Georgetown Environmental Law and Policy Institute's
Takings-Net

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Takings Snapshots, Volume 89, March 6, 2008

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. John R. Sand & Gravel Co. v. United States, 128 S.Ct. 750 (U.S., January 8, 2008) (affirming a decision by the U.S. Court of Appeals for the Federal Circuit, the U.S. Supreme Court ruled that the appeals court properly raised sua sponte the issue of whether a regulatory taking claim was barred by the applicable statute of limitations; the Court reasoned that the statute of limitations defense to a taking claim is jurisdictional and therefore could be raised by the appeals court even though the government had abandoned the defense in the trial court; the Supreme Court concluded that its longstanding precedents addressing the statute of limitations defense in a takings context mandated the conclusion that the defense was nonwaivable, and rejected the argument that its more recent decisions dealing with statutes of limitations in other contexts implicitly overruled these precedents).

2. Noghrey v. Town of Brookhaven, 2008 WL 384441 (N.Y. App. Div., February 13, 2008) (in a useful and instructive decision dealing with the proper application of the Penn Central economic impact factor, the Appellate Division of the New York Supreme Court reversed a $1.6 million takings award based on the Town of Brookhaven's rezoning of the claimant's land from commercial to residential use; the Court ruled that the trial court erred in instructing the jury that a "significant" or "substantial" negative effect on property value was sufficient to establish a taking and directed the trial court on remand to instruct the jury that, to support a finding of a taking under Penn Central, the economic loss must be "one step short of complete" or, in other words, the regulation must leave the owner only a "bare residue" of value) (GELPI filed an amicus brief in the Appellate Division on behalf of the Association of Towns for the State of New York, the American Planning Association, and the New York Metro Chapter of the American Planning Association, which is available on the GELPI website).

3. Trail Enterprises, Inc. v. City of Houston, 2000 WL 4157244 (Tex. App., November 21, 2007) (in a bizarre and troubling case, the Court of Appeals of Texas reversed the trial court's dismissal of a taking claim against the City of Houston on ripeness grounds and, without remanding the case, rendered a judgment awarding plaintiff $16.9 million in compensation for a taking based on a city ordinance prohibiting oil drilling on land adjacent to Lake Houston, the city's primary drinking water supply; the trial court issued its order dismissing the case on ripeness grounds following a jury verdict in favor of the plaintiff on the taking claim; the appeals court ruled that the trial court erred in concluding that the claim was not ripe on the ground that the plaintiff had

not filed a drilling application, because the ordinance on its face barred any drilling at this site; the Court's Chief Justice dissented on the ground that, rather then render judgment for the plaintiff, the Court should have remanded the case to the trial court, arguing that the Court "simply do[es] not know what other issues may have been left pending and that are now appropriate for the trial court's initial consideration that were not a proper subject for this appeal").

4. Skoro v. City of Portland, 2008 WL 490642 (D. Or., February 21, 2008) (in a rare application of the Nollan essential nexus test to a sidewalk dedication, the federal District Court for the District of Oregon ruled that a required land exaction for an expanded sidewalk at one property violated the essential nexus test but disputed issues of material fact precluded resolving on summary judgment the nexus issue with respect to a similar exaction at another property; at the first property, the city proposed to exact a 6-foot area along the street, allowing the existing 6-foot sidewalk to be relocated and providing a six-foot space for trees and other plantings; at the second property, the city proposed to exact a 2-foot area and convert an existing 10-foot sidewalk into a 6-foot sidewalk with a 6-foot space for plantings; the Court ruled that in the latter case exacting property to advance a plan to reduce pedestrian sidewalk space could not satisfy the nexus test, whereas the outcome was more uncertain in the other case where the property was being exacted as part of a project to move the sidewalk).

5. Bair v. United States, 2008 WL 304886 (Fed. Cir., February 5, 2008) (in a fascinating and well-reasoned decision, the U.S. Court of Appeals for the Federal Circuit, affirming the claims court, rejected a taking claim based on the argument that recognition and enforcement of a super-priority lien in sugar refined from beets held by the federal Commodity Credit Corporation destroyed the value of state statutory liens in the same property held by the producers of the sugar beets; the Federal Circuit reasoned that a federal statute can establish a background principle of law defining private property interests and that the federal statute establishing the super-priority liens represented a background principle that preempted conflicting state law; because plaintiffs could not claim an entitlement to enforcement of their state liens in light of the superior federal liens, the Court ruled that the plaintiffs' taking claims failed for lack of a threshold property interest, obviating the need to consider whether recognition and enforcement of the federal liens might qualify as a "taking").

6. Swisher International, Inc. v. Johanns, 2007 WL 4200816 (M.D. Fl., November 27, 2007) (in an important ruling, the federal District Court for the Middle District of Florida rejected a takings challenge to the Fair and Equitable Tobacco Reform Act of 2004, which imposes significant financial assessments on manufacturers of tobacco products to provide transitional assistance to tobacco producers who are being weaned off the government's tobacco price support system; relying heavily on the five-justice plurality in Eastern Enterprises and the Federal Circuit en banc decision in Commonwealth Edison, the Court ruled that the Takings Clause does not apply to this type of monetary assessment; in the alternative, the Court ruled that the claim failed based on an analysis of each of the three Penn Central factors).

7. Palmyra Pacific Seafoods, LLC. v. United States, 90 Fed. Cl. 228 (Ct. Fed. Cls., January 22, 2008) (in a novel and colorful case, the U.S. Court of Federal Claims dismissed a taking claim based on the federal government's establishment of a national wildlife refuge around several

remote Pacific islands that the Nature Conservancy conveyed to the U.S. government, where the refuge designation barred commercial fishing around the islands and allegedly destroyed the value of plaintiff's contract with the original owners of the islands to conduct fishing operations from the islands; the Court reasoned that the plaintiff had no protected property right to utilize the public lands and waters within the refuge area for fishing purposes and, in addition, the government action did not appropriate plaintiff's contract rights, but merely frustrated them, as in the landmark Supreme Court Omnia case; the Court specifically rejected the plaintiff's theory that Omnia and its progeny are limited to the special contexts of government actions involving national security and foreign policy considerations).

8. State of Washington v. Vander Houwen, 2008 WL 383769 (Wash., February 14, 2008) (in another significant ruling, the Washington Supreme Court reversed a land owner's criminal conviction for shooting about a dozen elk that were feeding on and causing substantial damage to the owner's apple orchard; the Court ruled that implicit in the Washington state Due Process Clause is a constitutional right to protect private property from harm caused by wild animals; the Court ruled that the jury should have been instructed that a land owner could not be held criminally liable if killing a wild animal is "reasonably necessary" to defend private property; the Court further held that once a land owner presents sufficient evidence to support this defense, the burden of persuasion to prove beyond a reasonable doubt the absence of a justification for killing the animals shifts to the state; three justices concurred in the judgment, agreeing that the jury had been improperly instructed on the law, but arguing that the land owner should bear the burden of establishing the affirmative defense that killing of wild animals was necessary to protect private property).

9. Mola Development Corp. v. United States, 2008 WL 482595 (Fed. Cir., February 25, 2008) (the U.S. Court of Appeals for the Federal Circuit affirmed the claims court's rejection of a taking claim based on government regulators' seizure of a savings and loan and the government's failure to pay over to the owner the financial surplus allegedly remaining following liquidation of the savings and loan; while the Court recognized that the owner could claim a property interest in any surplus that existed, the Court ruled that this taking claim failed because there was no actual surplus remaining following the liquidation).

10. St. Christopher Associates, L.P. v. United States, 511 F.3d 1376 (Fed. Cir., January 9, 2008) (the U.S. Court of Appeals for the Federal Circuit affirmed the claims court's rejection of a claim by a HUD-sponsored housing developer alleging that HUD's refusal to consider allowing the developer to increase the rents in his development resulted in a taking; the Court ruled that since the claimant's relationship with HUD was governed by a contract, the claimant was required to pursue any claim arising from this relationship as a breach of contract; in the alternative, the Court ruled that the plaintiff had not demonstrated the type of "severe financial loss" necessary to support a successful regulatory taking claim).

11. South Lyme Property Owners Association, Inc. v. Town of Old Lyme, 2008 WL 323257 (D. Conn., February 4, 2008) (in a debatable ruling (because it appears to be based on an unduly narrow reading of Williamson County), the federal District Court for the District of Connecticut declined to grant the town's motion to dismiss on ripeness grounds a taking claim challenging a regulation governing the conversion of seasonal residences to year-round use; the Court ruled

that neither the finality prong nor the state compensation prong of Williamson County applies to a facial challenge to a regulation).

12. Griffin Broadband Communications, Inc. v. United States, 79 Fed. Cl. 320 (Ct. Fed. Cls., November 19, 2007) (in an instructive decision, the U.S. Court of Federal Claims rejected a taking claim based on allegations that the Department of the Army interfered in various ways with plaintiff's agreement with the Army to provide cable television services to a military base in California; insofar as the plaintiff claimed that the government's alleged contract breach constituted a taking, the Court rejected the claim as a matter of law, stating "A contract itself does constitute a property interest that potentially can be the subject of a taking. A contract is not considered taken, however, when the Government breaches a contract, but does not deprive a contract holder of the right to seek damages for breach of that contract"; insofar as the plaintiff alleged that the government had violated certain federal employment laws, the Court ruled that the claim failed because the Takings Clause cannot serve as a remedy for property damage caused by "unauthorized government actions"; finally, insofar as the plaintiff claimed a taking based on the government's failure to prevent Army personnel from damaging the property, the Court ruled that the claim failed because government "inaction" cannot provide the basis for a finding of a taking).

13. American Energy Corp. v. Datkuliak, 2007 WL 4696811 (Ohio App., December 28, 2007) (in an interesting case involving an alleged "judicial taking," the Ohio Court of Appeals rejected a claim that a trial court effected a taking by issuing an opinion construing a deed for a split-estate property to authorize the owner of the coal estate to require the surface owner to cap and plug a gas well on the property; while the Court recognized that a judicial order can, in some circumstances, give rise to a viable taking claim, it said that in this case the trial court was simply construing a deed and a judicial determination of legal rights under a deed cannot constitute a taking; the Court said, "Even if the determination was incorrect, the decision does not constitute a taking; rather, it would just be an error of law.").

14. Walker v. United States, 79 Fed. Cl. 685 (Ct. Fed. Cls., January 3, 2008) (in the latest installment in this long-running takings litigation arising from a dispute over private cattle grazing on federal public lands, the U.S. Court of Federal Claims, in the aftermath of the New Mexico Supreme Court's issuance of a comprehensive opinion in response to certified questions posed by the claims court, granted the government's motion for summary judgment and dismissed the plaintiffs' taking claims, ruling that (1) plaintiffs were not entitled to statutory compensation under the Federal Land Policy and Management Act for cancellation of their grazing permits, because the cancellation was not for the purpose of devoting the land to some new public purpose, but based on the plaintiffs' failure to pay their grazing fees and reduce stocking levels as ordered by the Bureau of Land Management, (2) plaintiffs lacked a compensable property right to use public lands for grazing based on their alleged ownership of water rights and rights of way, (3) certain of the water rights claimed by plaintiffs actually belonged to the United States not plaintiffs, but in any event plaintiffs' taking claim based on these alleged interests failed because plaintiffs could not show that they had sought to transfer the water to some other use and in any event they had no entitlement to an alternative, non-grazing related use of the water that would necessarily be profitable, and (4) plaintiffs' claim of a taking of their base ranch failed because they had no protected entitlement to use of their private

ranch property in conjunction with the federal lands) (GELPI filed a brief in this case before the New Mexico Supreme Court, which is available on the GELPI website).

15. International Industrial Park, Inc. v. United States, 2008 WL 576332 (Ct. Fed. Cls. February 22, 2008) (in a case with potentially important political ramifications, the U.S. Court of Federal Claims denied the government's motion for summary judgment on a physical-occupation taking claim based on allegations that border patrol officers along the U.S.-Mexico border conducted extensive and continuous operations on plaintiff's 100+ acre property and that the scope of the activities had expanded since 9/11; the Court declined to dismiss the claim based on the statute of limitations or the theory that the plaintiffs failed to state a claim, because the parties presented sharp, factual disputes about the extent of the patrol officers' use of the property, and about whether and to what extent their activities on the property had expanded in recent years).

16. Voisin v. United States, 80 Fed. Cl. 164 (Ct. Fed. Cls., January 4, 2008) (in a case of considerable historical interest, the U.S. Court of Federal Claims dismissed, based on the applicable six-year statute of limitations, a taking claim filed by the descendents of an individual who obtained a grant to an island in Louisiana in 1788 from the Spanish Governor of Louisiana; the Court ruled that the claim accrued in the 1840s, when the United States began granting away portions of the island to other parties notwithstanding the family's prior title; the Court ruled that neither equitable tolling nor other principles justified waiving the statute of limitations).

17. E. Perry Iron & Metal Co., Inc. v. City of Portland, 2008 WL 131671 (Me., January 15, 2008) (the Maine Supreme Court affirmed the trial court's rejection of a taking claim based on application of a municipal regulatory ordinance to plaintiff's scrap metal recycling facility, observing that "there is no showing that the . . . ordinance either deprives [plaintiff] of all economically beneficial uses of the property, or decreases the value of the property so substantially as to strip the property of all practical value").

18. ASAP Storage, Inc. v. City of Sparks, 173 P.3d 734 (Nev., December 27, 2007) (affirming a trial court decision, the Nevada Supreme Court ruled that store owners failed to demonstrate a taking based on the city's determination, in response to a serious flood, to evacuate plaintiffs' businesses, to barricade the street entrance to their businesses, and to deny them access to remove certain personal property; the Court ruled that the plaintiffs failed to establish a "physical appropriation by ouster," which requires a showing of a "substantial interference" with an owner's ability to access his property, because in this case the plaintiffs' access to the property was only blocked for 48 hours).

19. Foster v. Wickliffe, 2007 WL 4564945 (Ohio App., December 28, 2007) (affirming a trial court ruling, the Ohio Court of Appeals rejected a claim that a municipal ordinance barring the parking of recreational vehicles in the front yards of private residences effected a taking, observing that, in this case, the plaintiffs had "not suffered any impact due to" the ordinance and the character of the government action weighs against the claim because "the ordinance is merely designed to adjust the burdens of economic life by requiring owners of certain vehicles to park them in certain places on their properties").

20. District of Columbia v. Beretta U.S.A. Corp., 2008 WL 88699 (D.C., January 10, 2008) (the D.C. Court of Appeals rejected a taking claim based on federal legislation barring the prosecution of a damages lawsuit against a gun manufacturer under a District of Columbia statute, ruling that a pending legal claim is not property for the purposes of the Takings Clause and, in any event, the federal legislation left the plaintiffs some alternative remedies).

21. Steward v. United States, 2008 WL 553653 (Ct. Fed. Cls., February 27, 2008) (the U.S. Court of Federal Claims rejected a taking claim based on federal law enforcement officers' seizure of plaintiff's property as part of a lawful criminal investigation, ruling that the Court lacked jurisdiction over the claim, and the plaintiff also failed to state a claim, because confiscation of property in the course of a criminal investigation cannot be the basis for a federal taking claim under governing Federal Circuit precedent).

22. Stahelim v. Forest Preserve District of Du Page County, 877 NE 2d 1121 (Ill. App., October 10, 2007) (the Second District Appellate Court of Illinois rejected a taking claim based on the city's adoption and subsequent repeal of an ordinance authorizing the taking of plaintiff's property by eminent domain for park purposes; the Court affirmed the trial court's rejection of the taking claim because the ordinance had been repealed and the city thereafter placed no legally binding limitations on plaintiff's use of the property).

23. Car Huml Investors, LLC v. State of Arizona, 2007 WL 4403981 (D. Ariz., December 11, 2007) (the federal District Court for the District of Arizona rejected a taking claim based on enforcement of Arizona's subdivision regulations, ruling that (1) the claim was not ripe in federal court under Williamson County, and (2) a mere requirement to undergo a regulatory review process does not provide a basis for a finding of a taking).

24. Reagan v. County of St. Louis, 2008 WL 250349 (E.D. Mo., January 29, 2008) (following closely the U.S. Supreme Court's 2005 decision in San Remo, the federal District Court for the Eastern District of Missouri ruled that where the plaintiff prosecuted a taking claim under the Missouri Constitution challenging a municipal zoning amendment in state court and ultimately lost, the plaintiff was barred by the doctrine of claim preclusion from seeking to prosecute a substantively identical taking claim under the U.S. Constitution in federal court; the Court also ruled that the federal taking claim was barred by the Rooker-Feldman doctrine).

25. Rowlette v. State of North Carolina, 2008 WL 423666 (N.C. App., February 19, 2008) (affirming a trial court ruling, the Court of Appeals of North Carolina rejected the argument that the state's unclaimed property law results in a taking by permitting the state to retain interest earned on unclaimed funds that come into the state's possession; following the clear majority rule among the state courts, and distinguishing the U.S. Supreme Court's decisions in Webb's Fabulous Pharmacies and Washington Legal Foundation, the Court reasoned that since unclaimed property has been abandoned as a result of the owner's action, rather than acquired by the government as a result of some affirmative action by government, the owner has no entitlement to interest earned on the property, and therefore has no basis for claiming a taking).

26. Snaza v. City of St. Paul, 2008 WL 323212 (D.Minn., February 5, 2008) (the federal District Court for the District of Minnesota rejected a taking claim based on the denial of a conditional

use permit that would have authorized the claimant to make continued use of the property for an auto sales and service business; the Court ruled that the claim was not ripe because the plaintiff failed to pursue available state inverse condemnation remedies; the Court also ruled, in the alternative, that the claim failed on the merits, because the plaintiff did not establish that she was deprived of all economically beneficial use of the property and "In fact, the city code provides for other uses at the Property that the Plaintiff appears to have not considered.").

27. Sands North, Inc. v. City of Anchorage, 2007 WL 3491269 (D. Alaska, November 15, 2007) (the federal District Court for the District of Alaska rejected a taking claim based on the city's adult entertainment ordinance, ruling that the ordinance's provision rendering "an area within four feet of any entertainer unusable" did not result in a taking and, more generally, the claim failed because the ordinance did not deny the owner all economically viable use of the property and was designed to substantially advance the government's legitimate interest in diminishing the secondary effects associated with adult entertainment [obviously applying an outdated takings test post-Lingle]).

28. Underwood Livestock Inc., v. United States, 79 Fed. Cl. 486 (Ct. Fed. Cls., November 29, 2007) (the U.S. Court of Federal Claims rejected a taking claim based on the government's issuance of a trespass notice and the removal of plaintiff's diversion dam from federal lands; the Interior Board of Land Appeals had previously ruled that the plaintiff possessed no grandfathered right to maintain the dam on this site and had not received authorization to maintain such a structure pursuant to the Federal Land Policy and Management Act, and the claims court ruled that it lacked authority to review or revisit that determination; given that the plaintiff lacked a protected property interest, the Court ruled that the taking claim failed as a matter of law; however, instead of dismissing the action, the Court ordered a stay to permit the plaintiff an opportunity to bring an action in federal District Court challenging the IBLA decision).

29. Surf and Sand, LLC. v. The City of Capitola, 2008 WL 413748 (N.D. Cal., February 13, 2008) (the federal District Court for the Northern District of California ruled that a taking claim based on the city's adoption of a mobile home conversion ordinance was not ripe in federal court because plaintiffs had not pursued available California inverse condemnation procedures).

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March 6, 2008