million for commercial timber production; based on this finding and its prior determinations concerning the other Penn Central factors, the court concluded that the taking claim failed).

10. Hairston v. North Carolina Agricultural & Technical State University, 2005 WL 2136923 (MD NC August 5, 2005) (federal magistrate court issued a recommended order proposing dismissal, based on the Eleventh Amendment, of a suit by a photographer alleging that North Carolina Agricultural & Technical State University had "taken his copyright" in a photograph he took of the "Greensboro Four" by using the photograph without plaintiff's permission in various university publications; the court concluded that this takings claim in federal court was barred under the Eleventh Amendment, because the claim sought a form of legal relief, in accord with the consistent line of federal appeals court decisions upholding Eleventh Amendment/sovereign immunity defenses to takings claims; in a footnote, the magistrate court observed, "whether a copyright is even a property interest protected by the Fifth Amendment Takings Clause appears to be an open question not yet definitively answered by the Supreme Court").

11. Tuchman v. State of Connecticut, 89 Conn.App, 745 (Conn.App.Ct., June 24, 2005) (on appeal from a trial court decision rejecting various constitutional challenges to the state Department of Environmental Protection's denial of a permit to transship hazardous wastes, the Connecticut Appellate Court ruled that the trial court properly dismissed the claims (including the federal takings claim), insofar as they sought monetary relief, based on the doctrine of sovereign immunity; the court also concluded that the trial court properly denied injunctive relief based on the taking claim, primarily because the plaintiff was simply alleging business losses without pointing to any adverse impact on any tangible property interest).

12. George Washington University v. District of Columbia, 391 F Supp 2d 109 (D.D.C. September 16, 2005) (on remand from the DC Circuit, in a case challenging restrictions imposed by the District of Columbia government on the expansion of George Washington University, and in particular its construction of additional off-campus housing, the federal District Court (Oberdorfer, J.) rejected the plaintiff's per se Lucas taking claim out of hand, and rejected its claim under Penn Central as well; under Penn Central, the court ruled that (1) plaintiff failed to demonstrate any actual economic loss of property value, and simply alleged that it would "cost money" for the university to dedicate some of its property to alternative uses, (2) there was no interference with investment-backed expectation because the university was on notice that new regulations might be imposed given the District government's frequently-expressed concerns about the university's expansion plans, and (3) the character factor weighed against the claim because, in the court's view, the character factor related to whether a regulation advances a public purpose and that condition was satisfied in this case by the DC Circuit's earlier conclusion, made in the context of addressing a substantive due process challenge to the regulation, that the regulation was rationally related to a legitimate public purpose).

13. Uhlfelder v. Weinshall, 2005 WL 2036985 (N.Y. Sup. August 24, 2005) (the New York Supreme Court (the state trial court) declined to grant summary judgment to the City of New York on a taking claim challenging a new city law governing newsstands; plaintiffs claimed the law effected a taking because it required all newsstands to be operated in the future by a single franchisee and allegedly destroyed the resale value of all existing newsstands; the court ruled that the summary judgment record did not permit the court to resolve whether the economic value of the newsstands had been completely destroyed by the law).

14. Cohn v. Contra Costa Health Services Dep't, 2005 WL 2171804 (N.D. Cal. September 8, 2005) (federal District Court rejected as applied and facial takings challenges to a county ordinance prohibiting construction of septic tanks within 1000 feet of a reservoir or tributary stream, ruling that the as applied claim was unripe under both prongs of Williamson County, and that the facial "substantially advance" claim was precluded by the Supreme Court's decision in Lingle; the court also ruled that the plaintiff's substantive due process claim failed because this claim was subsumed, under governing Ninth Circuit precedent, by their takings claim, and in any event the ordinance was related to a legitimate government interest; finally, the court denied summary judgment to the county on the equal protection claim, because evidence that some owners had received permission to install septic systems within the buffer area precluded a finding as a matter of law that plaintiffs had not been denied equal protection).

15. Andrews v. Town of Amherst, 2005 WL 2651395 (Mass Land Court, October 18, 2005) (the Massachusetts Land Court held that including a single property, in response to a citizen petition, in a Flood Prone Conservancy District constituted illegal "spot zoning" inconsistent with the state's zoning enablement statute; but the court rejected the plaintiff's taking claim on the ground that the Supreme Court's Lingle decision precluded the plaintiff's substantially advance takings theory; the court also ruled that, even if the court had upheld the zoning as valid, the temporary and partial restriction imposed by the

designation did not rise to the level of a taking under Penn Central).

16. Sartori v. United States, 67 Fed.Cl. 263 (Ct.Fed.Cl. August 18, 2005) (on cross-motions for summary judgment in a wetlands takings case, the Court of Federal Claims ruled that the United States was entitled to summary judgment on the plaintiff's Lucas per se takings claim, but that a trial was required to resolve the plaintiff's Penn Central claim (including the issue of the ripeness of the claim); the case arose from a dispute between the owner and the United States over whether a several-thousand acre property in Florida included jurisdictional wetlands, a dispute that was ultimately resolved in the owner's favor through proceedings before the federal District Court and the US Court of Appeals for the Eleventh Circuit).

17. Byrd v. City of Hartsville, 620 SE2d 76 (S.S.C. September 19, 2005) (in a badly confused decision, the South Carolina Supreme Court affirmed a trial court decision rejecting a takings claim based on a one-year delay by the city in ruling on a zoning petition, where the delay was motivated by the city's desire to avoid elimination of National Historic Landmark status of the property; while the court recognized that the Supreme Court's decision in Lingle had significantly altered the law of regulatory takings, the court ruled that the legitimacy of the city's motivation nonetheless militated against the takings claim; on the other hand, in dissent, Chief Justice Toll concluded that there was a taking because the city's delay was "ultra vires and unreasonable," given that the proposed rezoning would not actually have affected the National Historic Landmark designation).

18. Naco Inc. v. Bank of America NA 331 B.R. 773 (U.S.BankruptcyCt. October 13, 2005) (federal bankruptcy court rejected takings challenge to the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, which had the effect of abrogating a suit by unsecured creditors to void a preferential transfer by the debtor to a bank; the court ruled that an interest in a cause of action does not represent a vested property right for the purpose of the Takings Clause, unless and until a judgment has been entered on the claim).

19. Herron v. Mayor and City Counsel of Annapolis, 388 F Supp2d 565 (D.MD, September 21, 2005) (federal District Court rejected developer's Nollan/Dolan challenge to school impact fees based on the argument that fees paid by residents of one city benefited a larger school district; the court ruled that the fees met (a loosely defined) nexus and proportionality standard; the court also ruled that the plaintiffs lacked standing to bring the case, and that the suit was effectively an action to enjoin a state tax that had to be brought in state court).

20. County of Alameda v. Superior Court 34 Cal Reptr.3rd 895 (Cal.Ct.App., October 18, 2005) (reversing the trial court, the California Court of Appeals held that a taking claim based on Alameda County's designation of an area for low intensity development was not ripe because the plaintiff had not submitted a specific development application and the filing of an application was not "futile" given the various uses that could be permitted under the ordinance and a safety-valve provision for when the restrictions imposed by the

ordinance would rise to the level of a taking).

21. Vaizburd v. United States, 67 Fed.Cl. 499 (Ct.Fed.Cls. August 18, 2005) (on remand from the Federal Circuit, which sustained the trial court's finding of a taking, but rejected the conclusion that plaintiffs were not entitled to any recovery, and remanded the case to determine whether plaintiffs might be entitled to recovery based on a "cost of cure" theory, the Court of Federal Claims made a modest award based on this theory; the case was based on the argument that the Army Corps of Engineers effected a physical taking of plaintiffs' waterfront property by replenishing the sand on the eroding ocean beach in Coney Island, NY, leading to accumulation of large quantities of sand on plaintiffs' nearby residential property; the court awarded $37,000 for erection of a wall, for sand removal and landscaping, and for repairs to plaintiffs' home, rejecting most of plaintiffs' claims of damage for failure of proof).

22. Chandler v. Village of Chagrin Falls, 2005 WL 1966321 (ND Ohio, August 15, 2005) (in a colorful little dispute, the federal District Court in Ohio dismissed a takings claim based on a four-month delay in plaintiff's ability to construct a garage, approval for which was held up by complicated local administrative proceedings and the filing of various objections by neighboring property owners; in rejecting the taking claim, the court emphasized that the village was seeking to address legitimate design concerns and had allowed plaintiff to stabilize the construction site while a stop-work order was in effect; while the court rejected the takings claim (and an equal protection claim) it allowed a substantive due process claim to proceed to trial).

23. Royal Manor Limited v. United States, 2005 WL 2995375 (Ct.Fed.Cl. October 31, 2005) (in another in the series of takings cases arising from Congress' effort to preserve low- income housing, the Court of Federal Claims ruled that a developer's taking claim filed in 1998 was not barred by the statute of limitations because the claim did not accrue in 1990, when Congress passed legislation prohibiting prepayment of mortgages (and escape from the obligation of providing low-income housing), but, instead, accrued in 1993, when the developer's 20-year commitment to provide low income housing under its original mortgage expired; the court rejected the government's argument that the court's earlier order in the case, holding the plaintiff had no need to pursue administrative proceedings in order to ripen its takings claim based on the 1990 legislation, implied that the claim accrued when the 1990 legislation was enacted; rather, the court reasoned, the claim accrued only when the 1990 law imposed concrete injury, which was in 1993.

24. Mobley Construction Co. v. United States, 2005 WL 2853699 (Ct.Fed.Cl. October 28, 2005) (applying the applicable 6-year statute of limitations, the Court of Federal Claims dismissed as time-barred a suit by a construction company claiming a taking as a result of the Army Corp of Engineers' issuance of a dredge permit under the Clean Water Act for sand and gravel operations in the White River in Arkansas that contained new environmentally protective conditions limiting when dredging operations could occur).