Takings Snapshots, Volume 80, March 6, 2006

1. MacPherson v. Department of Administrative Services, 2006 WL 433953 (Or. Feb. 21, 2006) (the Oregon Supreme Court, reversing a trial court ruling entered on October 24, 2005, issued a decision upholding the constitutionality of Oregon Measure 37, ruling that this landmark takings measure did NOT (1) impermissibly intrude on the legislature's plenary power (2) violate the equal privileges and immunities guarantee of the Oregon Constitution; (3) impermissibly suspend the laws in violation of the Oregon Constitution; (4) violate the separation of powers principles of the Oregon constitution or (5) violate the Due Process Clause of the 14th amend-ment; the Oregon Supreme Court also affirmed the trial court's rejection of two other constitutional challenges, including that: (1) Measure 37 impermissibly waived sovereign immunity and (2) Measure 37 violated separation of powers principles by encroaching on executive power and by improperly delegating legislative power without adequate safeguards).

2. Benson v. State, 2006 W.L. 213746 (S.D. Jan. 24, 2006) (in a lengthy and fascinating decision, a divided South Dakota Supreme Court, reversing a trial court ruling, rejected a taking claim based on a state statute decriminalizing shooting of game from a public right of way when the game is in flight above private property; the court ruled that the legislation amounted to neither a per se physical taking nor a taking under the Penn Central analysis; in response to the plaintiffs' argument that the legislation imposed an economic burden, the court, invoking the ancient doctrine of public ownership of wildlife, observed "the state has the undisputed right to regulate its wildlife as it is the property of the state until lawfully taken by a hunter").

3. Robins v. Wilkie, 433 F. 3rd 755 (10thCir. Jan. 10, 2006) (in a novel ruling, the 10th Circuit affirming a trial court decision, ruled that defendant BLM officials were not entitled to qualified immunity in Bivens suit alleging that they retaliated against plaintiffs for defending their rights under the Takings Clause; plaintiffs alleged that BLM officials harassed them in various ways (including by blocking their access to federal lands) after they declined to grant BLM an easement across their ranch property; in response to the Department of Justice's argument that the Takings Clause simply creates an entitlement to compensation, not a basis for restraining government from acting, the court observed "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause").

4. Mansoldo v. State of New Jersey, 2005 WL 2076708 (N.J. App Div. 2005) (unpublished decision) (in a potentially significant if seemingly somewhat bizarre analysis, the New Jersey Appellate Division ruled that the State of New Jersey was liable for a taking based on implementation of a flood hazard regulation that blocked an owner from filling an area and constructing two homes in the floodway of the Hackensack River; at the same time, the court ruled that plaintiffs' compensation was limited to the value of the uses not restricted by the regulation, that is, use of the property for parkland, open space, or a parking lot).

5. Torromeo v. Town of Freemont, 2006 WL 3904446 (1st Cir. Feb. 21, 2006) (in an interesting case, the First Circuit affirmed the federal district court's dismissal of a taking claim based on a local growth control ordinance on the grounds of res judicata, where the plaintiffs previously litigated the federal takings claim unsuccessfully in the NH courts (even though, under NH precedent the state court apparently should not have considered the federal takings claim alongside the plaintiffs' state takings claim); as to the plaintiffs' substantive due process and equal protection claims, the court said that it was a close question whether these claims were also barred by res judicata, but the court proceeded to address the claims on the merits and affirmed dismissal of both claims, stating that substantive due process was reserved for "truly horrendous situations" and that the equal protection clause was likewise reserved for "extreme circumstances").

6. Hensley v. City of Columbus, 2006 WL 44222 (6th Cir. Jan. 10, 2006 (the Sixth Circuit, following certification of a state law question regarding ownership of groundwater to the Ohio Supreme Court (which resolved that property owners have a property interest in the groundwater underlying their land), remanded the case to the district court to allow the plaintiff land owner to pursue a taking claim on the theory that the government's excavation of a trench adjacent to plaintiff's property in order to install a sewer pipe caused the well on plaintiff's property to run dry).

7. CIS Communications, L.L.C. v. County of Jefferson, 177 S.W.3d 848 (Mo. App. Nov. 15, 2005) (in a twist on Williamson County, the Missouri Court of Appeals, reversing a trial court decision, ruled that prosecution by a "site developer for telecommunications carriers" of a claim in federal court under the Federal Telecommunications Act did not, under the doctrine of res judicata, bar plaintiff from subsequently bringing an inverse condemnation action against the county in state court; the Court of Appeals rejected the county's argument that the developer could have pursued a state inverse condemnation claim in federal court under the federal court's supplemental jurisdiction; in addition, the court ruled that Williamson County requires not only that a plaintiff pursue state compensation procedures before pursuing a federal takings claim but that the state claim be pursued in a state forum; accordingly, since the federal court could not have heard the taking claim in the first instance, the federal court action did not bar plaintiff's subsequent effort to litigate its taking claim in state court).

8. City of Olympia v. Drebick 126 P.3rd 802 (Wash 2006) (in a case turning on an issue of statutory interpretation, the Washington Supreme Court, by a vote of 6-3, ruled that the provisions of the Washington Growth Management Act relating to impact fees do not require local governments to calculate impact fees based on an individual assessment of a new development's impact on the community; therefore, the court ruled the city had properly imposed a $132,000 fee on a developer based on the city's legislatively adopted fee schedule; the majority observed that the Nolan/Dolan constitutional tests for exactions have not been extended to fees imposed by general legislation).

9. B.A.M. Development LLC v. Salt Lake County, 2006 W.L. 44087 (Utah Jan. 10, 2006) (in a case involving a challenge to development exactions, the Utah Supreme Court resolved the debate over whether the Nolan/Dolan tests apply only to adjudicative

decisions or apply as well to legislative mandates by adopting the broader view of the scope of Nolan/Dolan; the court arrived at this constitutional interpretation based largely on a judicial policy of deference to the legislature, relying on the fact that in 2005 the legislature had enacted a bill prospectively extending the Nolan/Dolan tests to exactions of all kinds).

10. Hammer v. City of Eugene, 121 P.3rd 693 (Or. App. Oct. 12, 2005) (the Oregon Court of Appeals, apparently in a case of first impression, ruled that Dolan does not affirmatively require government to conduct a rough proportionality analysis prior to imposing an exaction; therefore, the court ruled, when a plaintiff first raises the Dolan issue in a takings suit challenging an exaction, the government is permitted at that time to develop and submit evidence to demonstrate that the exaction satisfies the rough proportionality test).

11. Krier v. Dell Rapids Township, 2006 WL 200347 (S.D. 2006) (the South Dakota Supreme Court, affirming a trial court decision, ruling that a township's decision not to repave the road in front of plaintiff's home, but instead to resurface it with gravel, which allegedly led to an accumulation of dust and dirt on plaintiff's property, did not support an inverse condemnation claim under the South Dakota Takings Clause; the Court observed that it had interpreted the state Takings Clause as going beyond the federal Takings Clause in two ways, by adopting a narrower definition of "public use," and by permitting recovery for consequential "damage" to private property; the court ruled that the plaintiff was not entitled to recovery in this case under the "damaging" theory because he failed to show any special or unique injury to him as a result of the government action).

12. Omaha Public Power District v. United States, 69 Fed.Cl 237 (Nov. 30, 2005) (in this latest entry in the burgeoning litigation arising form the nation's stockpile of spent nuclear fuel, the Court of Federal Claims rejected a motion to dismiss a taking claim based on the theory that the government's failure to take responsibility for spent fuel, as envisioned by the 1982 Nuclear Waste Policy Act, effected a taking by forcing the utility to devote its own real property to storing the spent nuclear fuel).

13. Mutschler v. City of Phoenix, 2006 WL 336232 (Az. App. Feb. 14, 2006) (in a particularly thoughtful opinion, the Arizona Court of Appeals affirmed a trial court ruling that a city ordinance barring "swingers clubs" did not effect a taking, because (1) all takings claims, including claims of partial takings, are subject to the background principles defense, and (2) plaintiffs could claim no entitlement to operate a swingers club because this type of activity has long been proscribed under nuisance law).

14. Harms v. City of Sibley, 702 NW2nd 91 (Iowa Aug. 12, 2005) (in a significant decision by the Iowa Supreme Court, distinguishing and explaining its landmark 1998 Bormann decision, the court ruled as a matter of law that a city could not be held liable in inverse condemnation based on the negative economic impact on plaintiff's property due to a zoning change permitting the construction of a ready-mix plant on adjacent property;

at the same time, the court ruled that the owner of the property leased to the ready-mix operator was properly held liable for creating a nuisance).

15. Murray v. State of Oregon, 2005 WL 3484648 (Or. App, Dec. 21, 2005) (the Oregon Court of Appeals, in a very careful and scholarly opinion, reversed a taking award to a land owner within the Columbia River Gorge who was permanently enjoined from disturbing archeological resources on a 20-acre parcel; the court ruled that (1) the claim was not ripe because the plaintiff had not pursued available administrative options for proceeding with his development application; (2) pursuing the administrative options was not futile; and (3) the court injunction itself did not effect a taking because the purpose of the injunction was simply to enjoin illegal destruction of archeological resources and the land owner remained free to pursue development options for the property through the proper channels).

16. City of Des Moines v. Gray Businesses, LLC, 24 P.3d 324 (Jan. 24, 2006) (the Washington Court of Appeals, in a 2-1 ruling, reversing a lower court finding of a taking, ruled that the city's imposition of a requirement that the operator of a nonconforming mobile home park submit a site plan to the city did not effect a taking; distinguishing the Washington Supreme Court's Manufactured Housing decision, the court ruled that the right to use property for some specific purpose is not a fundamental attribute of property ownership and, furthermore, the site plan requirement imposed in this case "had virtually no impact" on plaintiff).

17. Lynch v. Young, 2005 WL. 3115172 (N.D. Ill. Nov.17, 2005) (the federal district court, in a case involving allegations by home owners of a pattern of official harassment and intimidation, rejected the plaintiff's taking claim, stating that the claim "is not supported by any case law applying the takings clause to similar cases" and is "utterly unpersuasive").

18. Buffalo Teacher's Federation v. Tobe, 2005 WL 2000155 (W.D.N.Y., Aug. 18, 2005) (in a challenge to a decision by the City of Buffalo financial control board, the federal district court rejected a taking claim based on the abrogation of city workers' contracts promising salary increases; the court ruled that the contract abrogation did not effect a physical occupation of the employees' property rights in their contracts).

19. Pengal v. City of Mentor-On-the-Lake, 2005 WL 2372795 (Ohio. App. Sept. 23, 2005) (the Ohio Court of Appeals, applying the Ohio Supreme Court's 1982 Nagen precedent, ruled that denial of a permit for a single-family residence on a non-conforming tax lot created prior to the current zoning effected a taking; however, in a seemingly pointless gesture, the appeals court remanded the case for the limited purpose for allowing the trial court to clarify the basis for its decision in light of the U.S. Supreme Court's 2005 Lingle decision).

20. Herzberg v. County of Plumas, 34 Cal Rptr.3rd 588 (Cal. App. Oct. 3, 2005) (the California Court of Appeals affirmed a trial court decision rejecting a takings claim by land owners whose neighbor's cattle came onto their property, causing physical damage

to the property; the court ruled that the county's adoption of a "fencing out" statute requiring an owner to build a fence in order to keep his neighbor's cattle of his land did not affect a taking of the plaintiff's property under any theory).

21. White River Amusement Pub Inc. v. Town of Hartford, 2005 W.L. 3448028 (D. Vt., Dec. 15, 2005) (federal district court rejected claim that prohibition on operation of nude dancing establishment effected a taking; the court reasoned that restrictions on nude dancing affected only one stick in the bundle of plaintiff's property rights and therefore did not rise to the level of a taking).

22. Nuway Environmental Limited v. Upper Darby Township, 2006 W.L. 212289 (E.D.Pa. Jan. 23, 2006) (federal district court rejected inverse condemnation claim filed by property owner denied permission to operate a trash transfer facility; the court stated that the plaintiff had failed to demonstrate that the regulation "did not benefit the public interest and has deprived plaintiff of all uses of his property or has left him with no reasonable economically viable use of his property").

23. City of Marion v. Howard, 832 NE 2nd 528 (Ind. App. Aug. 4, 2005) (the Indiana Court of Appeals, reversing a trial court decision, held that the city did not effect a taking by designating plaintiff's planned property use as a "junkyard," a use which not conform to the current zoning,; the court ruled that the trial court lacked subject matter jurisdiction over plaintiff's state law inverse condemnation claim because the claim was not final given that plaintiff's had not sought a special exception from the zoning restrictions).

24. Banks v. United States, 69 Fed.Cl. 206 (Ct.Fed .Cl. Jan. 9, 2006) (in a takings suit seeking compensation for shoreline erosion caused by the Army Corps of Engineers' construction of jetties along the shore of Lake Michigan, the court of federal claims ruled, without resolving the underlying liability issue, that, if the U.S. were liable at all, it also would be liable for any further erosion damage caused by plaintiffs' construction of shoreline revetments in an effort to control the erosion caused by the Corps jetties).

25. Ishal v. City of Los Angeles, 2005 WL 3196412 (Cal. App. Nov. 30 2005) (in one of weirder takings cases in recent memory, the California Court of Appeals, affirming a lower court ruling, rejected a takings claim based on a city's revocation of an alarm permit based on the plaintiff's failure to pay numerous fines for false alarms; the court reasoned that, among other things, (1) the city's action merely had the effect of prohibiting the use of an alarm, not use of the real property itself; (2) permits generally do not constitute property for the purpose of the Takings Clause, and (3) use of the police power that incidentally imposes a cost on a private property owner does not amount to a taking).

26. Dunn v. County of Santa Barbara, 38 Cal.Rptr.3rd 316 (Cal. App. Jan. 25, 2006) (in a challenge to a wetland ordinance, the California Court of Appeals rejected a challenge to the validity of the ordinance but remanded the case for resolution of the taking claim; the court ruled that since the county had definitively determined that it would not permit subdivision of plaintiff's property, the taking claim was ripe for review).

27. Carpenter v. United States, 2006 WL 337522 (Ct.Fed.Cl. Feb. 10, 2006) (in a complex case arising from congressional legislation restricting prepayment rights available to investors in a Department of Agriculture low-income housing program the Court of Federal Claims ruled that the plaintiff, the successor in interest to the original investor, could not pursue a contract claim because she lacked privity with the United States, but that she could pursue the contract action as the personal representative of the estate of her grantor; the court declined to dismiss plaintiff's taking claim based on the federal legislation, without resolving whether the property allegedly taken was either the right to prepay the loans on the property or the underlying real property; the court also deferred resolving whether the plaintiff could proceed simultaneously with its contracts and takings claims).

28. City of San Antonio v. El Dorado Amusement Co., 2006 WL 334295 (Tex.App. Feb. 15, 2006) (in a first of its kind, only in Texas kind of ruling, the Texas Court of Appeals affirmed a trial court ruling that the City of San Antonio effected a taking by adopting a new zoning ordinance that prohibited sales of alcoholic beverages in a particular area; according to the findings of fact, the regulation reduced the value of plaintiff's bar (which actually had been closed prior to the zoning change because of some kind of "disturbance") from $660,000 to $418, 000, representing a less than 40% "diminution in value").

29. Goodrich v. United States 2006 WL 39052 (Fed.Cir. Jan. 9, 2006) (affirming a decision by the Court of Federal Claims, the Federal Circuit ruled that a rancher's claim that the Forest Service effected a taking of his water rights by permitting another rancher to use water on his allotment was time-barred because the claim accrued when the Forest Service issued it its Record of Decision, which occurred more than 6 years prior to the filing of the action).

30. Richfield Landfill Inc. v. State of Michigan, 2005 WL 2810711 (Mich. App. Oct. 27, 2005) (reversing a ruling by the Michigan Court of Claims, the Michigan Court of Appeals ruled that the trial court's finding that the state's denial of a permit for a sanitary landfill was arbitrary and capricious could not, in light of the U.S. Supreme Court's Lingle decision, support a finding of a taking; the court vacated the judgement and remanded the taking claim for retrial, including consideration of whether Lingle should be given retroactive effect.

31. Dorman v. Township of Clinton, 2006 WL 297655 (Mich. App. Feb. 7, 2006) (affirming a trial court decision, the Michigan Court of Appeals ruled that a township's re-zoning of property from Light Industrial to Residential Multiple, which interfered with plaintiff's planned use of the property for a public storage facility, was not a taking; the court observed that "a municipality is not required to zone property for its most profitable use," and that a "mere diminution in value does not amount to a taking").

32. Clark v. City of Anchorage, 2006 WL 288647 (W.D. Ky. Feb. 3, 2006 (federal district court ruled that issuance of a permit authorizing activity that allegedly "negatively

impacted" a neighbors property could not support a taking claim under either the U.S. or Kentucky Constitutions).

33. Laredo Road Co. v. Maverick County, 389 F.Supp.2d 729 (W.D. Tex. July 14, 2005) (federal district court rejected a taking claim based on county order imposing a licencing requirement and siting restrictions on sexually-oriented businesses; the court reasoned that the takings claim failed under Penn Central because the order did not have a significant adverse economic impact on the plaintiff and plaintiff had received advance notice of the order but continued with construction anyway).

34. Park View Homes Inc. v. City of Rockwood, 2005 WL 2468433 (E.D.Mi. Oct. 6, 2005) (on a motion for a preliminary injunction seeking to block enforcement of a 90-day moratorium on cluster development, later extended for another 90 days, the federal district court ruled that the plaintiff was not likely to prevail on a regulatory takings theory, observing that in Tahoe-Sierra the U.S. Supreme Court had upheld a "far more restrictive moratorium").

35. Skillo v. United States, 68 Fed.Cl. 734 (Nov. 30, 2005) (in a suit by a taxpayer challenging the IRS's disallowance of certain deductions and service of a notice of deficiency on the claimant, the Court of Federal Claims rejected various claims against the United States, including a takings claim; as to the takings claim the court ruled that (1) "taxes do indeed 'take' income but this is not the sense in which the constitution uses takings," (2) in any event plaintiff could not demonstrate a taking because plaintiff was alleging that the IRS had acted improperly and a taking claim presupposes valid government action).

36. Brady v. Abbot Laboratories, 2005 WL 3544683 (9th Cir. Dec. 29, 2005) (in a non-takings property case, the Ninth Circuit, reversing a federal district court ruling, held that a company was not liable to the owner of an adjacent pecan orchard for property damage caused by the company's lowering of the water table in connection with construction of a manufacturing facility; the court ruled that the Arizona reasonable use doctrine permits an owner to exploit groundwater so long as it is doing so in connection with reasonable use of the land. which was the case here).

37. Davison v. Puerto Rico Firefighters Corps, 2006 W.L. 349683 (Feb. 14, 2006) (in a multifaceted litigation arising from the application of state fire prevention regulations, a federal district court ruled that plaintiffs' inverse condemnation claim under the Fifth Amendment was not ripe because plaintiffs could and should have pursued the claim in state court in the first instance).