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

1. Mann v. Georgia Department of Corrections, 2007 WL 4142738 (Ga. November 21, 2007) (in a remarkable case, the Georgia Supreme Court, reversing a Superior Court decision, ruled that a registered sex offender was entitled to a declaration that a Georgia law resulted in a taking by prohibiting him from occupying his home located within 1000 feet of a child care facility; emphasizing that the plaintiff purchased his home before the establishment of the child-care facility, the Court reasoned that the law resulted in a taking because it imposed a significant economic burden on the plaintiff and mandated his "immediate physical removal" from his home; at the same time, the Court rejected the claim that the law effected a taking by preventing the plaintiff from physically working at a restaurant of which he was part owner).

2. Yamagiwa v. City of Half Moon Bay, 2007 WL 4276385 (N.D. Cal. November 28, 2007) (in a startling decision, the federal District Court for the Northern District of California, after a bench trial, ruled that the City of Half Moon Bay, a relatively small community north of Golden Gate Bridge, was liable for nearly $37,000,000 under the federal and state takings clauses, as well as the common law doctrines of nuisance and trespass, for constructing a storm water drainage system that, according to the trial court's findings, led to creation of flooded areas on plaintiff's property; the Court rejected the City's statute of limitations defense, reasoning that the scope of the injury caused by the drainage project did not become apparent until the City rejected a development application based on the flood conditions; the Court also rejected the argument that it lacked jurisdiction under Williamson County, reasoning that the assertion of a federal due process claim as well as a taking claim justified the initial removal of the case from state court and it would have been inequitable to accept the City's late-filed objection to jurisdiction).

3. Boise Cascade Corp. v. State of Oregon, 2007 WL 4247678 (Or. Ct. App. December 5, 2007) (in the latest decision in an extraordinarily long-running and convoluted case, the Oregon Court of Appeals, reversing a takings award based on a jury verdict, ruled that the trial court should have granted a directed verdict to the state on a claim that a Board of Forestry regulation, restricting logging to protect nesting spotted owls, constituted a per se Lucas taking; the Court ruled that the Lucas per se claim failed on the basis of the "parcel-as-a-whole" rule given that (1) the regulation only affected 56 acres out of plaintiff's total of 65 acres, (2) the regulation only applied to the trees, not the land, and (3) the restriction turned out to be temporary because the

owls left this particular nesting site after several years).

4. Scheehle v. Justices of the Supreme Court of Arizona, 2007 WL 3377965 (9th Cir. November 15, 2007) (the U.S. Court of Appeals for the 9th Circuit, affirming a District Court ruling, decided that a rule issued by the Maricopa County, Arizona, Superior Court requiring lawyers to serve as arbitrators in civil cases did not effect a constitutional taking; the rule required court-appointed lawyers to serve as arbitrators for up to two days per year at seventy-five dollars per day; the Court ruled that the per se takings analysis did not apply, and that the takings claim failed under the Penn Central analysis; in reaching these conclusions the Court emphasized that the burden imposed by the rule was "negligible" and that lawyers implicitly accept the duty to provide this kind of service when they join the bar and become officers of the court).

5. Action Apartment Association, Inc. v. Santa Monica Rent Control Board, 2007 WL 4225774 (9th Cir. December 3, 2007) (the U.S. Court of Appeals for the 9th Circuit, affirming a District Court decision, rejected takings and due process challenges to the Santa Monica, California, rent control ordinance; the Court rejected a claim based on the "public use" language of the federal Takings Clause on the ground that the ordinance was "rationally related" to a legitimate public purpose [query whether this type of claim, previously recognized by the 9th Circuit, should survive Lingle?]; the Court also rejected the due process claim, as to one plaintiff, on the ground that it was barred by the applicable statute of limitations and, as to the second plaintiff, on the ground that the claim was not ripe because the ordinance had not been applied to that individual).

6. Adams v. Village of Wesley Chapel, 2007 WL 4322321 (4th Cir. December 11, 2007) (affirming a District Court grant of summary judgment to a municipality on a regulatory takings claim, the U.S. Court of Appeals for the 4th Circuit ruled that (1) a taking claim is not rendered moot by sale of the property during the pendency of the litigation and (2) adoption of a new zoning regulation that excluded flood plain and power line rights of way from the parcel's usable acreage (barring development on about 40 acres out of a total of 184 acres) did not effect a taking; while acknowledging that the zoning restriction reduced the value of the property, the Court said that plaintiffs were not denied "the ability to obtain a reasonable return on their investment," observing that the sale of the property during the litigation for $3.7 million showed that it "could still be developed, just not quite to the extent that it could have been before the Village adopted its zoning ordinance;" with regard to the character factor, the Court said that "the regulation at issue is garden-variety zoning based on the need to control growth, preserve a small-town atmosphere, and maintain a low tax rate").

7. El Paso Production Co. v. Blanchard, 2007 WL 4260972 (Ark., December 6, 2007) (in a suit by a property owner seeking recovery for property damage caused by seismic exploration operations conducted by an oil company that owned the mineral interests on the property, the Supreme Court of Arkansas rejected the argument that the Arkansas Oil & Gas Commission effected a taking by requiring mineral-rights holders to obtain permission from the surface owner before conducting seismic operations; the Court observed that, under the rule, "only seismic activity was prohibited without the express permission of the land owner," and the oil company was "not prohibited from exploring the mineral estate in other capacities, such as drilling").

8. State ex rel. v. Granville, 2007 WL 4145595 (Ohio November 20, 2007) (in an original action filed in the Ohio Supreme Court, the Court concluded that a park district board had effected a taking by constructing a recreational trail across plaintiffs' property and, therefore, plaintiffs were entitled to a writ of mandamus to compel the commencement of condemnation proceedings and the payment of just compensation).

9. Haisley v. Mercer County Board of Zoning Appeals, 2007 WL 3342768 (Ohio. App. Ct. November 13, 2007) (the Ohio Court of Appeals overturned a trial court decision reversing and vacating a county zoning board decision to deny a zoning variance; the property owner had sought the variance to obtain permission to build a residence on an undersized lot; the appeals court reversed the trial court's finding of a taking because the lower court had improperly placed the burden of proof on the City rather than the land owner, and because the appeals court could not determine whether the trial court had relied on the substantially-advance takings test that was repudiated in the U.S. Supreme Court's 2005 Lingle decision).

10. Sundry Development v. City of Lowell, 2007 WL 4179398 (Mich. App. November 27, 2007) (the Michigan Court of Appeals, reversing a trial court ruling, rejected a takings claim based on the City's delay in acting on a rezoning petition, where the delay was caused in part by a citizens' referendum challenging the City's handling of the petition, and the delay caused the owner to lose a valuable contract to develop the property; the Court ruled that loss of the contract and the consequent loss of profits did not provide the basis for a taking claim; the Court also ruled that the City's rezoning procedures did not violate the Takings Clause, observing that "short of depriving an owner of all viable use of the land or encumbering the property with inherently unreasonable restrictions, a municipality must have leeway to manage individual property parcels pursuant to an overall plan;" finally, the Court ruled that even if there had been a taking, the plaintiff was not entitled to recover because its alleged losses were purely consequential).

11. Kessler v. Hevesi, 2007 WL 4169340 (N.Y. App. Div. November 27, 2007) (the New York Supreme Court Appellate Division affirmed a trial court's rejection of a taking claim based on the State's imposition on cell phone users of a monthly surcharge for enhanced 911 services; the Court stated that the takings inquiry focuses on whether legislation unfairly concentrates public burdens, and that this could "hardly" be said to be the case given that a similar surcharge was initially placed on land-line telephone users).

12. Martin Marietta Materials, Inc. v. Brainard, 2007 WL 4232184 (S.D. Ind. November 28, 2007) (the federal District Court for the Southern District of Indiana, exercising jurisdiction over a state inverse condemnation claim based on the Court's diversity jurisdiction, denied the City's motion for summary judgment, ruling that the plaintiff could potentially recover under Lucas, based on the City's denial of a special use permit for a proposed limestone mining operation).

13. Mendez v. Florida Department of Agriculture and Consumer Services, Case No. 2002 CA013717AJ (Fl. Cir. Ct. December 7, 2007) (in the latest entry in the extensive body of Florida takings case law arising from measures designed to protect the citrus industry from various pests, the Florida Circuit Court, in a class action brought on behalf of all owners of non-commercial

citrus trees in Palm Beach County, ruled that the State was liable for a taking based on its destruction of citrus trees that were not actually infected with citrus canker but were located within 1,900 feet of infected trees and were at risk of becoming infected and spreading the canker to other trees; the Court reasoned that the physical destruction of personal property represents a presumptive taking and that the government action could not be justified on the ground that it was a response either to a nuisance or to an imminent threat to public health, safety, or welfare; the Court emphasized that while the canker may reduce citrus trees' productivity, it does not kill the trees or render the citrus fruit inedible).

14. Kottschade v. City of Rochester, No. 55-CV-06-11405 (Minn. Dist Ct. November 26, 2007) (in this long-running takings battle between Franklin Kottschade and the City of Rochester, Minnesota, based on the City's grant of a development permit that included various dedication requirements and other conditions on a proposed development, and after Mr. Kottschade's initial taking claim filed in federal court was dismissed under Williamson County (and he testified in Congress in support of a federal bill designed to overturn Williamson County), a state trial court in Minnesota dismissed his state taking claim on the ground that it was barred by the applicable 6-year statute of limitations; the Court rejected plaintiff's argument that the limitations period did not begin to run when the conditions were first imposed but instead began when the City's zoning board denied his application for a variance from the permit conditions, reasoning that the zoning board had no authority to review the conditions and therefore a petition for administrative relief from that body could not affect the commencement of the limitations period; the Court also ruled that Kottschade no longer presented a justiciable claim because his development permit (along with the conditions) had expired two years after it was issued; as to the merits of the taking claim, the Court ruled that disputed issues of material fact precluded summary judgment on the question of whether the conditions imposed by the City resulted in a taking under Nollan/Dolan).

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