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. The Estate of E. Wayne Hage and the Estate of Jean N. Hage v. United States, 2008 WL 2358593 (Ct. Fed. Cls., June 6, 2008) (in what is apparently the final chapter of this notorious 17-year-old litigation before the U.S. Court of Federal Claims, the Court (Smith, Loren, J.) concluded that various management decisions by U.S. Forest Service officials resulted in a taking of the Hages' water rights and ditch easements associated with their public land ranch in Nevada, and awarded them just compensation of $3.85 million; the Court rejected the Hages' broadest claims that the Forest Service's cancellation of their grazing permit resulted in a taking of the entire ranch, their stock watering rights on public lands, and the grazing permit itself; however, the Court ruled that the Forest Service took the Hages' property by erecting fencing around certain streams that prevented their cattle from accessing water and by barring them from clearing streams and thereby depriving them of water they would otherwise have received; the Court also found the Forest Service liable under the Federal Land Policy and Management Act on the ground that it had cancelled the grazing permit in order to devote the area to other purposes, including public recreation and as an elk preserve, and awarded the Hages an additional $1.36 million based on that claim) (GELPI participated in filing several briefs in this case, which are available on the GELPI website).

2. Seven Up Pete Venture v. Schweitzer, 523 F.3d 948 (9th Cir., April 21, 2008) (in an important and carefully reasoned decision, analyzing all of the recent pertinent Supreme Court jurisprudence, the U.S. Court of Appeals for the Ninth Circuit, in accord with the rulings of all or virtually all other federal appeals courts that have addressed the issue, ruled that the Eleventh Amendment bars a claim under the federal Takings Clause seeking monetary compensation from state officials in federal court; importantly, the Court observed that Supreme Court precedent simultaneously supports the conclusion that state courts, where the Eleventh Amendment does not apply, must be open to hear inverse condemnations against state officials).

3. County of Ventura v. Channel Islands Marina, Inc., 71 Cal. Rptr. 3rd 762 (Cal. Ct. App., Jan. 30, 2008) (in a fascinating case involving the interplay of takings doctrine and contract law, the California Court of Appeals, reversing the trial court, ruled that a marina operator was not entitled to compensation when, after the end of a 40-year lease, the County allegedly refused to permit the operator to exercise its right under the lease to remove improvements from the property; first, the Court ruled the plaintiff's claim, if any, was based on contract, rather than inverse condemnation; second, the Court ruled that, under any theory of liability, the plaintiff would only have been

entitled of the scrap value of the improvements (which was nominal), rather than the market value of the improvements to the County or another operator of the marina; one Judge dissented, arguing that the plaintiff operator was entitled to recover $3.5 million based on the market value of the improvements under an inverse condemnation theory).

4. Trail Enterprises, Inc. v. City of Houston, No. 100-05-003820- CV, Opinion on Rehearing (Tex. Ct. Apps., April 9, 2008) (in the latest installment in this extraordinary case in which the Texas Court of Appeals awarded 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 (see Takings Net Volume 89), on rehearing the Texas Court of Appeals modified its ruling to make clear that, even though the City was being held liable for a permanent taking, the oil and gas company plaintiff would not be required to hand over to the city the property interests that were allegedly taken in exchange for the payment to the city).

5. Atamirzayeva v. United States, 524 F.3d 1320 (Fed. Cir., May 7, 2008) (affirming the claims court, the U.S. Court of Appeals for the Federal Circuit rejected a taking claim by an Uzbekistan citizen whose cafeteria was destroyed by local officials at the request of U.S. officials to improve the security of the adjacent U.S. embassy in Tashkent; the Court ruled that a claimant cannot pursue a taking claim against the United States in the U.S. Court of Federal Claims based on an alleged U.S. government taking in a foreign land if the claimant is not a U.S. citizen and has no "special relationship" with the United States).

6. Agripost, LLC v. Miami-Dade County, 525 F.3d 1049 (11th Cir., April 22, 2008) (in a case applying the Supreme Court's San Remo Hotel decision, the U.S. Court of Appeals for the Eleventh Circuit ruled that the claimant was barred by issue preclusion from litigating its federal taking claim in federal court where the state court had ruled that plaintiff lacked a protected property interest in its non-conforming property use sufficient to support its state taking claim; given its resolution of the case based on issue preclusion, the Court stated that it did not need to resolve whether San Remo Hotel impliedly overruled Circuit precedent holding that a claimant could use a so-called England reservation to preserve the right to a litigate a Fifth Amendment taking claim in federal court after exhausting state court compensation procedures).

7. Tuccio v. Central Pine Barrens Joint Planning and Policy Commission, 2008 WL 206930 (Sup. Ct., Jan. 16, 2008) (in an interesting case involving a taking claim in a novel context, the N.Y. Supreme Court rejected a taking claim based on the N.Y. Central Pine Barrens Commission's denial of an allocation of Pine Barrens development credits to a property owner where the owner had previously received credits for other portions of the same property and had also been granted two extraordinary hardship variances allowing the construction of six additional buildings on the property, the Court concluded that "petitioners have not demonstrated any adverse economic impact resulting from the Commission's determination or that the denial has interfered with reasonable investment-backed expectations").

8. Kincaid v. City of Fresno, 2008 WL 2038390 (E.D. Cal., May 12, 2008) (in another interesting case addressing the viability of due process claims in the Ninth Circuit post-Lingle, the federal District Court for the Eastern District of California rejected the City of Fresno's argument that a procedural due process challenge to a municipal policy of conducting sweeps of homeless individuals, including collecting and destroying their personal property, had to be dismissed on

the ground that the allegations actually stated a Fifth Amendment takings claim and was therefore subject to Williamson County's state-exhaustion requirement; the Court reasoned that neither the Supreme Court's decision in Graham v. Connor nor the Ninth Circuit's decision in Armendariz requires a claimant in this circumstance "to plead and prove a Fifth Amendment Takings Claim in lieu of a Fourteenth Amendment procedural due process claim").

9. Charles A. Pratt Constr. Co. v. California Coastal Com'n, 76 Cal. Rptr. 3d 466 (Cal. Ct. Apps., May 8, 2008) (affirming the judgment of the Superior Court, the California Court of Appeals ruled that the California Coastal Commission's rejection, on an appeal from a decision by San Luis Obispo County, of a development application did not support a ripe taking claim because the Commission's action did not definitively resolve what development the Commission would or would not allow; the Court observed that while 80 percent of the property had been designated as environmentally sensitive habitat, "that leaves 20 percent of the 121-acre tract, over 24 acres, available for development;" the Court also observed that, to the extent the denial was based on a lack of water to support the development, plaintiff "cites no authority that the denial of a development permit because of insufficient water supply constitutes a taking. Nor does [plaintiff] cite authority that the setting of priorities for water use in the face of an insufficient supply constitutes a taking. Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm.").

10. Prosser v. Kennedy Enterprises, Inc., 179 P.3d 1178 (Mt., March 12, 2008) (in a case addressing the intersection of takings and nuisance law, the Court ruled by a margin of four to three that the plaintiffs could not seek damages against the City on a nuisance theory because the City authorized establishment of a casino lounge and failed to control nuisance activities associated with the lounge that allegedly reduced the value of their properties; the majority refused to recognize that any "special relationship" exception to the "public duty" defense to a nuisance claim applied in this case; Justice James Nelson filed a dissenting opinion arguing that the property owners were entitled to recover on an inverse condemnation claim under the U.S. and Montana Constitutions; the majority dismissed the takings theory championed by Justice Nelson, arguing that plaintiff had not actually asserted an inverse condemnation claim and, in any event, the claim failed on the merits because one plaintiff purchased the property after the law authorizing the casino had been passed and two other plaintiffs were mere tenants of the properties where they resided).

11. Bragg v. Edwards Aquifer Authority, 2008 WL 596862 (W. Dist. Tex., Jan. 9, 2008) (in an important new entry in the debate over how takings doctrine applies to interests in water, the federal District Court for the Western District of Texas rejected plaintiffs' motion for summary judgment on their claim that the denial of asserted grandfathered rights to irrigate their pecan ranch using water from the Edwards Aquifer violated Article one, section 17 of the Texas Constitution; the Court ruled that plaintiffs failed to demonstrate a physical taking, because under Tahoe-Sierra, a restriction on an owner's ability to pump groundwater represents a use restriction rather than a physical occupation of the property; the Court also rejected plaintiffs' per se regulatory takings theory on the ground that, even assuming the relevant denominator where the groundwater resources under plaintiffs' property, the plaintiffs were not denied all economically viable use of the property because they can continue to use irrigation water from shallow wells and also make limited use of Edwards Aquifer water for domestic or livestock uses).

12. Duncan v. Village of Middlefield, 2008 WL 1777844 (Ohio App. April 18, 2008) (in a useful and instructive decision, the Ohio Court of Appeals granted summary judgment rejecting plaintiff's claim that a village had effected a taking of plaintiff's property as a result of various delays and procedural obstacles that local officials allegedly raised to thwart plaintiff's effort to obtain site plan approval for a tavern; the Court ruled that all three Penn Central factors weighed against the claim because (1) alleged lost profits and increased costs are not the kinds of economic impacts on property that support a taking claim, (2) a modest delay in plaintiff's ability to launch his business was not sufficient to show an interference with reasonable investment-backed expectations, and (3) the character factor did not support the claim because plaintiff's allegation that local officials interfered with his project as retaliation for previously bringing a lawsuit against the village raised a due-process issue rather than a takings question).

13. City of Milwaukee Post # 2874 Veterans of Foreign Wars v. Redevelopment Authority of the City of Milwaukee, 746 N.W. 2nd 536 (Wisc. Jan. 23, 2008) (in a case involving the interplay between eminent domain doctrine and inverse condemnation law, the Wisconsin Court of Appeals held that the so-called unit rule, which requires that a property be valued for eminent domain purposes as if there were only one owner of the property, resulted in an unconstitutional taking in the unusual circumstances of this case, where the jury had determined that the building as a whole had zero value, the plaintiff tenant had a valuable, pre-paid 99-year lease to occupy a portion of the property, and the lease contained no provision addressing lease forfeiture upon condemnation).

14. Ocean Harbor House Homeowners Association v. California Coastal Com'n, 2008 WL 2152686 (Cal. Ct. App., May 23, 2008) (in a rare example of a court actually applying the Nollan/Dolan standards for regulatory exactions (rather debating the threshold question whether or not the Nollan/Dolan tests apply), the California Court of Appeals, affirming a Superior Court ruling, rejected the claim that the California Coastal Commission took the plaintiff's private property by granting a permit for the construction of a seawall to protect a pre-existing condominium complex on the condition that the applicant homeowner association pay a fee of $2.15 million to be used toward the purchase of beach property elsewhere along the shore; the Court ruled that there was an essential nexus between the beach loss that would be caused by the seawall and use of the funds to acquire replacement beach property; the Court also ruled that the condition satisfied the rough proportionality test because, actually going beyond the requirements of Dolan, the Coastal Commission had set the fee based on a mathematically precise calculation of the recreational value that would be lost as a result of future beach erosion caused by the seawall).

15. Schooner Harbor Ventures, Inc. v. United States, 81 Fed.Cl. 404 (Ct. Fed. Cls, April 15, 2008) (the U.S. Court of Federal Claims rejected a taking claim by a land investor who sold land to the military for a housing development but was required by the U.S. Fish and Wildlife Service to purchase additional property to mitigate damage to endangered species habitat that was expected to result from development of the property; the Court ruled that the plaintiff lacked a protected property interest sufficient to support a taking claim, stating that "the right to sell the property to the government at a particular price and without conditions is not a cognizable property interest which is protected by the fifth amendment").

16. City of Minot v. Boger, 744 N.W. 2d 277 (N.D., Jan. 17, 2008) (affirming a trial court

decision, the North Dakota Supreme Court ruled that a zoning enforcement action brought by a city to bar plaintiffs from storing and parking heavy construction equipment in a residentially zoned area did not result in a taking where the zoning regulation was in place when plaintiffs purchased the property and the ordinance did not deny plaintiffs all economically viable use of the property given that that they could continue to use the property for residential purposes).

17. Rifkin Scrap Iron & Metal Co. v. Ogemaw County, 2008 WL 2157067 (E.D. Mich., May 21, 2008) (in a surprisingly expansive ruling, in a case which arguably does not belong in federal court at all, the federal District Court for the Eastern District of Michigan denied the County's motion for summary judgment on a claim that the County effected a regulatory taking by issuing a stop work order based on plaintiff's operation of a scrap yard in violation of applicable zoning requirements and by denying plaintiff's application for approval of a "vehicle dealer's license;" while acknowledging that plaintiff could not establish a taking under Lucas, the Court ruled that an analysis of the Penn Central factors did not support the conclusion that the Penn Central claim would necessarily fail; at the same time, the Court stated that the record was unclear as to whether plaintiff pursued the administrative proceedings to a final conclusion; the Court did not explicitly address the question whether Williamson County's requirement that a takings claimant pursue available state compensation procedures barred plaintiff from prosecuting the claim in federal court; the opinion concluded with an instruction to the plaintiff to file an amended complaint restating its allegations).

18. Olson v. Town of Cottage Grove, 2008 WL 2220920 (Wisc., May 30, 2008) (the Wisconsin Supreme Court, primarily interpreting and applying Wisconsin precedents, and in a ruling highly reminiscent of the U.S. Supreme Court's Suitum decision, ruled that a claimant presented a ripe takings claim seeking declaratory relief based on an ordinance requiring the claimant to acquire transferable development rights (TDRs) in order to proceed with a development; the Court ruled that the claimant was not required to actually purchase the TDRs at a cost of approximately $750,000 in order to litigate the takings issue).

19. District of Columbia v. Beretta U.S.A. Corp., 940 A2nd 163 (D.C. Jan. 10, 2008) (the D.C. Court of Appeals, affirming a decision of the Superior Court, ruled that Congress' adoption of the Protection of Lawful Commerce Arms Act did not effect a taking by eliminating plaintiffs' cause of action under the D.C. firearms control statute, the Assault Weapons Manufacturing Strict Liability Act, stating that "the expectancy the plaintiffs have of a successful outcome of their suit [under the D.C. statute] is not an interest the government is obliged to pay for as the price for eliminating it").

20. Laurel Sand & Gravel Inc., v. Wilson, 519 F.3d 156 (4th Cir., March 5, 2008) (affirming the District Court, the U.S. Court of Appeals for the Fourth Circuit rejected a taking claim based on a state law imposing liability on mining companies whose operations caused wells of neighboring property owners to fail; the Court ruled that the imposition of liability did not impact a protected property interest under the Takings Clause; the Court also ruled that the claim failed under the Penn Central test, given the character of the regulation and its minimal economic impact).

21. Mackin v. City of Coeur D'Alene, 2008 WL 848118 (D. Idaho, March 27, 2008) (in an oddball yet instructive case, the federal District Court for the District of Idaho dismissed plaintiff's taking claim based on the theory that the city had effected a taking by prosecuting an

ultimately unsuccessful quiet title action to determine the location of the high water mark defining the boundary of plaintiff's property; the Court reasoned that the filing of a quiet title action by the government, regardless of its ultimate outcome, "falls outside the framework of takings jurisprudence").

22. Huntleigh USA Corp. v. United States, 2008 WL 2051966 (Fed. Cir., May 15, 2008) (affirming the claims court, the U.S. Court of Appeals for the Federal Circuit rejected a takings claim by a private company that formerly provided passenger and baggage screening services at the nation's airports based on post 9/11 federal legislation transferring responsibility for airport security from the airlines to the federal government; the Court ruled that the legislation did not appropriate the plaintiff's contracts, but instead merely frustrated the plaintiff's contract expectancy by eliminating the airlines' legal responsibility for airport security; the Court also rejected the claim that the plaintiff was entitled to compensation directly under the 2001 legislation on the ground that the federal government "assumed the contracts," ruling that the government had not stepped into the plaintiffs' shoes under the contracts but instead had directly taken on the security responsibilities itself).

23. Hart v. Somerford Township Board, 2008 WL 1704244 (Ohio Ct. Apps., April 14, 2008) (affirming a decision by the Madison County Court of Common Pleas, the Ohio Court of Appeals rejected a taking claim brought by the owner of a 500-acre property based on an ordinance permitting only two additional residences on the land; the owner sold off two lots for development and then sued claiming a taking of a portion of a remainder of the property; the Court rejected the claim, ruling that the plaintiff failed to carry its burden of demonstrating a taking given that, even though the land had marginal value for agriculture, the plaintiff failed to present evidence regarding the viability of other permitted and conditional uses including "boarding kennels, riding stables, cemeteries, schools, churches, walks and stables, nature trails, greenhouses, equestrian trails, beekeeping, or forest and game management").

24. O'Neal Homes, Inc. v. City of Orange Beach, 2008 WL 2163919 (S.D. Ala., May 14, 2008) (the federal District Court for the Southern District of Alabama rejected a claim that a city effected a taking by amending its zoning ordinance to prohibit duplex apartments, ruling that there was no physical occupation of the property and "no showing that, or direct argument explaining how, enforcement of the amended zoning ordinance will sufficiently deny [the plaintiffs'] economically beneficial or productive use of land to constitute a taking").

25. Chapel Hill Title & Abstract Co., v. Town of Chapel Hill, 2008 WL 2095714 (N.C. App., May 20, 2008) (the North Carolina Court of Appeals, reversing the trial court, ruled that a zoning board of adjustment properly rejected a zoning variance to allow construction of a single family home where the owner could build in conformity with the zoning but could not also comply with the additional restrictions imposed by a private restrictive covenant; the Court also rejected plaintiff's alternative taking claim, arguing that, as with the variance issue, the impact of the regulatory restriction should be evaluated for takings purposes without regard to the restrictive covenant; a dissenting Judge argued that since the restrictive covenant predated the zoning, the owner was entitled to a variance and, if the owner did not receive a variance, the city should be liable for a taking under Lucas).

26. Equity Lifestyle Properties, Inc. v. City of Albuquerque, 2008 WL 619188 (D.N.M., Jan. 31,

2008) (in a convoluted case, the federal District Court for the District of New Mexico permitted a plaintiff landowner to file an amended complaint asserting that the City's designation of plaintiff's property as "blighted," which allegedly interfered with plaintiff's plans to sell the property for development, resulted in a physical-occupation taking of plaintiff's property by the current tenants; at the same time, the Court acknowledged that the case might be subject to dismissal under Williamson County's state-exhaustion requirement and/or on the ground that the factual allegations do not actually support a physical occupation takings theory).

27. Texas Bay Cherry Hill v. City of Fort Worth, 2008 WL 2229748 (Tex. App., May 29, 2008) (affirming the trial court, the Texas Court of Appeals rejected an inverse condemnation claim based on the City of Fort Worth's adoption of an economic development plan (which the city explicitly announced would not involve the use of eminent domain) on the ground that the plan was too general and at too early a stage of development to have any discernable impact on plaintiff's housing project, stating "the Plan currently exists only on paper, and unless and until the plan is implemented, [plaintiff] cannot allege facts that constitute a regulatory taking").

28. Niemeyer v. Williams, 2008 WL 906051 (CD Ill, March 31, 2008) (adopting in part the recommendations of a federal magistrate, the Federal District Court for the Central District of Illinois rejected a taking claim based on the City's impoundment of vehicles used in connection with drug trafficking and its subsequent transfer of possession of the vehicles to lien holders who had commenced foreclosure proceedings against the vehicles; the magistrate had proposed dismissal of the claim on the ground that the plaintiff had not complied with Williamson County's requirement that a takings claimant pursue available state compensation procedures before filing suit in federal court; the District Court agreed that the claim should be rejected, but on the ground that the plaintiffs' allegations that the City was acting for the private benefit of the lien holders did not implicate the Takings Clause but rather presented, if anything, a potential Due Process violation).

29. Busse v. Lee County, 2008 WL 1990661 (M.D. Fl., May 5, 2008) (the federal District Court for the Middle District of Florida dismissed plaintiff's claim that Lee County had effected a taking by passing a resolution claiming public ownership of accreted property in front of plaintiff's coastal lots, ruling that plaintiff had not pursued available state compensation procedures and therefore the claim was not ripe for adjudication in federal court).

30. Braun v. Ann Arbor Charter Tp, 519 F.3d 564 (6th Cir., March 13, 2008) (the U.S. Court of Appeals for the Sixth Circuit affirmed a District Court decision dismissing property owners' taking claim as not ripe under Williamson County, where the plaintiffs had unsuccessfully sought rezoning of the property, and had then sought a variance from the township zoning board of appeal, but had failed to bring a state court inverse condemnation claim before filing suit in federal court).

31. Secondo v. Campbell, 2008 WL 919718 (N.D. Fl., April 4, 2008) (the federal District Court for the Northern District of Florida rejected a takings claim based on a police officer's actions restoring tenants to possession of their apartment over the landlord's objections, on the ground that the plaintiff landlord had not pursued state compensation procedures as required by Williamson County).

32. Johnson v. City of Shorewood, 2008 WL 434680 (MN. App., April 29, 2008) (affirming a state court decision, the Minnesota Court of Appeals rejected plaintiff's numerous takings claims, essentially ruling that all the claims were either barred by the claim preclusion doctrine (as a result of prior judicial proceedings), time-barred or meritless; the Court ruled that the crux of plaintiffs' case, that they had allegedly been awarded inadequate compensation in a prior case on their claim that the City had effected a taking of their land by flooding it, had been fully litigated and resolved in favor of the defendant city; the Court closed its opinion by stating, "It is time that this prolonged litigation and the emotional and financial toll it has taken on all involved, appellant and respondents alike, is declared to be at an end").

33. Harris v. City of St. Clairsville, 2008 WL 1781236 (6th Cir., April 17, 2008) (unpublished decision) (the U.S. Court of Appeals for the Sixth Circuit affirmed a grant of summary judgment to the City on a claim that the City took plaintiff's property by annexing it and subjecting it to new zoning restrictions; the Court ruled that the plaintiff failed to present any material evidence to support the claim that the ordinance was "arbitrary or unreasonable" and, in any event, the claim was not ripe in federal court because the plaintiff failed to pursue available Ohio procedures for seeking compensation for the alleged taking).

34. Aceval v. Gaskin, 2008 WL 723574 (E.D. Mich., Feb. 13, 2008) (in an unusual (and very arguably erroneous) twist on the ripeness issue, a federal magistrate recommended that a state prisoner's inverse condemnation claim alleging the taking of various items of personal property be dismissed on ripeness grounds and pursuant to Younger abstention doctrine to the extent the property was the subject on an ongoing state forfeiture proceeding; however, the magistrate declined to apply the ripeness bar to property allegedly taken but not involved in the forfeiture proceeding, reasoning that the requirement to first litigate inverse condemnation claims in state court applies primarily if not exclusively to real property).

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