

Georgetown Environmental Law and Policy Institute's
Takings-Net

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Takings Snapshots, Volume 87, November 7, 2007

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 (<http://www.law.georgetown.edu/gelpi>). As in the past, the cases are organized in rough order of their importance and interest value.

1. *Cienega Gardens v. United States*, 2007 WL 2778687 (Fed. Cir., September 25, 2007) (in an important decision, involving several consolidated cases, and issued by an unusual seven-judge panel, the Federal Circuit reversed a ruling that federal legislation effected a taking by restricting low-income housing developers' ability to prepay their mortgages and thereby escape legal limits on the rents they could charge; the decision largely repudiates the reasoning of a controversial 2005 Federal Circuit decision in this case in which the Court affirmed a similar takings claim; the latest (enlarged) panel decision distinguished the prior decision on the ground that it was "based on a partial record and limited arguments;" the Federal Circuit ruled that the claims court made four errors in finding a taking, including (1) failing to consider the effect of the restriction on the property as a whole, and instead erroneously measuring economic impact by comparing the rate of return the owner would receive on its investment with and without the restriction in a single year, (2) failing to consider the offsetting benefits offered by the federal legislation, including the opportunity to sell the property or receive various incentives under a so-called "use agreement;" (3) failing to consider the limited duration of the legislation; and (4) failing to consider whether the opportunity to prepay a mortgage was material to an investor's original decision to invest in a project).

2. *Crown Point Development v. City of Sun Valley*, 2007 WL 3197049 (9th Cir. November 1, 2007) (in a decision clarifying the meaning and significance of the Supreme Court's 2005 *Lingle* decision, the U.S. Court of Appeals for the Ninth Circuit, reversing a District Court decision, ruled that a developer claiming that a city arbitrarily denied subdivision approval could challenge the city's decision under the Due Process Clause; the Court recognized that *Lingle*, which repudiated the "substantially advance" takings test, effectively overruled the Ninth Circuit's 1996 en banc ruling in *Armendariz* that a challenge to the alleged arbitrariness of a land use regulation can only be brought under the Takings Clause).

3. *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 2007 WL 2894304 (Ohio, October 3, 2007) (in a major decision, the Ohio Supreme Court, with two justices dissenting, affirmed rejection of a takings claim based on denial of a conditional use permit for a sand and gravel operation, ruling that the property owner had not been denied all economically viable use of the entire parcel; the decision effectively overrules the Ohio Supreme Court's controversial 2002 decision in *State ex rel. R.T.G., Inc. v. State*, in which the Court held that a mining

company with fee title could claim that the relevant property consisted of only the owner's mineral interest, and not the entire fee interest, by demonstrating that it purchased the property for mining purposes; in this case, in contrast, the Court ruled that where a mining company has purchased fee title, the relevant parcel consists of the entire fee, not just the mineral interest, regardless of the claimant's subjective intentions; this decision brings Ohio back in line with the general approach used in the rest of the country for defining the relevant parcel in takings litigation).

4. *ConocoPhillips Co. v. Henry*, 2007 WL 290879 (N.D. Okla., October 4, 2007) (in a fascinating case involving a conflict between leading "conservative" legal causes, the federal District Court for the Northern District of Oklahoma rejected a takings claim based on an Oklahoma statute making it a criminal offense for any person to enforce a rule prohibiting guns in locked cars on their premises; in rejecting a takings claim by ConocoPhillips, which objected to employees bringing guns into the parking areas of its facilities, the Court concluded that, while the law impaired the right to exclude, it did not fall within the scope of any U.S. Supreme Court precedent supporting *per se* treatment; applying *Penn Central*, the Court concluded that, given the physical invasion, the character factor very strongly supported the taking claim, but nonetheless rejected the claim because the company failed to present any evidence of economic impact or interference with investment-backed expectations).

5. *Derksen v. Fond du Lac County*, 2007 WL 2325357 (E.D. Wis., August 14, 2007) (in an interesting *pro se* case, the federal District Court for the Eastern District of Wisconsin rejected a taking claim by a landowner who violated county regulations relating to the pumping and/or inspection of septic tanks on private property; the Court reasoned that "a regulatory taking only occurs when the regulation completely deprives an owner of all economic use of the property," and plaintiff offered "no evidence, nor does he even allege, that he was denied all economic use of this property, so his Fifth Amendment argument must...be rejected").

6. *Riehl v. City of Rossford*, 2007 WL 2164158 (Ohio Ct. App., July 27, 2007) (in a useful decision supporting the view that the legislative branch has at least some role in defining state "background principles," the Ohio Court of Appeals affirmed a trial court decision rejecting a takings claim based on enforcement of a municipal nuisance ordinance requiring property owners to prevent vegetation on their property from encroaching on public roads; the Court observed that the plaintiffs had presented "no specific evidence or arguments" to support their taking claim, and also indicated that U.S. Supreme Court precedent establishes that a taking claim necessarily fails "to the extent that background principles of nuisance and property law independently restrict the owner's intended use of their property").

7. *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 2007 WL 2694667 (9th Cir., September 17, 2007) (the U.S. Court of Appeals for the Ninth Circuit affirmed a District Court decision rejecting takings (as well as due process and equal protection) claims based on a county mobile home rent control ordinance; the Court ruled that the plaintiff's as applied takings claim was properly rejected because the plaintiff failed to satisfy the Williamson County state-litigation requirement; on the other hand, the Court ruled that the plaintiff's facial takings claim was not subject to the state-litigation requirement because the county adopted the ordinance before the California courts recognized that takings claimants are entitled to the remedy of compensation;

the Court nonetheless affirmed rejection of the facial taking claim based on the applicable statute of limitation; however, in the course of making its ruling on the statute of limitations issue the Court stated that, in light of the Supreme Court Palazzolo decision, the limitations period on a facial claim should restart with each transfer of the property; despite prevailing before the Ninth Circuit, the County, with support from amici League of California Cities and the California State Association of Counties, has sought rehearing of the panel decision, arguing that the panel erred in ruling that the limitations period on a facial takings claim recommences with each transfer of the property).

8. *City Line Joint Venture v. United States*, 2007 WL 2791704 (Fed. Cir., September 27, 2007) (the U.S. Court of Appeals for the Federal Circuit, reversing a decision by the U.S. Court of Federal Claims, ruled that a low income housing developer's claim of breach of contract was not barred by the sovereign acts doctrine because the federal legislation at issue did not serve a "public and general" purpose but instead "directly and intentionally" abrogated the plaintiff's contract rights by eliminating its right to prepay its mortgage and avoid caps on permissible rental rates; this case, unlike Cienega Gardens, discussed above, proceeded as a breach of contract case because, in contrast to the situation in Cienega Gardens, there was privity of contract between the developer and the United States).

9. *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir., August 22, 2007) (the U.S. Court of Appeals for the Seventh Circuit affirmed dismissal of a taking claim arising from municipal expansion of a sewage system based on Williamson County's state-litigation requirement; the Court rejected the contention that the Illinois compensation procedures were inadequate because certain types of Illinois municipalities allegedly lack delegated eminent domain authority, observing that the state's the inverse condemnation remedy arises from the self-executing takings provision of the Illinois Constitution; finally, the Court stated that Williamson County's ripeness requirements are prudential, but concluded that the requirements were nonetheless binding in this case).

10. *Accredited Home Lenders, Inc. v. City of Seattle*, 2007 WL 1977137 (W.D. Wash., July 2, 2007) (the federal District Court for the Western District of Washington ruled that it was barred under Williamson County from addressing a federal inverse condemnation claim based on a prohibition of development of an undersized lot when plaintiff had not pursued available state compensation remedies; the Court also concluded that remand of the claim rather than dismissal was warranted to avoid the potentially preclusive effect of state court proceedings on the federal claim under the Supreme Court's San Remo decision).

11. *Alexandre v. New York City Taxi & Limousine Commission*, 2007 WL 2826952 (S.D.N.Y., September 28, 2007) (in a takings suit by New York City Yellow Cab owners based on a city ordinance requiring the installation of GPS and other modern technology, the federal District Court for the Southern District of New York rejected plaintiffs' request for a preliminary injunction, ruling that the plaintiffs were unlikely to prevail on their takings claim given that: (1) the regulation did not leave plaintiffs' business worthless or economically idle; (2) plaintiffs had not demonstrated a deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking; and (3) the regulation did not prevent the plaintiffs from operating a profitable business).

12. *Canal Insurance Co. v. Hopkins*, 2007 WL 3087678 (Tex. Ct. App., October 24, 2007) (the Texas Court of Appeals affirmed a trial court ruling that an insurance company was liable to a towing company for the cost of towing a truck involved in an accident under a Texas statute assigning liability for towing charges to a vehicle's insurer; the Court rejected the argument that the Texas statute resulted in a taking; the Court reasoned that the statute did not result in a taking under *Penn Central* because, assuming the economic impact of the statute was "substantial", the investment expectations and character factor weighed against the claim, given that the insurance industry is subject to substantial government regulation and the regulation was more accurately characterized as readjusting the benefits and burdens of economic life than as a physical invasion).

13. *Acceptance Insurance Companies, Inc. v. United States*, 2007 WL 2828153 (Fed. Cir., October 2, 2007) (in a case illustrating jurisdictional complexities sometimes raised by takings claims, the Federal Circuit reversed a decision by the federal District Court in Nebraska declining to transfer a regulatory takings case to the Court of Federal Claims; the Court of Federal Claims had originally transferred the case to the District Court in Nebraska, on the theory that the Federal Crop Insurance Act vested exclusive jurisdiction over suits against the agency in the District Court; the Federal Circuit ruled that, while the District Courts have exclusive jurisdiction over suits against the agency, suits against the United States, seeking compensation based on agency action, fall within the jurisdiction of the claims court).

14. *Banks v. United States*, 2007 WL 2880263 (Ct. Fed. Cl., September 28, 2007) (in an exhaustive post-trial opinion in a takings case arising from coastal erosion on Lake Michigan caused by an Army Corps of Engineers navigation project, the U.S. Court of Federal Claims ruled that, in light of the Army Corps' efforts to mitigate property losses through beach replenishment, the government was responsible for 30% of each plaintiff's property loss above the mean high water line).

15. *Evans v. United States*, 2007 WL 2908212 (Fed. Cir., October 4, 2007) (the U.S. Court of Appeals for the Federal Circuit affirmed, without opinion, the U.S. Court of Federal Claims' rejection of a per se taking claim based on a raisin marketing order issued under the Agriculture Marketing Act; see *Takings Net* volume 83, February 26, 2007, for a description of the claims court decision).

16. *Island Park, LLC v. CSX Transportation, Inc.*, 2007 WL 1851784 (N.D.N.Y., June 26, 2007) (the federal District Court for the Northern District of New York dismissed a federal takings claim based on the closure of a private crossing over a railroad right of way because the plaintiff had not pursued available state compensation remedies before filing suit in federal court; the Court ruled that although the plaintiff only purported to plead a Due Process claim, it was in substance asserting a claim under the Takings Clause, and therefore the Williamson County state-litigation requirement applied).

17. *Decamp, Inc. v. New Jersey Transit*, 2007 WL 2851098 (N.J. Super., May 11, 2007) (the Superior Court, following a trial, rejected a takings claim by a New Jersey bus company alleging that it suffered economic harm as a result of NJ Transit's establishment of a competing rail

service; first, the Court ruled that the claim failed because the plaintiff lacked a protected property right in its ridership or its transportation routes; second, the Court ruled that the plaintiff failed to establish a taking because the investment-expectations factor weighed against the claim, since the claimant could not reasonably expect its ridership and revenues to continue free from all competition, and the character factor weighed against the claim, since the claimant's economic loss was simply an indirect result of NJ Transit's more economical fare structure).

18. *Ligon v. City of Detroit*, 276 Mich. App. 120 (Mich. Ct. App., June 26, 2007) (the Michigan Court of Appeals affirmed a trial court ruling that the razing of a building on plaintiff's property by city officials constituted a compensable taking, notwithstanding the fact that the city officials had acted "in error").

19. *Kelly v. Town of Chelmsford*, 2007 WL 3010153 (Mass. App. Ct., October 16, 2007) (unpublished decision) (the Massachusetts Court of Appeals affirmed rejection of a Lucas takings claim based on a city's refusal to modify one-acre zoning, which left the plaintiff's property with a minimum value of \$20,000 per acre, reasoning that a Lucas claim required a showing that "the value of the property has been completely eliminated").

20. *CBS Outdoor, Inc. v. New Jersey Transit Corp.*, 2007 WL 2509633 (D.N.J., August 30, 2007) (not for publication) (the federal District Court in New Jersey dismissed a takings claim by CBS Outdoor, Inc. against N.J. Transit alleging that the transit authority's decision to transfer the right to maintain billboards on transit property was an unconstitutional taking without compensation and/or a taking for a private use; the Court rejected the plaintiff's argument that the Williamson County state-litigation requirement did not apply because the plaintiff attempted to frame its taking claim as seeking declaratory and/or injunctive relief; viewing the taking claim as necessarily seeking compensation, the Court dismissed the claim under Williamson County because New Jersey courts have recognized claims for compensation under the Takings Clause and the plaintiff had failed to avail itself of the opportunity to sue in state court; the Court also dismissed the plaintiff's "private takings" claim because the plaintiff's allegations could not support the conclusion that the transit authority's decision was "palpably without reasonable foundation").

21. *Boice v. Village of Ottawa Hills*, 2007 WL 2458488 (Ohio Ct. App., August 31, 2007) (reversing a trial court decision, the Ohio Court of Appeals ruled that the plaintiffs stated a potentially viable taking claim by asserting that a rezoning, after they had purchased their property, rendered a building lot unusable for development; the Court ruled that the lower court had erred in rejecting the taking claim on the theory that the plaintiffs were required to show a denial of all economically viable use in order to establish a taking, and remanded the case for reconsideration of the claim under Penn Central).

22. *Carlisle v. Martz Concrete Co.*, 2007 WL 2410692 (Ohio Ct. App., August 27, 2007) (the Ohio Court of Appeals, affirming a trial court ruling, rejected a taking claim based on a city ordinance requiring that private property be maintained; the Court said that Ohio continues to follow the Agins "substantially advance" takings test repudiated by the U.S. Supreme Court in *Lingle*, but that the trial court properly ruled that the plaintiff's taking claim failed under either Agins or the Penn Central analysis).

23. *Brace v. United States*, 2007 WL 2947319 (Fed. Cir., October 10, 2007) (unpublished decision) (the U.S. Court of Appeals for the Federal Circuit affirmed, “based on the well-reasoned opinion of the trial court,” a decision of the U.S. Court of Federal Claims rejecting a takings claim based on the terms of a consent decree entered as a result of an EPA wetlands enforcement action; see *Takings Snapshot*, Volume 81, August 31, 2006, for a description of the claims court decision).

24. *Harris v. Boarg*, 2007 WL 2893419 (M.D. Ala., September 28, 2007) (the federal District Court for the Middle District of Alabama rejected a claim that the Director of the Alabama Securities Commission took plaintiff’s property by issuing a cease and desist order to address plaintiff’s alleged fraudulent activity; the Court reasoned that the plaintiff did not allege that he had lost any money as a result of the cease and desist order and, in any event, the order required that funds be returned to the investors, not transferred to the government).

25. *Aero Meridian Assocs. LP v. City of Denison*, 2007 WL 2900536 (E.D. Tex., September 28, 2007) (the federal District Court for the Eastern District of Texas rejected a taking claims based on a city’s denial of a special use permit for a club and restaurant, emphasizing that the plaintiff had held the property for some time, the denial of the permit did not foreclose all uses of the property, and the plaintiff failed to present evidence of its investment-backed expectations).

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