Georgetown Environmental Law & Policy Institute's
Takings-Net

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To provide timely information about regulatory takings litigation, the Georgetown Environmental Law & Policy Institute provides brief summaries of recently issued decisions and other important case developments. Past snapshots are collected on the GELPI website. As in the past, the cases are organized in rough order of their importance and interest value.

1. MHC Financing, LTD v. City of San Rafael, Preliminary Decision, No. C-00-003785 VRW (N. D. Cal., July 26, 2007) (in a far-reaching ruling, the federal District Court of the Northern District of California, following a bench trial, and after dismissing various procedural defenses (ripeness, statute of limitations), issued a preliminary ruling in favor a mobile home park owner, concluding that the City of San Rafael's mobile home rent and vacancy control ordinance resulted in a taking under Penn Central and constituted an invalid taking for a "private use" under Kelo; on the other hand, the Court ruled that the plaintiff failed to establish that the ordinance violated substantive due process; the case is particularly interesting because the plaintiff originally filed suit based on the substantially advance takings theory, which the Supreme Court subsequently repudiated in Lingle, and then the plaintiff amended its complaint to assert different taking theories and, at least at the trial level, has succeeded on several of these alternate theories).

2. Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn., July 12, 2007) (the Minnesota Supreme Court, reversing the state intermediate Court of Appeals, vacated a decision in favor of a city on a Penn Central takings claim because various disputed factual issues precluded resolution of the case on summary judgment; the case arose from the city's denial of the owner's application for a plan amendment that would have permitted the development of a 160-acre golf course for residential purposes; the court ruled that the investment-expectations factor weighed against the claimant, because the claimant purchased the property with notice of the existing restrictions, while the character factor weighed in favor of the claimant, because the city's regulatory action singled out the claimant for special treatment; the court directed the trial court on remand to resolve the remaining issue of economic impact by determining whether continued use of the property as a golf course, or holding it as a long-term investment, would provide the owner with "any reasonable use of the property").

3. OFP, L.L.C. v. State of New Jersey, 2007 WL 2274860 (N.J. App. Div., August 10, 2007) (in the first major legal challenge to the Highlands Water Protection and Planning Act, New Jersey's landmark 2004 legislation protecting an 800,000-acre area in central New Jersey, the N.J. Appellate Division affirmed a trial court ruling rejecting various constitutional challenges to the act, including a taking claim; the court ruled that the

taking claim was not ripe because the plaintiff had not availed itself of the procedures available under the act for obtaining a hardship variance in the event that strict application of the law's requirements would result in a constitutional taking).

4. Bailey v. United States, 2007 WL 2317493 (Ct. Fed. Cls., August 10, 2007) (in a quite long-winded opinion, the U.S. Court of Federal Claims denied the government's motion to dismiss, and granted in part and denied in part the government's motion for summary judgment, in a takings case based on the Army Corps of Engineers' denial of an after-the-fact wetlands permit and issuance of an order requiring the claimant to restore filled wetlands adjacent to Minnesota's Lake of the Woods; claimant had filled the wetlands without a permit and in violation of an Army Corps directive to cease unauthorized wetlands destruction; the court ruled that the taking claim based on the restoration order was ripe insofar as the claimant alleged that the order represented a determination that no access would be allowed on the property, and that the claimant was not barred from proceeding with the taking claim merely because he was challenging the validity of the restoration order (distinguishing several Federal Circuit precedents indicating that a valid government action IS a precondition for a taking claim); in the most novel and interesting part of the opinion, the court, in light of the fact that the plaintiff sold, and later received back, various lots, addressed the question of when a landowner can assert a taking occurred, basically ruling that a claimant can assert a regulatory taking (unlike a permanent physical-occupation taking) at any time that the regulation continues to be enforced; finally the court ruled that a taking claim can be premised on an alleged taking of a mortgagee's lien interest (and not merely a fee interest), and that the case could proceed in the absence of the owners of certain lots in which the plaintiff held a mortgage lien interest).

5. Vacation Village, Inc. v. Clark County, 2007 WL 2284279 (9th Cir., July 23, 2007, amended August 10, 2007) (in a case raising novel and complex procedural issues, the U.S. Court of Appeals for the Ninth Circuit ruled that since a state regulatory takings action based on airport land use regulations filed by a debtor in a chapter 11 bankruptcy proceeding was a case "related to" a case under chapter 11, the federal courts had jurisdiction over this regulatory takings case; the court also ruled that since the takings claim litigated in bankruptcy court was the state law claim, Williamson County's state litigation requirement was not a bar to the federal court hearing the case; on the merits, the court upheld the District Court's ruling that the County was liable for a taking based on a height restriction under a *per se* physical takings theory based on the governing Nevada Supreme Court precedent in McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006); on the other hand, the court rejected a Penn Central claim based on restrictions on the use of a 1.25 acre parcel, reasoning that (1) the economic impact was minimal because the 1.25 acres represented less than 5% of plaintiff's property, and some modest uses (such as a parking lot) could be made of the parcel; (2) the interference with reasonable investment-backed expectations was minimal because development of the airport predated the plaintiff's acquisition of the property, and the regulation furthered "an important public policy of airline safety," and (3) the character factor supported the county because the airport zoning "benefits the public as a whole").

6. Holliday Amusement Co. v. South Carolina, 2007 WL 1893384 (4th Cir., July 3, 2007) (affirming a district court ruling, the U.S. Court of Appeals for the Fourth Circuit rejected a takings claim based on a state law outlawing video gaming machines; the court ruled that the claim was barred in federal court by Williamson County's state litigation requirement and plaintiff could not invoke the futility exception to Williamson County based on the fact that similarly-situated plaintiffs had already prosecuted an unsuccessful takings challenge to the law in state court; alternatively, the court rejected the takings claim on the merits, reasoning that U.S. Supreme Court case law makes clear that gambling regulations "per se do not constitute takings").

7. State Route 4 Bypass Authority v. Superior Court, 2007 WL 2255226 (Cal. App., August 8, 2007) (in a relatively novel case, the California Court of Appeals rejected the trial court's approach to the valuation of property being condemned for highway purposes, and in the process provided guidance on the proper application of the Nollan/Dolan tests; under California's so-called Porterville rule, a court, in setting the amount of just compensation due for a condemnation, has to determine whether the government could have exacted part of the property being condemned without incurring takings liability under Nollan/Dolan; the trial court concluded that the exaction by the county of a portion of a highway right of way would not have satisfied Dolan because the County proposed to impose relatively greater burdens on some land owners than others who contributed equally to creating new traffic demand; the court of appeals reversed, ruling that this comparative approach to the Dolan "rough proportionality" analysis was improper, and that Dolan merely requires an individualized determination of whether an owner is being assessed for more than the "full spillover costs" of developing his property).

8. Papaiya v. City of Union City, 2007 WL 2307525 (3rd Cir., Aug., 14, 2007) (unpublished) (the U.S. Court of Appeals for the Third Circuit affirmed a District Court ruling that a city did not effect a physical-occupation taking when it ordered the closure of residential apartment buildings on the ground that they were "unsafe for human habitation" because of high carbon monoxide levels, electrical hazards and other problems; the appeals court said that the city "did not physically take the [plaintiffs'] property or physically trespass on the property in a permanent way" but rather "was merely regulating the use of the premises for the legitimate purpose of maintaining safe and healthy living conditions for its citizens;" the court apparently did not recognize the Williamson County state litigation requirement issue).

9. Butchard v. Baker Co., 2007 WL 1990181 (Or. App., July 11, 2007) (in an interesting case alleging that a county effected a taking by declaring that a road across plaintiff's land was a public road, the Oregon Court of Appeals affirmed the trial court ruling rejecting the claim; the court ruled that there was sufficient trial evidence to support the finding that the road across plaintiff's land was constructed while the land was still in public ownership, that the road therefore qualified as a public road under the federal law commonly known as "RS 2477," and accordingly the county's recognition of a public road crossing plaintiff's property did not invade any protected property right held by plaintiff).

10. North Fork Knowlls v. Town of Riverhead, 2007 NY Slip Op 31083(u) (N.Y. S. Ct., May 2, 2007) (in a regulatory takings suit against the Town of Riverhead on Long Island, the New York Supreme Court, while observing that a takings claimant has "a heavy burden," declined to dismiss, as a matter of law, a claim that the owner of a 78-acre parcel suffered a taking when the Town rezoned the property from commercial to "tourism/resort campus" (permitting country clubs, country inns, bed and breakfasts, and recreational sporting clubs,) and the owner alleged the zoning applied to this property was "the most restrictive in the town," that only one other property was subject to the same zoning classification, and that the rezoning diminished the value of the property in an amount not less than $50,000,000.00).

11. River City Capital, L.P. v. Board of County Commissioners, 491 F.3d 301 (6th Cir., June 6, 2007) (on appeal from a federal District Court ruling rejecting a taking claim based on the theory that the County was responsible for a sinkhole on plaintiff's property because the County had allegedly directed various neighboring landowners to divert storm water to a private sewer on plaintiff's property, the Sixth Circuit vacated the trial court decision on ripeness grounds based on Williamson County's state litigation requirement; the appeals court ruled that, contrary to the reasoning of the trial court, in the Sixth Circuit the Williamson County state litigation requirement applies both to physical takings and regulatory takings).

12. T-Mac, LLC v. Mayor & Common Council of Westminster, 2007 WL 2363618 (D. Md. Aug, 16, 2007) (federal District Court for the District of Maryland dismissed claim that city imposed an unconstitutional "exaction" by requiring plaintiff to contribute $42,500 toward improvement of a public roadway in order to develop its property, ruling that under Supreme Court precedent an exaction only occurs when an owner "is required to dedicate land or a real property right").

13. Litva v. Village of Richmond, 2007 WL 1976592 (Ohio App., June 29, 2007) (the Ohio Court of Appeals, with one judge dissenting, affirmed a grant of summary judgment to a village on a takings claim challenging an ordinance adopted as a result of a voter initiative banning farm animals within the village (with an exception permitting those who already possess animals to keep them); the dissent argued that the majority was improperly applying a *per se* rule that a voter initiative can never result in taking, that the majority erroneously applied a due process analysis in rejecting the takings claim, and disputed issues regarding the ordinance's alleged economic impact and its effect on the claimant's investment expectations precluded entry of summary judgment).

14. Park v. City of San Antonio, 2007 WL 2052179 (Tex. App., July 19, 2007) (the Texas Court of Appeals affirmed a trial court's rejection, following a bench trial, of a taking claim based on the theory that the city's refusal to grant a variance from its fence-height ordinance undermined the economic viability of plaintiff's golf driving range and ultimately caused the business to fail; the court evaluated the claim under Penn Central and ruled that each of the three factors weighed against the claim; specifically, the court ruled that the economic impact factor weighed against the claim because the record

showed that there were various possible alternative uses of the property and the plaintiff presented no specific evidence of economic loss; the court also ruled that the expectations factor weighed against the claim because the property was a vacant lot when plaintiff purchased it and plaintiff had affirmatively requested a rezoning of the property which included the fence-height limitations he claimed resulted in a taking; finally, the court said the character factor weighed against the claim because enforcement of the city's fence ordinance was "not so far outside the zone of reasonableness as to constitute a taking, based on this factor alone").

15. Gonzalez v. City Plan Commission, 2007 WL 1836872 (N.D. Tex., June 26, 2007) (the federal District Court in Texas granted summary judgment to a city on a takings claim brought by a property owner based on the city's sale of abandoned and surplus property to a neighboring owner and replatting of the properties with another property held by the neighbor; the court ruled that the claim was ripe in federal court because plaintiff alleged that the taking was for a "private purpose;" on the merits, the court ruled that the claim failed under Penn Central because the alleged adverse economic impact was "speculative and marginal," it was "objectively unreasonable" for the plaintiffs to expect the city not to sell or replat the properties, and the character factor supported the city because "[i]t is difficult to imagine land-use or zoning decisions with a more benign effect upon the property interests of nearby landowners").

16. City of Oakland v. Abend, 2007 WL 2023406 (N.D. Cal., July 12, 2007) (the federal District Court for the Northern District of California dismissed without prejudice a taking claim based upon a city's filing of a nuisance abatement lawsuit against the plaintiff landowner, reasoning that the court could not determine the severity of the impact on the owner until the nuisance suit was resolved).

17. Rowlett/2000 LED v. City of Rowlett, 2007 WL 2355733 (Tex. Ct. Apps., August 20, 2007) (the Texas Court of Appeals affirmed a trial court ruling rejecting a Lucas takings claim based on a city's refusal to amend a one-unit per acre zoning ordinance to permit more intensive development; the court ruled that the plaintiff failed to establish that the city's action "completely eliminated" the property's value, given that the evidence showed that the property had a value of $2,000 per acre under the current zoning; the court stated it was irrelevant for the purpose of a Lucas claim whether the owner could profitably develop the property; the court also stated that, in light of the Supreme Court's Lingle decision, plaintiff's allegation that the city's desire to maintain the current zoning in the face of increasing urbanization was unreasonable was irrelevant for the purpose of a Lucas claim).

18. Rocky Mountain Christian Church v. Board of County Commissioners of Boulder County, 481 F.Supp.2d. 1213 (D. Col., March 30, 2007) (in an action in Colorado federal District Court brought by a church, with the United States acting as plaintiff-intervenor, asserting various claims based on the county's denial of a special use application, the Court ruled that plaintiffs' Nollan/Dolan claim based on an alleged exaction of conservation easements over part of the property was barred by the applicable statute of limitations).

19. Derksen v. Fond du Lac County, 2007 WL 2325337 (E.D. Wis., Aug. 14, 2007) (the federal District Court in Wisconsin rejected a *pro se* takings claim based on the county's enforcement of requirements regarding the operation and maintenance of a septic tank, ruling that a regulatory taking only occurs when the regulation completely deprives the owner of all economic use of the property and the plaintiff offered no evidence, nor even alleged, that he was denied all economic use of the property).

20. Riehl v. City of Rossford, 2007 WL 2164158 (Ohio Ct.Apps., July 27, 2007) (the Ohio Court of Appeals affirmed a trial court ruling rejecting a takings claim on the ground that plaintiffs had "presented no specific argument or evidence" to support their claim that they suffered a taking as a result of the adoption and implementation of a municipal nuisance ordinance requiring landowners to prevent vegetation from extending into, on, or over a public right of way).

21. Kent Acres Development Co. v. City of New York, 2007 WL 1704583 (N.Y. App. Div., June 12, 2007) (the New York Appellate Division, without elaboration, affirmed the trial court's rejection of a developer's taking claim against the City of New York and the New York Department of Environmental Protection based on enforcement of regulations governing wastewater treatment plants in the watershed supplying New York City's drinking water).

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