

## **“Takings Snapshots,” Volume 82, December 4, 2006**

1. *Wilkie v. Robbins*, (U.S. No 06-219) (the U.S. Supreme Court on December 1, 2006, granted certiorari in a case in which Tenth Circuit ruled (438 F.3d 1074).that a rancher stated a viable Bivens claim based on BLM officials’ alleged retaliation for the rancher’s assertion of a property “right to exclude;” the questions presented in the petition are stated as follows:

“This case involves a damages action brought against officials of the Bureau of Land Management in their individual capacities based on alleged actions taken within the individuals’ official regulatory responsibilities in attempting to obtain a reciprocal right-of-way across private property intermingled with public lands. The following questions are presented: 1. Whether government officials acting pursuant to their regulatory authority can be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 et seq., of the predicate act of extortion under color of official right for attempting to obtain property for the sole benefit of the government and, if so, whether that statutory prohibition was clearly established. 2. Whether respondent’s Bivens claim based on the exercise of his alleged Fifth Amendment rights is precluded by the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. 701 et seq., or other statutes for the kind of administrative actions on which his claim is based. 3. Whether the Fifth Amendment protects against retaliation for exercising a “right to exclude” the government from one’s property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established.”).

2. *Colvin Cattle Co. v. United States*, 2006 WL 3085559 (Fed. Cir., Nov.1, 2006) (the Federal Circuit ruled that eviction of a public land rancher from the public range in Nevada for non-payment of grazing fees did not effect a taking of the rancher’s appropriative water rights; the court ruled that a Nevada water right does not include a right to graze appurtenant federal lands and, in any event, a grazing permittee is barred from claiming such a right by federal law under the terms of the 1866 Mining Act) (GELPI filed an amicus brief urging rejection of the takings claim on behalf of the Natural Resources Defense Council).

3. *Zoltek Corp. v. United States*, 464 F.3d 1335 (Sept. 21, 2006) (the U.S. Court of Appeals for the Federal Circuit denied a petition for rehearing en banc, rejecting the argument that a panel of the Court erred in ruling (see 442 F.3d 1345) that 28 U.S.C. § 1498, providing a right of action against the United States for unauthorized use of a patent, represents the exclusive remedy against the United States for alleged patent infringement and that a patent holder cannot bring an independent claim for compensation under the Takings Clause for an alleged “taking” of a patent right; Judge Newman filed a vigorous dissent).

4. *Giovanella v. Conservation Commission of Ashland*, 2006 WL 3393153 (Mass. Sp. Jud. Ct., Nov. 28, 2006) (in a very comprehensive decision discussing the parcel as a whole rule, Massachusetts’ highest court adopted a formal rule that “the extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel,” a presumption that may be overcome “to either increase or decrease the size of the parcel” by the application of a wide variety of factors; applying this rule, the Court upheld a lower court ruling

that, where a landowner purchased two contiguous lots with one house on one of the lots, and was barred by local wetlands regulations from building a second house on the second lot, the relevant parcel consisted of the two lots considered together; based on this parcel definition, the Court upheld rejection of both Lucas and Penn Central claims).

5. *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir., Sept. 22, 2006) (in a potentially important case, the U.S. Court of Appeals for the Fourth Circuit, reversing a trial court decision, ruled that plaintiff stated a viable unreasonable seizure claim under the Fourth Amendment by alleging that the city published a map depicting a public trail across plaintiff's property, which allegedly resulted in frequent public use of the property; in dissent, Judge Traxler argued that treating these allegations as supporting a Fourth Amendment claim created an "end around the Takings Clause," eviscerating the Williamson County state-exhaustion requirement and contradicting the established limitations on the remedy for takings under the Takings Clause; an application for rehearing is pending in the Fourth Circuit).

6. *Osceola County v. Best Diversified, Inc.*, 936 So.2d 55 (Fl. Ct. Apps., Aug. 11, 2006) (in a dramatic reversal of its earlier opinion in this case, the Florida Court of Appeals, by a vote of 2 to 1, granted rehearing and repudiated its prior ruling that Osceola County effected a taking by preventing plaintiff from engaging in activity necessary to proceed with closure of a landfill; in its new decision, the court ruled that the claim against the state DEP was barred under background principles of nuisance law because the landfill constituted a nuisance; the court ruled that the claim against the county failed because the plaintiff never actually presented a plan to the county to close the facility; the majority also rejected the Bert Harris Act claim on the ground that plaintiff never submitted a valid appraisal of the property during the administrative proceedings and in any event the Act could not support recovery when, as in this case, the regulated activity was a nuisance; the dissenting judge stood by the court's prior ruling upholding both the constitutional taking claim and the Bert Harris Act claim).

7. *Gangemi v. City of New York*, 2006 WL 2808069 (N.Y. Sp. Ct, Sept. 9, 2006) (in a fascinating little case, arising from plaintiff's slip and fall on a city-owned sidewalk in Brooklyn, New York, the New York Supreme Court (the state's trial court) ruled that a 2003 city ordinance shifting tort liability related to sidewalk conditions from the city to owners of adjacent private properties did not effect a taking; the court rejected all per se takings theories and also held that the ordinance did not represent a taking under Penn Central, ruling that the law "merely effectuates a public adjustment of the burdens of economic life in order to promote, what the New York City Council and the City's chief executive have determined to be, public safety and the general welfare').

8. *Innovair Aviation, Ltd. v. United States*, 72 Fed.Cl. 415 (Aug. 31, 2006) (in an interesting case, the U.S. Court of Federal Claims (Smith, J.) held that the United States was liable for a per se taking after the United States brought a forfeiture action to seize plaintiff's contract rights, which were acquired in part with funds received from the sale of aircraft to Columbian drug dealers, where the plaintiffs had been determined to be "innocent" recipients of the funds and had not received return of the full value of their contract rights following the forfeiture).

9. *Acadia Technology, Inc v. United States*, 458 F.3d 1327 (Fed. Cir., Aug. 8, 2006) (the U.S. Court of Appeals for the Federal Circuit affirmed the trial court's rejection of a takings claim based on the Custom Service's seizure of imported goods that contained a counterfeit Underwriters Laboratory certification; the court ruled that (1) the alleged illegality of the seizure could not provide the basis for a taking claim, because a taking claim must presuppose the legality of the government action, and (2) the government's allegedly unreasonable delay in returning the imported goods did not support a taking claim because the only basis for a claim of unreasonableness was the alleged illegality of the seizure).

10. *Besaro Mobile Home Park v. City of Fremont*, 2006 WL 2990201 (N.D. Cal., Oct. 19, 2006) (in a further indication that the courts in the Ninth Circuit have failed to appreciate that the Supreme Court's *Lingle* decision revived the possibility of due process challenges to land use regulations, the federal district court in California dismissed a due process claim alleging that a mobile home rent control ordinance failed to advance a legitimate public purpose concluding, based on the Ninth Circuit's *Armendariz* decision, that the claim could and should have been brought under the Takings Clause).

11. *Shankel v. City of Canton*, 2006 WL 2256996 (Ohio Ct. Apps., Aug. 7, 2006) (affirming the trial court, the Ohio Court of Appeals held that application of a city's minimum lot-size requirement to bar residential development of substandard lots did not effect a taking where (1) plaintiff purchased the lots after the regulation was already in place, and (2) plaintiff could have used the lots for development by combining them with adjacent lots he already owned).

12. *Weiss & Klempp Development, LLC v. Charter Township of Mundy*, 2006 WL 2034357 (Mich.App., July 20, 2006) (Michigan Court of Appeals affirmed dismissal of claim that the allegedly arbitrary and capricious application of a zoning ordinance effected a taking, on the ground that the U.S. Supreme Court's decision in *Lingle* precludes this type of takings claim).

13. *Adams v. Village of Wesley Chapel*, 2006 WL 2689376 (W.D.N.C., Sept., 18, 2006) (federal district court ruled that application of a zoning ordinance limiting the permitted intensity of residential development did not effect a Penn Central taking, given that (1) the zoning ordinance "reduced the property value by only 33%," (2) the ordinance did not interfere with investment-backed expectations given that plaintiff purchased the property forty years earlier for a small fraction of the current market value subject to the zoning regulation, and (3) the character of the regulation supported rejection of the taking claim given that prevention of overcrowding and preservation of agricultural character are legitimate zoning objectives).

14. *OSI, Inc. v. United States*, 2006 WL 2615847 (Fed.Cl., Sept. 8, 2006) (Court of Federal Claims refused to dismiss taking claim pursuant to 28 U.S.C. § 1500, ruling that plaintiff was not barred from pursuing taking claim in the claims court based on governmental contamination of its property while it was simultaneously pursuing RCRA and CERCLA claims in federal district court, because the two suits sought different forms of relief).

15. *Fry v. United States*, 72 Fed.Cl. 500 (Aug. 11, 2006) (Court of Federal Claims dismissed a scattershot complaint challenging an IRS tax enforcement action, (1) rejecting a taking claim

alleging that the tax had been illegally imposed, on the grounds that (a) a valid takings claim must presuppose the lawfulness of the government action, and (b) the lawful exercise of the government's taxing power cannot amount to a taking, and (2) rejecting a taking claim based on the government's allegedly illegal seizure of plaintiff's property to enforce the tax claims, on the grounds that (a) what amounts to a tax refund claim will lie only if the claimant has met the statutory prerequisites for making a tax refund claim, which plaintiff had not done in this case, and (b) an allegedly illegal "exaction" is subject to challenge in the claims court only if the statute allegedly causing the exaction itself provides that the remedy for its violation entails a return of money unlawfully exacted, and plaintiff pointed to no such statute).

16. *Modern, Inc. v. State of Florida*, 2006 WL 1679347 (M.D. Fl, June 19, 2006) (federal district court denied Florida Department of Transportation's motion for summary judgment on taking claim, ruling that plaintiffs advanced a triable taking claim by asserting that the Department effected a taking by requiring mitigation that involved filling of a canal that allegedly resulted in flooding of plaintiffs' property).

17. *Modern, Inc. v. State of Florida*, 2006 WL 1877101 (M.D. Fl., July 6, 2006) (federal district court rejected St. Johns River Water Management District's motion for summary judgment, ruling that plaintiffs presented material issues about whether the District effected a taking by engaging in various actions that resulted in flooding of plaintiffs' property).

18. *Pelletier v. Bertrand*, 2006 WL 2457925 (Mass.Land Ct., Aug. 25, 2006) (in a zoning enforcement action in which a town required a landowner to remove an illegally constructed warehouse, the Massachusetts Land Court rejected the owner's Lucas claim (because the property at the time of the purchase could lawfully be used for residential purposes) and the owner's Penn Central claim (because the plaintiff lacked reasonable investment-backed expectations).

19. *Ferrari v. United States*, 2006 WL 2831141 (Ct. Fed Cls., Sept. 29, 2006) (Court of Federal Claims rejected taking claim based on inclusion of plaintiff's land within the boundary of the Petroglyph National Monument, where the government had delayed in initiating planned eminent domain proceedings, but plaintiff was subjected to no restrictions on the use of the property pending acquisition of the property by the federal government).

20. *Michels v. United States*, 72 Fed.Cl. 426 (Sept. 1, 2006) (Court of Federal Claims rejected taking claim by patent holder claiming a taking of her patent due to enforcement of statutorily mandated maintenance fee; the court ruled that the statutory requirement did not result in a taking because it merely represented a condition attached to the privilege of patent ownership; the court also rejected plaintiff's illegal exaction claim, ruling that plaintiff failed to properly plead a taking and in any event the imposition of the maintenance fee was within Congress's authority under the Intellectual Property Clause and therefore could not constitute an illegal exaction).

21. *ConocoPhillips v. United States*, 73 Fed.Cl. 46 (Sept. 12, 2006) (Court of Federal Claims rejected taking claim seeking to recover alleged difference between the fair market value, and the contract price, of fuel delivered to a federal agency; the court ruled that the government had not

committed a breach of contract and therefore could not be held to have effected a taking, observing “we aware of no authority that would identify as a Fifth Amendment taking the acquisition of property by the government pursuant to a valid contract with a willing seller”).

22. *Forsgen v. United States*, 73 Fed.Cl. 135 (Sept. 27, 2006) (the Court of Federal Claims dismissed on the basis of 28 U.S.C. § 1500 plaintiffs’ taking claim alleging that efforts by BLM officials to reconstruct several ponds on public property had resulted in flooding of their land, because the same claim was pending in the federal district court in Wyoming when the claims court action was filed; the court ruled that section 1500 applied because the claims were identical given that they arose from the same operative facts and because they both sought monetary relief; the court ruled that it was irrelevant that the district court action alleging trespass and a due process violation might have been subject to dismissal based on lack of subject matter jurisdiction).

23. *Independence Park Apartment v. United States*, 465 F.3d 1308 (Fed. Cir., Sept., 15, 2006) (the Federal Circuit rejected a petition for rehearing, reiterating that the proper way to assess compensation for a taking due to a congressional measure frustrating low-income house providers’ mortgage prepayment rights, when the providers subsequently entered into “use agreements” with the government, was to assess the value of the initial permanent taking and then to subtract the value of the use agreements).

24. *Mohlen v. United States*, 2006 WL 3231339 (Ct.Fed.Cls., Nov. 7, 2006) (Court of Federal Claims granted motion to dismiss taking claim by former owners of waterfront property claiming that the Army Corps of Engineers effected a taking by revoking, prior to the sale of the property, a “nationwide permit” under the Rivers and Harbors Act authorizing reconstruction of a coastal pier in front of the property; the court ruled that (1) plaintiffs lacked a protected property interest in the nationwide permit, which by its terms was revocable at any time; (2) in any event plaintiffs’ claim failed for lack of reasonable investment-backed expectations because they knew of the regulatory restrictions when they purchased the property; and (3) to the extent plaintiffs alleged that the Corps’ action was illegal and discriminatory, those claims fell outside the jurisdiction of the claims court under the Takings Clause).

25. *Heaphy v. Department of Environmental Quality*, 722 N.W.2d 877 (Mi., Oct. 31, 2006) (the Michigan Supreme Court denied the State’s application for leave to appeal an unpublished Michigan Court of Appeals decision (available at 2006 WL 1006442) ruling, among other things, (1) that the parcel as a whole rule did not require that three lots on which development was barred under the Michigan Sand Dune Protection and Management Act be aggregated with several other lots held by plaintiffs in the same subdivision, and (2) rejecting the State’s request, if the takings ruling stands, that it receive title to the property in exchange for payment of just compensation).

26. *PC Air Rights, LLC v. Mayor and Council of the City of Hackensack*, 2006 WL 2035669 (N.J. Super, July 20, 2006) (New Jersey Superior Court ruled that rezoning of air rights above railroad from high-rise residential development to one and two-family residential constituted illegal spot zoning, but rejected claim that rezoning effected a taking, on the ground that plaintiff

had not presented evidence regarding the reasonableness of plaintiff's investment expectations or on the effect of the rezoning on the property's value).

27. *City of Gaylord v. Maple Manor Investments, LLC*, 2006 WL 2270494 (Mich.App., August 8, 2006) (Michigan Court of Appeals affirmed trial court's rejection of takings claim based on city ordinance requiring homeowners to connect to a city water system; the court observed that the plaintiffs failed to produce evidence that ordinance would have an adverse effect on the value of their properties and the ordinance did not interfere with plaintiffs' primary intended use of the property for residential housing).

28. *Borten v. Santa Monica Rent Control Board*, 141 Cal. App.4th 1485 (August 14, 2006) (California Court of Appeals rejected takings challenge to Santa Monica rent-control ordinance based on the allegation that ordinance provided protection to non-resident tenants; the court rejected the claim on the grounds that plaintiffs' substantially-advance takings theory had been repudiated by the U.S. Supreme Court in *Lingle* and, in any event, in a previous case the court had construed the ordinance as not extending protection to non-resident tenants).

29. *Alost v. United States*, 2006 WL 3094126 (Fed.Cl., Sept. 5, 2005) (Court of Federal Claims rejected landowners' takings claim based on Army Corps of Engineers construction and operation of the Red River Waterway Navigation Project, on the ground that the evidence showed that the project did not cause more frequent flooding or groundwater seepage onto plaintiff's property, the court also ruled that the evidence did not show that any rise in groundwater levels due to the project had any adverse impact on the operation of a business on the property).

30. *Roth v. United States*, 73 Fed.Cl. 144 (Sept., 27, 2006) (Court of Federal Claims dismissed as time-barred under the applicable six-year statute of limitations claims by mineral patent owners that Congress effected a taking with the Military Lands Withdrawal Act barring private access to public lands subject to plaintiffs' mining claims).

31. *Pulte Land Co. v. Alpine Township*, 2006 WL 2613450 (Mich. App., Sept. 12, 2006) (unpublished decision) (in an interesting case, the Michigan Court of Appeals affirmed a trial court ruling that a township's enforcement of an agricultural zoning designation, specifically reaffirmed by a municipal referendum, resulted in a taking under *Penn Central* when (1) under "character," development of plaintiff's property on the urban fringe was "inevitable," (2) enforcement of the agricultural zoning effected an apparent 85% reduction in value, and (3) enforcement of the regulation frustrated investment-back expectations when, even though the regulation was in place at the time of the purchase of the property, the area had been designated for development in the township comprehensive plan).

32. *Douglas Building, Inc. v. Town of Woodstock*, 2006 WL 3114436 (Super. Ct. Conn., Oct. 12, 2006) (unpublished decision) (the Connecticut Superior Court rejected a takings claim based on a 9-month moratorium on subdivision applications, citing *Tahoe-Sierra* and observing that "there are no reported Connecticut inverse condemnation cases awarding damages for purely regulatory takings, namely restrictions on the use of land by land use regulations").