Georgetown Environmental Law and Policy Institute's
Takings-Net

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Takings Snapshots, Volume 91, September 2, 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. Watergate East Committee Against Hotel Conversion to Co-op Apartments v. District of Columbia Zoning Commission, 2008 WL 2827436 (DC, July 24, 2008) (in a relatively novel taking case, the District of Columbia Court of Appeals affirmed rejection of a taking claim by residents of the Watergate complex alleging that the DC Zoning Commission's approval of the conversion of the Watergate Hotel into cooperative apartments violated their private property rights; the Court ruled that since a planned unit development such as that governing the Watergate complex is subject to modification by public authorities, the plaintiffs have no vested property rights in the existing mix of uses in the complex that would support a viable taking claim).

2. Scofield v. State of Nebraska, 753 NW2d 345 (Neb., July 25, 2008) (in a significant departure from the general rule that a land owner can claim no property right to hunt on her land, the Nebraska Supreme Court reversed dismissal of a taking claim based on the state's establishment of a game refuge along the North Platte River that included plaintiffs' private lands; the Court ruled that, in view of plaintiffs' allegations that the restrictions on their ability to hunt on their land severely burdened their property rights, the trial court erred in dismissing the claim as a matter of law; the Court reached this result despite the previously well-established rule in Nebraska (and other states) that no land owner can claim a protected property right to hunt public wild game on private land, and the Court exhibited no awareness that it was departing from well established precedent on this subject; the Court rejected plaintiffs' due process challenge to the refuge restrictions based on their alleged burdensomeness, reasoning that the so-called "due process takings" theory adopted by some courts is invalid and that claims of regulatory burdensomeness can only be brought under the Takings Clause).

3. West Linn Corporate Park LLC v. City of West Linn, 2008 WL 2875296 (9th Cir., July 28, 2008) (in a somewhat bizarre use of the certification process in the takings context, the U.S. Court of Appeals for the Ninth Circuit, in a multi-faceted challenge to the conditions that a city placed on a development project, including takings claims under both the Oregon and U.S. Constitutions, certified to the Oregon Supreme Court three questions of state law which the appeals court believed required state court resolution before the court could address the plaintiff's federal takings claim; the certified questions included: (1) whether a claimant challenging an exaction in Oregon state court must exhaust available local remedies before

asserting an inverse condemnation claim in court; (2) whether a condition requiring a developer to construct offsite improvements constitutes an exaction subject to the Nollan/Dolan standards under Oregon law; and (3) whether the city's vacation of a public street was ultra vires under Oregon law on the ground that the city had not complied with Oregon landowner consent provisions; by contrast, the more common approach in a case such as this is for the federal court to conclude that the federal taking claim is not ripe and to dismiss the state taking claim so the plaintiff can pursue it in state court).

4. AmeriSource Corp. v. United States, 525 F3d. 1149 (Fed.Cir., May 1, 2008) (in an important decision, the U.S. Court of Appeals for the Federal Circuit, affirming the claims court, ruled that the government's seizure of pharmaceuticals from an innocent owner for use as evidence in a third party's criminal prosecution did not constitute a taking, because the government was acting pursuant to its "police power" in administering the criminal justice system).

5. Innovair Aviation, Ltd v. United States, 2008 WL 3852171 (Ct.Fed.Cls., Aug. 15, 2008) (in response to an application for reconsideration based on the Federal Circuit's AmeriSource decision (see above), the U.S. Court of Federal Claims (Smith, J.) refused to reconsider its 2006 ruling (see Takings-Net, Vol. 82, Dec. 4, 2006) that the government effected a taking by compelling plaintiff to forfeit contractual rights that it had acquired in part with funds derived from sale of an aircraft to dealers of illegal drugs; the Court ruled that AmeriSource did not apply in this case because the property at issue had not been used in connection with any criminal activity and was not required as evidence in a criminal proceeding, and reasoned that extending the holding in AmeriSource to this case "would give the Government extremely broad and virtually unlimited police powers" by allowing the government to seize virtually any property purchased with funds traceable in any way to criminal activity).

6. Akins v. United States, 2008 WL 2973951 (Ct.Fed.Cles., July 24, 2008) (in more fall out from AmeriSource, the U.S. Court of Federal Claims ruled that the Bureau of Alcohol Tobacco Firearms and Explosive's classification of plaintiff's firearm as a machine gun, barring its sale to the general public, did not effect a taking because, under the "police power doctrine," a regulatory measure designed to protect the public's "general health, safety, and welfare" cannot be a taking, and, in any event plaintiff's "expectancy interest" in being permitted to manufacture and sell a commercial product to the general public is not a protected property right under the Takings Clause).

7. Action Apartment Association v. City of Santa Monica, 2008 WL 3971764 (Cal. App., August 28, 2008) (the California Court of Appeals affirmed dismissal of a Nollan/Dolan taking claim challenging a city's inclusionary housing ordinance, ruling that the Nollan/Dolan standards only apply in the context of individual adjudicative permit approval decisions, and not in the context of facial challenges to general legislation; the Court specifically rejected the argument that the U.S. Supreme Court's Lingle decision implicitly authorized Nollan/Dolan challenges to general legislation).

8. D & D Landholdings v. United States, 82 Fed. Cl. 329 (June 30, 2008) (in another in the series of takings case arising from stepped-up law enforcement along the US/Mexico border (see also International Industrial Park v. United States, Takings Snapshots Vol. 89, March 6th, 2008),

the U.S. Court of Federal Claims denied the United States' motion for summary judgment on a claim that U.S. border patrol effected a physical taking by significantly expanding law enforcement operations on plaintiff's 135-acre parcel adjacent to the border; the Court ruled that the plaintiff presented a potentially viable physical-occupation taking claim)

9. B.A.M. Development, LLC v. Salt Lake County, 2008 WL 2726956, (Utah, July 15, 2008) (in an interesting interpretation of the U.S. Supreme Court's Dolan decision, the Supreme Court of Utah reversed and remanded the trial court's rejection of a Dolan taking claim, ruling that the Dolan rough proportionality test should be interpreted as a "rough equivalency test," meaning that (1) the exaction must be related in nature to the impacts of the proposed development and (2) the costs to the government, in dollars, of "assuaging the impact" of the development must be "about the same" as the cost to the developer of complying with the exaction; the Court remanded the case for reconsideration in light of these instructions).

10. City of Sherman v. Wayne, 2008 WL 3823981 (Tex.App., Aug 18, 2008) (in a rare example of a successful Lucas taking claim, the Texas Court of Appeals affirmed a trial court finding of a Lucas taking based on a jury determination that limiting an owner to use of the property for residential purposes resulted in a total taking because the cost of preparing lots for development exceeded their potential market value in this particular market; however, the Court of Appeals overruled the trial court in so far as it allowed the plaintiff to retain the property following the finding of a taking, ruling that on satisfaction of the judgment title to the property would vest in the city).

11. RAR Development Associates v. New Jersey Schools Construction Corp., 2008 WL 2663403 (NJ.App., July 9, 2008) (unpublished) (in a thoughtful and well-reasoned opinion, the New Jersey Appellate Division affirmed dismissal of a taking claim against the New Jersey School Construction Corporation based on pre-condemnation planning activity that led one of plaintiff's primary tenants to vacate the property even though the corporation ultimately abandoned its plan to condemn the property; first, the Court rejected the taking claim because the plaintiff building owner had a mere expectancy, not a legal entitlement, to its tenant's continued occupation of the property; second, the Court rejected the taking claim on the ground that, even if the lease space were regarded as the relevant parcel, the government's actions did not destroy the plaintiff's right to lease, possess, or otherwise use the leased space).

12. Rural Water Co., Inc. v. Zoning Board of Appeals of the Town of Ridgefield, 947 A.2d 944 (Ct., June 10, 2008) (the Connecticut Supreme Court affirmed a trial court ruling rejecting a taking claim under the U.S. and Connecticut Constitutions by a water company denied permission to develop a quarter-acre lot for residential purposes after the company voluntarily discontinued use of a water well on the property due to the presence of radon in the water; the Connecticut Supreme Court ruled that the plaintiff failed to establish that the restriction barred any reasonable use of the property because plaintiff did not produce expert testimony proving that continued use of the well as a water supply would present an unacceptable risk to public health; the Court also ruled that the plaintiff's Penn Central claim failed because the restriction did not interfere with the plaintiff's reasonable investment-backed expectation, given that (1) the property was a well lot when plaintiff purchased it and plaintiff had used the property for that

purpose for 20 years, and (2) plaintiff produced no economic evidence regarding the difference in the value of the property as a well lot and for residential development).

13. Florida Retail Federation, Inc. v. Attorney General of Florida, 2008 WL 2908003 (N.D.Fl., July 28, 2008) (in an ironic twist on the usual takings case, on a motion for a preliminary injunction, the Federal District Court for the Northern District of Florida rejected a takings challenge to a 2008 Florida law compelling employers to allow employees to keep guns secured in their vehicles in the work place parking lot, observing that the law merely provides "that, if a business chooses to provide parking, the business may not keep arms from being secured in a vehicle;" the Court also struck down a separate provision requiring businesses to allow their customers to keep guns in their cars on the ground that the provision rested on irrational distinctions between different types of businesses).

14. Midwest Retailer Assoc. Limited v. City of Toledo, 2008 WL 2588617 (N.D.Ohio, June 30, 2008) (in an interesting companion to the Florida gun case (see above) the Federal District Court for the Northern District of Ohio granted a preliminary injunction barring enforcement of a municipal regulation requiring store owners to install security cameras, ruling that plaintiffs were not likely to prevail on their claim that the ordinance resulted in a regulatory taking, but, if they succeeded in their argument that the cameras should be regarded as city property, they would likely prevail on their claim that the requirement regarding security cameras resulted in a permanent physical occupation taking under Loretto).

15. Richfield Landfield, Inc. v. State of Michigan, 2008 WL 2439892 (Mich.App., June 17, 2008) (unpublished) (in a complex case, the Michigan Court of Appeals, on the third appeal in this 17-year old case, based on regulatory restrictions on the operations of a sanitary landfill, again vacated the claims court's finding of liability and remanded the case for further proceedings; in an earlier ruling (Takings Snapshot, Vol. 80, March 6, 2006) the appeals court, in light of Lingle, vacated a finding of a taking based on a finding that the regulations were arbitrary and capricious and remanded for reconsideration in light of that decision; on remand, the claims court found a taking, concluding that Lingle was distinguishable on its facts and in any event should only be applied prospectively; in this subsequent appeal, the appeals court rejected the ruling of the claims court, stating that Lingle announced a broad legal principle that clearly precluded this claim and that the precedent set in Lingle must be applied retroactively to pending cases; addressing a parenthetical parcel issue, the appeals court emphasized that the economic impact of the regulation had to be evaluated on the basis of the parcel as a whole, that is, the entire landfill property, and not a portion of the property).

16. Township of Montville v. MCA Associates, L.P., 2008 WL 3822061 (NJ.App., Aug. 18, 2008) (in a novel takings case, the New Jersey Appellate Division rejected a land owner's effort to obtain additional compensation for a town's condemnation of property based on the enactment of state wetlands regulations; first, the Court ruled that the plaintiff was not entitled, in the context of this condemnation case, to bring a third party inverse condemnation claim against the State based on the wetlands law, because the town's declaration of a taking deprived plaintiff of title and eliminated its standing to bring an inverse condemnation claim; second, the Court rejected the argument that the owner was entitled to recover additional compensation based on the wetlands law, the requirements of which supposedly violated the terms of a consent decree

that the owner had earlier entered into with the state, because the consent decree by its terms did not protect the property owner from future regulatory requirements).

17. East First Street, LLC v. Board of Adjustment, 2008 WL 2567080 (La.App., June 6, 2008) (unpublished) (in an interesting application of the Supreme Court's Palazzolo decision, the Louisiana Court of Appeals, affirming a trial court ruling, rejected a taking claim based on a city's refusal to rezone property from residential to commercial use, ruling that the zoning in place at the time plaintiffs acquired the property represented a "background principle" of property law barring the claim).

18. Empress Casino Joliet Corporation v. Giannoulias, 2008 WL 2278889 (Ill. June 5, 2008) (the Supreme Court of Illinois rejected a taking claim based on state legislation imposing, for a 2-year period, a three percent surcharge on state-licensed river boat casinos with adjusted gross receipts of over $200 million, with the proceeds of the surcharge to be distributed to horse racing tracks within the state, on the ground that the Takings Clause does not apply to the power of taxation and regulatory actions requiring the payment of money are not takings).

19. Moldon v. County of Clark, 188 P.3d. 76 (Nev., July 24, 2008) (the Nevada Supreme Court, invoking the U.S. Supreme Court's 2003 decision in Brown v. Legal Foundation of Washington, ruled that a Nevada statute resulted in a taking by requiring that interest earned on condemnation deposits held by a district court clerk be dedicated to the local government's general fund).

20. Dubuc v. Department of Environmental Quality, 2008 WL 2744639 (Mich.App., July 15, 2008) (unpublished) (the Michigan Court of Appeals, affirming the trial court, ruled that the Michigan Department of Environmental Quality took plaintiffs' property by denying a permit to fill wetlands on a 1.73-acre lot in order to develop the property for single-family residential purposes; the Court rejected the Department's argument that the denominator for the purpose of accessing economic impact should include the entire collection of seventeen properties that plaintiffs previously owned in the vicinity; the Court emphasized that this is not a case in which an owner gradually sold of pieces of a larger parcel but instead the plaintiffs purchased and sold the other parcels, which were mostly non-contiguous, before purchasing the lot that was the subject of this case (apart from one other lot which plaintiffs still owned on which they had a personal residence); in rejecting the Department's proposed denominator the Court reasoned that "to accept defendant's argument, we would have to create a rule that the appropriate 'denominator portion' should include all parcels that the landowner ever owned in the area even if not at the same time;" applying the Penn Central factors, the Court ruled that the plaintiffs established a taking, notwithstanding the generality of the regulations and the fact that the wetlands restrictions were in place well before the plaintiffs purchased the property, given that similarly situated neighboring property owners had received wetlands permits and the restriction rendered the lot, which had a market value of $27,500 for development, "unmarketable").

21. Carney v. Attorney General, 898 N.E.2d 121 (Mass., July 15, 2008) (in a challenge to a ballot initiative aimed at banning parimutuel dog-racing, the Supreme Judicial Court of Massachusetts rejected the claim that the Attorney General erred in certifying that the measure was "not inconsistent with the right to receive compensation for private property appropriated to

public use;" the Court said that its responsibility in this case was not to definitively resolve a takings issue but rather to determine whether the Attorney General's determination was "reasonable" in light of the limited factual record and the presumption that the petition process should be implemented so as to support the people's prerogative to initiate and adopt laws; applying this deferential standard, the Court ruled that the Attorney General properly certified that the ballot petition would not result in a taking of plaintiffs' real property interest because the property would retain economic value for alternative uses; the Court also ruled that the Attorney General properly certified that the ballot petition would not result in a taking of plaintiffs' racing licenses, because the licenses did not represent protected property interests for the purpose of the Takings Clause given that they were non-exclusive, the government retained the authority to modify the program creating the licenses, and the plaintiffs were involved in a highly regulated industry).

22. People v. Marshall, 2008 WL 2487865 (Cal.App., June 3, 2008) (unpublished) (affirming a trial court ruling and implicitly rejecting the reasoning of the Georgia Supreme Court in Mann v. Georgia Department of Corrections (see Takings Snapshots, Vol. 88 December 19, 2007), the California Court of Appeals rejected a suit seeking to invalidate based on the Takings Clause a state law barring a convicted sex offender from residing within 2000 feet of a park, daycare center, or school, ruling that the plaintiff, who was living in a friend's home, lacked any protected property interest to support a taking claim, that the allegation that the law might interfere with plaintiff's future housing choices did not present a ripe claim, that the plaintiff would not be entitled under the Takings Clause to a determination that the law was unconstitutional as opposed to an award of compensation, and that "it is questionable whether the application of criminal law which results in a loss of property supports a constitutional takings claim").

23. City of Chicago v. Prologis, 890 NE.2d 639 (Ill.App., June 6, 2008) (the Appellate Court of Illinois, affirming a ruling by the trial court, ruled that the holders of TIF (tax increment financing) bonds were not entitled to compensation under the Takings Clause when the City of Chicago acquired land for airport expansion that included the redevelopment area for which the bonds had been sold, allegedly rendering the bonds valueless; observing that the bonds were not secured by the real property taken by the City, the Court ruled that the plaintiffs' loss was a mere consequential injury not within the scope of the Takings Clause).

24. Morris v. Chiang, 163 Cal.App.4th 753 (June 3, 2008) (affirming a trial court ruling, the California Court of Appeals rejected a claim that the California Unclaimed Property Law resulted in a taking by allowing the State to retain interest earned by the funds held in state custody; the Court decided that the rule that interest "follows principal," recognized by the U.S. Supreme Court in Phillips v. Washington Legal Foundation, does not apply in this case because title to the property vested in the State when it obtained possession of the unclaimed property, even though the State's interest was subject to defeasance if the original owner came forward to reclaim the property).

25. Coppoletta v. State of California, 2008 WL 2569456 (Cal.App., June 30, 2008) (unpublished) (a ruling by another District of the California Court of Appeals reaching the same result as the court in Morris v. Chiang (see above), based on essentially the same reasoning).

26. Dayspring Development, LLC v. City of Little Canada, 2008 WL 2494126 (Minn.App., June 24, 2008) (unpublished) (on appeal from the dismissal of a taking claim involving a city's review of a plat application on the ground that the city's ultimate approval of the application mooted the taking claim, the court of appeals reversed on the ground that the plaintiff was entitled to attempt to establish taking on a temporary takings theory).

27. Kamaole Pointe Development, LP v. County of Maui, 2008 WL 2622819 (D.Hawai'i, July 3, 2008) (the Federal District Court for Hawai'i, based on a comprehensive review of Lingle v. Chevron USA, and the impact of that decision on Nollan/Dolan claims, dismissed without prejudice plaintiff's takings claims based on a County inclusionary housing ordinance; the Court first rejected plaintiff's effort to evade the Williamson County state-litigation requirement by attempting to characterize the claim as a so-called "unconstitutional conditions claim;" second, viewing the claim as a traditional Nollan/Dolan claim subject to Williamson County, the Court dismissed the claim on the ground that the plaintiff was first required to seek relief in state court).

28. Rollins v. Blaine County, 2008 WL 2413168 (D.Idaho, June 12, 2008) (the Federal District Court for Idaho abstained from adjudicating takings and other constitutional challenges to a County's administration of its land use regulations based on the Pullman abstention doctrine, ruling that land use planning represents a sensitive area of social policy, the outcome of a parallel challenge to the land use regulations pending before the Idaho Supreme Court could affect the federal constitutional claims, and the outcome of the state court case was doubtful).

29. Willis v. BNSF Railway Corp., 531 Fed.3d 1282 (10th Cir., July 16, 2008) (the U.S. Court of Appeals for the Tenth Circuit, in an appeal from a District Court ruling dismissing takings claims based on ongoing challenges to a state condemnation proceeding, ruled that since the state court proceedings had been concluded during the course of the federal appeal the rulings in those proceedings now barred plaintiff from trying to re-litigate the same issues in federal court).

30. Gevman v. State of New York, 2008 WL 2433693 (N.D.N.Y., June 12, 2008) (the Federal District Court for the Northern District of New York dismissed a pro se taking claim arising from a city's sale of property, ruling that the claim was barred against the State of New York under the Eleventh Amendment and the claim against the city failed because the plaintiff was a mere contract vendee of the property allegedly taken and therefore lacked standing to prosecute the claim).

31. State of Indiana v. Dunn, 888 N.E.2d 858 (Ind.App., June 25, 2008) (reversing a trial court ruling, the Indiana Court of Appeals ruled that the state did not effect a taking by constructing a roadway median that cut off direct access to plaintiff's hotel from one direction, with the result that certain hotel guests had to use a circuitous route to gain access to the hotel; the opinion includes a comprehensive discussion of decisions from Indiana and other jurisdictions addressing the issue of when government action blocking or limiting highway access to private property constitutes a taking).

32. Anderson v. Village of Obetz, 2008 WL 3319285 (Ohio App., Aug 12, 2008) (the Court of Appeals of Ohio, affirming the decision by a magistrate judge, rejected a taking claim based on rezoning of a property to Community Facilities, which only permitted use of the property for schools and other public facilities (and for residential use on a grandfather basis); applying the Penn Central test, the Court concluded that "a loss of market value due to respondents' rezoning, without more, does not by itself constitute taking," plaintiff "is able to use his property for residential purposes and for any lawful purpose for which it was used under its previous zoning classification under a grandfathering provision," and the restrictions "substantially related to promoting the general welfare of the citizens" by implementing a plan designed to address changes based on increased pedestrian and vehicular traffic, continued development pressure and redevelopment opportunities).

33. Tobin v. Centre Township, 2008 WL 2917595, (Pa.Cmwlth., July 31, 2008) (the Commonwealth Court of Pennsylvania rejected a regulatory taking claim based on allegedly excessive development fees, ruling that the claim was not ripe because claimants had not pursued an available statutory procedure for obtaining adjustments to development fees and in any event, the fees did not rise to the level of a taking because, "At most, the 1990 fee schedule deprived Landowners of their ability to put their land to its most profitable use, but this is not a taking").

34. McCulloch v. Town of Milan, 2008 WL 2986257 (S.D.N.Y., July 17, 2008) (the Federal District Court for the Southern District of New York dismissed a taking claim based on plaintiff's failure to pursue available state procedures, specifically noting that the claim was subject to dismissal in federal court despite the fact that the claim was now barred in state court by the applicable statue of limitations).

35. Hartman v. Township of Readington, 2008 WL 2557544, (D.N.J., June 23, 2008) (the Federal District Court for the District of New Jersey, setting aside various procedural objections to plaintiffs' takings claims, ruled on the merits that plaintiffs failed to establish a taking under the Dolan rough proportionality test based on a township mandate that they preserve 107 acres of open space as a condition of approval for a 38 home, 75 acre subdivision; in reaching this conclusion the Court emphasized that the township's decision advanced the goal of the state development plan to combat urban sprawl).

36. Star Northwest Inc. v. City of Penmore, 2008 WL 2230036 (9th Cir., May 28, 2008) (unpublished) (the US Court of Appeals for the Ninth Circuit affirmed dismissal of a taking claim based on a city ordinance barring the operation of "card rooms," on the ground that the claim was not ripe for adjudication in the federal court, observing that "the [Supreme] Court has solidly rejected the argument that the ripeness rule is unfair because a claimant might be collaterally estopped from litigating its federal takings claim if it pursued state court remedies").

37. C.C.A. Associates v. United States, 2008 WL 2796396 (Fed.Cir., July 21, 2008) (unpublished) (in another takings case, rising from the Emergency Low Income Housing Preservation Act of 1987, the US Court of Appeals for the Federal Circuit reversed the finding of a taking based on the Court's landmark 2007 Cienega X decision and remanded the case for further proceedings consistent with that precedent).

38. McNeil v. United States, 2008 WL 2329337 (Fed.Cir., June 5, 2008) (unpublished) (affirming the claims court, the US Court of Appeals for the Federal Circuit dismissed plaintiff's claim that a levy imposed on his federal retirement annuity to collect back taxes resulted in a taking, ruling that since plaintiff alleged the levy was "wrongful," he could not assert a viable claim under the Takings Clause, which presupposes a valid governmental action).

39. Western Shoshone National Council v. United States, 2008 WL 2166051 (Fed.Cir., May 22, 2008) (affirming a ruling by the claims court, the U.S. Court of Appeals for the Federal Circuit rejected claims by a Western Shoshone tribe to $14 billion dollars in prejudgment interest allegedly due for the taking of Indian property in the 19th Century; while the Court recognized the Fifth Amendment requires payment of government compensation, including prejudgment interest, for the taking of fee title property established pursuant to a US treaty, it determined that the treaty at issue in this case, the Treaty of Ruby Valley, did not recognize that the Western Shoshone held a fee title interest).

40. Mekler v. City of New York, 2008 WL 2966034 (N.Y.Sup., Aug 4, 2008) (the New York Supreme Court (the state's trial division) rejected a taking claim by a landlord based on the City of New York's commencement of a proceeding to appoint a guardian ad litem for the tenant, which had the effect of delaying plaintiff's effort to execute a warrant of eviction based on non-payment of rent; the Court ruled that there was no physical-occupation taking because "the plaintiff here has not been forced to use the property in a way that was not contemplated when the eviction proceeding was stayed," and also rejected a claim under Penn Central on the ground that "a mere deprivation of a right to use and obtain a profit from property . . . is not sufficient to establish a taking," and "there is a strong public interest in not evicting an incapacitated person" from his home).

41. Fifty-Eight Limited Liability Co. v. Charter Township of Lyon, 2008 WL 2745980 (Mich.App., July 15, 2008) (unpublished) (the Michigan Court of Appeals, affirming the trial court, rejected a taking claim based on a township's refusal to rezone a 19-acre parcel from R-1 (Residential / Agriculture) to B-2 (Community Business), ruling that plaintiffs failed to present any material evidence that could preclude summary judgment for the township under Penn Central; the Court particularly emphasized that plaintiffs had not offered any admissible evidence on the value of the property with and without the regulatory restrictions).

42. Avery v. County of Santa Clara, 2008 WL 2878376 (Cal.App., July 28, 2008) (unpublished) (the California Court of Appeals affirmed the trial court's rejection of a taking claim based on the County's delay in processing an application to construct a cell tower and the County's revocation of a long-existing use permit for a commercial business on the ground that plaintiffs had not complied with various terms of the permit relating to parking, landscaping, and other matters; as to the cell tower, the Court stated "At most, [plaintiffs] had to wait a period of time for the approval of an application that allowed the replacement of a 35-foot cellular tower with a 76-foot tower. That delay – assuming it were characterized as such – was simply an incident of ownership that cannot be considered a taking in a constitutional sense;" as to the revocation of the permit, the Court stated the claim failed on the merits because the revocation never became effective and also was not ripe because the County Board of Supervisors granted an appeal from the revocation and therefore the County never reached a final decision on the

revocation issue; finally, the Court rejected a taking claim based on the theory that "the County failed to show that its actions 'advanced a significant government interest,'" ruling that the Supreme Court's Lingle decision eliminated this theory of taking liability).

43. Texas Bay Cherry Hill v. City of Fort Worth, 257 S.W. 2229748 (Tex.App., May 29, 2008) (affirming a trial court ruling, the Texas Court of Appeals rejected an inverse condemnation claim based on a city's alleged efforts, as part of an urban redevelopment program, to reduce the value of plaintiff's apartment building so the city could acquire the property at a lower cost; the Court ruled that since the redevelopment plan was never implemented there was no proof that the city's actions had any economic impact on plaintiff's property).

44. Grand Blanc Venture, LLC v. Charter Township of Grand Blanc, 2008 WL 2356366 (Mich.App., June 10, 2008) (unpublished) (affirming a trial court ruling, the Michigan Court of Appeals rejected a taking claim based on a township's refusal to rezone property from research and development to general community, ruling that plaintiffs failed to establish a taking under any of the applicable tests).

45. Gilmour Realty Inc. v. City of Mayfield Heights, 2008 WL 2625350 (Ohio, July 2, 2008) (the Ohio Supreme Court, reversing a decision by the Ohio Court of Appeals, ruled that an owner's claim of a taking based on rezoning of the property from commercial to residential use was not barred from filing suit seeking a writ of mandamus requiring the city to commence appropriations proceedings by the fact that the plaintiff was simultaneously pursuing an action seeking a declaratory judgment that the rezoning represented an unlawful taking).

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