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. Kafka v. Montana Dept. of Fish, Wildlife and Parks, 2008 WL 5413504 (Mt., Dec. 31, 2008) (in a tightly contested case, the Montana Supreme Court, affirming a trial court ruling, and over a lengthy and strenuous dissent by Justice James Nelson joined by two other members of the Court, rejected a takings challenge to a citizens ballot initiative, Initiative No. 143, that banned landowners from charging a fee to customers seeking to shoot "alternative livestock"; the stated goals of the initiative were to promote Montana's hunting heritage and to protect wild game populations from the spread of disease and hybridization; the Court ruled that (1) the initiative did not take the plaintiffs' licenses to maintain alternative livestock because the government-issued licenses did not represent private property; (2) a claim for lost goodwill and going-concern value cannot be brought under the Takings Clause; (3) plaintiffs' claims based on the alleged taking of their real property failed because plaintiffs did not demonstrate any diminution in their property values, and (4) the claims based on the alleged taking of the alternative livestock failed because even though the economic impact was severe, the investment-backed expectations and character factors weighed against the claims; Justice Nelson agreed that the initiative did not result in a taking of plaintiffs' real property but would have upheld the plaintiffs' claims based on takings of their licenses, goodwill and going-concern value, and their alternative livestock).

2. Buhmann v. State of Montana, 2008 WL 5414076 (Mt, Dec. 31, 2008) (in a companion case to Kafka (above), the Montana Supreme Court, with three members of the Court again dissenting, rejected takings claims based on Initiative No. 143, ruling that: (1) the issue of takings liability was properly resolved by the trial judge rather than a jury, (2) the Montana Constitution provides no broader protection against alleged regulatory takings than the U.S. Constitution, (3) the initiative did not deny plaintiffs all economically viable use of their livestock, obviating the need to consider whether the Lucas per se rule applies to personal property interests, (4) plaintiffs could not recover under the Takings Clause for injury to their intangible business interests, and (5) the initiative did not result in a regulatory taking of plaintiffs' livestock because, even though the plaintiffs suffered a serious economic loss, the character and investment expectations factors weighed in favor of the state).

3. The People of Bikini v. United States, 2009 WL 205021 (Fed. Cir., Jan. 29, 2009) (in a striking example of an apparent injustice without constitutional remedy, the U.S. Court of Appeals for the Federal Circuit denied relief to a group of Marshall islanders who alleged a taking based on damage to their land and a breach of the government's fiduciary duty as a

result of nuclear testing activity on Bikini and Enewetak atolls starting in the late 1940s; in response to an earlier set of takings claims brought by the plaintiffs in the 1980's, Congress enacted legislation and an agreement was made to establish a Nuclear Claims Tribunal to adjudicate claims and make awards; this new round of takings claims was brought as a result of Congress's failure to provide funds to pay awards made by the tribunal; the Federal Circuit ruled that the legislation and agreement establishing the tribunal completely stripped the U.S. Court of Federal Claims of jurisdiction and plaintiffs were therefore left to the tender mercies of Congress in their attempts to obtain whatever compensation they could).

4. McGuire v. United States, 550 F.3d 903 (9th. Cir., Dec. 24, 2008) (in an important decision dealing with the intersection of takings doctrine and bankruptcy law, the U.S. Court of Appeals for the Ninth Circuit ruled that a federal District Court sitting as a Bankruptcy Court lacks jurisdiction to entertain a bankruptcy debtor's Tucker Act claim against the United States; the Court reasoned that the Tucker Act only waives the sovereign immunity of the United States with respect to suits filed in the U.S. Court of Federal Claims and no other legislation grants the District Courts jurisdiction to hear Tucker Act cases; this decision conflicts with the Federal Circuit decision in Quality Towing v. United States (47 F.3d 1569 (Fed. Cir. 1995)), in which the Federal Circuit ruled that a bankruptcy debtor can bring a Tucker Act claim in a federal District Court sitting as a Bankruptcy Court).

5. Lindsey v. DeGroot, 898 N.E.2d 1251 (Ind.Ct. App., Jan. 12, 2009) (the Indiana Court of Appeals, affirming the trial court's grant of summary judgment to the defendant farmer, ruled that the Indiana Right to Farm Law did not result in a taking of the property rights of the farmer's neighbor by barring the neighbor from bringing a nuisance action based on injuries allegedly caused by the farmer's dairy operation; the Court disagreed with an Iowa Supreme Court decision upholding a taking claim under similar circumstances (Bormann v. Bd. of Supervisors in and for Kossuth County, 584 N.W.2d 309 (Iowa 1998)), and expressed agreement with two other state court decisions rejecting this type of claim (Moon v. North Idaho Farmers Ass'n, 96 P.3d 637 (Idaho 2004); and Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544 (Tex.App.2004)); the Court distinguished Bormann on the seemingly hyper-technical basis that the Iowa Supreme Court characterized the right to maintain a nuisance action as a type of easement, a characterization that apparently had no support in Indiana law).

6. St. John's River Management District v. Koontz, 2009 WL 47009 (Fl. App., Jan. 9, 2009) (thoughtfully reprising an issue addressed by Justice Antonin Scalia in his 2000 dissent from denial of certiorari in the case of Lambert v. City & County of San Francisco, the Florida Court of Appeals, in a 2-to-1 decision, held that a water district was liable for a taking based on certain off-site mitigation requirements that the district unsuccessfully sought to impose on the plaintiff as a condition of a permit to develop wetlands; the Court ruled that the Nolan/Dolan tests apply in a situation such as this where the government seeks to impose exactions, but the landowner refuses to accept the exactions and the government ultimately denies the development application altogether; the lengthy dissent argued that the Nolan/Dolan tests only apply when exactions are actually imposed, and not when the development application is rejected based on the owner's refusal to accept the exactions).

7. Cary v. United States, 2009 WL 103531 (Fed. Cir., Jan. 16, 2009) (in a takings case tailor-

made for a law school exam, the U.S. Court of Appeals for the Federal Circuit affirmed the claims court's rejection of a taking claim by private homeowners who were neighbors of a National Forest in California and who alleged that the Forest Service's policy of fire suppression led to a major conflagration that invaded private lands and consumed the plaintiffs' homes; the case arose from the destructive 2003 Cedar Fire in the Cleveland National Forest near San Diego, which was ignited by a deer hunter's use of a rescue flare after he became lost in the woods; the Federal Circuit ruled that the claim failed because (1) the plaintiffs did not allege that the destruction of their homes was the "likely, foreseeable" result of Forest Service policies, and (2) in any event, the fire did not "preempt the owners' right to enjoy their property for an extended period of time," because plaintiffs were free to rebuild after the fire).

8. Shaw v. County of Santa Cruz, 2008 WL 5274617 (Cal. App., Dec. 19, 2008) (affirming the trial court, the California Court of Appeals ruled that a county's legally erroneous denial of an electrical connection to permit plaintiffs to operate a well on their property did not constitute a taking under the California Constitution; first, the Court ruled that the plaintiffs failed to establish a taking under either Penn Central or Lucas; second, the Court rejected the plaintiffs' claim based on the California Supreme Court's decision in Landgate, which held that an assertion of authority, whether or not erroneous, results in a taking if it fails to substantially advance a legitimate government interest; the Court raised the question whether the U.S. Supreme Court decision in Lingle effectively overruled Landgate, but did not decide the question, because it concluded that the county's assertion of regulatory authority "was plausible and the result of a good faith dispute").

9. Resource Investments, Inc. v. United States, 2009 WL 188044 (Ct.Fed.Cls., Jan. 23, 2009) (in an astonishingly prolix opinion, the U.S. Court of Federal Claims ruled that it could not grant summary judgment for either side in a takings action against the United States based on the Army Corps of Engineers's erroneous assertion of jurisdiction and denial of a permit to construct a solid waste facility on a 320-acre property that included federal jurisdictional wetlands; the plaintiff asserted three theories of liability, that the regulatory restriction resulted in a Lucas taking, the plaintiffs were entitled to recover on an "extraordinary delay theory," and the regulatory restrictions resulted in a taking under Penn Central; as to the Lucas claim, the Court held that elimination of profitable land uses, not the destruction of all property value, was the basic test for liability under Lucas, and ruled that plaintiffs were entitled to recovery under that interpretation of the Lucas test, but that disputed issues of fact concerning "causation," that is, whether state and local government regulatory decisions, as opposed to the actions of the Army Corps of Engineers, blocked plaintiffs' development of the property, precluded a final ruling on the claim; as to the "extraordinary delay" claim, the court ruled that numerous factual disputes relating to whether there was any delay attributable to government action, and if so, whether it was unreasonable or based on bad faith, precluded summary judgment for either side; and as to the Penn Central claim, the Court concluded that the economic impact factor supported the plaintiff but said disputed issues of fact precluded a determination as to whether the expectations factor or the character factor weighed in favor of the plaintiff or the government).

10. Aloisi v. United States, 85 Fed. Cl. 84 (Dec. 19, 2008) (in a decision pointing in a quite

different direction from the decision in Resource Investments (above), the U.S. Court of Federal Claims rejected a claim by miners that the U.S. Forest Service took their mining rights by engaging in protracted 43-month consultations with the U.S. Fish and Wildlife Service over the potential impacts of a proposed mining operation on the endangered spotted owl; first, the Court concluded that the claim was not ripe because the plaintiffs never filed a formal application with the Forest Service to conduct mining operations; second, the Court rejected the claim that the allegedly lengthy bureaucratic delay constituted a temporary taking, observing that the plaintiffs failed to demonstrate that (1) the Forest Service acted in bad faith or (2) the delay was unreasonable, given the numerous precedents rejecting takings claims based on even more extensive delays, the fact that the plaintiffs contributed to the delays by failing to submit necessary materials, and the complexity of this particular regulatory review process).

11. McAllister v. California Coastal Commission, 169 Cal.App.4th 912 (Cal. App., Dec. 30, 2008) (the California Court of Appeals, reversing a trial court decision upholding a California Coastal Commission permitting action, ruled that the Commission improperly authorized development in an ecologically sensitive area of the coastal zone: in the takings portion of the case, the Court rejected the Commission's argument that its decision to permit development was justified to avoid takings liability, as permitted under the California Coastal Commission Act; the Court concluded that the administrative record contained no indication that the Commission's decision to approve the development was actually motivated by a concern about potential takings liability; the Court also ruled that the Commission failed to make the factual findings necessary to support the conclusion that not allowing the development would have resulted in takings liability).

12. Arcadia Development Co. v. City of Morgan Hill, 86 Cal. Rptr. 3rd. 598 (Cal. App., Dec. 16, 2008) (in a particularly thoughtful opinion, reversing the trial court's dismissal of a taking (and equal protection) claim based on the applicable statute of limitations, the California Court of Appeals ruled that plaintiffs' cause of action challenging the city's decision to extend by ten years an earlier regulatory limit on density of development that was supposed to last twenty years accrued upon the date of enactment of the extension rather than when the original restriction was put in place, the Court reasoned that the city's decision to extend the restriction "changed the impact of the restriction" upon plaintiff's property based upon circumstances that existed when the decision was made).

13. Crosby v. Pickaway County General Health District, 2008 WL 5169159 (6th Cir., Dec. 8, 2008) (in a bizarre application of the Williamson County doctrine, the U.S. Court of Appeals for the Sixth Circuit ruled that property owners could proceed in federal District Court with a taking claim against a county health district based on the district's revocation of a permit to install a sewage system for a private residence; the state court had dismissed a state inverse condemnation action on the ground that the suit was not ripe because plaintiffs had not exhausted available administrative remedies; the Sixth Circuit ruled that the federal claim was ripe in federal court because the claim met a (different?) federal finality ripeness standard and because the state court's dismissal of the taking claim (even if on ripeness grounds) represented a state denial of compensation sufficient to satisfy the second prong of Williamson County).

14. Gilmour Realty Inc. v. Mayfield Heights, 2009 WL 41856 (Ohio App., Jan. 7, 2009) (on remand from the Ohio Supreme Court, which reversed the earlier dismissal of this takings suit on procedural grounds (see Takings Net Vol. 91, Sept. 2, 2008), the Ohio Court of Appeals rejected a taking claim based on the city's decision to rezone two parcels from commercial to residential use; the two parcels were adjacent to plaintiff's existing mortgage brokerage business and plaintiff had acquired the two parcels with the goal of expanding its business; the Court of Appeals ruled that the plaintiff failed to submit admissible evidence demonstrating "that the rezoning of the two parcels resulted in any cognizable detrimental economic impact or further interfered with any distinct investment-backed expectations").

15. Duncan v. Village of Middlefield, 2008 WL 5157846 (Ohio, Dec. 4, 2008) (affirming a lower court decision, the Ohio Supreme Court rejected a taking claim based on alleged delay in the issuance of zoning and occupancy permits for a planned tavern and pool hall; the Court ruled that the plaintiff failed to demonstrate the kind of "extraordinary delay" necessary to support a taking claim given that, among other things, most of the delay was caused by plaintiffs' own missteps in the application process and the delay imposed no economic harm on plaintiff).

16. Chapel Hill Title and Abstract Company, Inc. v. Town of Chapel Hill, 669 SE 2d. 286 (N.C., Dec. 12, 2008) (on appeal from a North Carolina Court of Appeals decision ruling that plaintiff was neither entitled to a variance nor had suffered a taking (see Takings Net Vol. 90, June 13, 2008), the North Carolina Supreme Court ruled that the municipal zoning board of adjustment improperly rejected a variance application for a single family residence where the zoning restriction, in conjunction with a private restrictive covenant on the property, prevented any development of the property; the Court remanded the case with instructions that the requested variance be issued; one member of the panel filed a concurring opinion asserting that plaintiffs were entitled to a variance, or if they did not receive a variance, to financial compensation under the Takings Clause).

17. Collins v. Historic District Commission of Carver, 897 NE 2d. 1281 (Mass. App. Ct., Dec.19, 2008) (reversing the trial court's finding of a temporary taking based on historic district regulations, the Massachusetts Court of Appeals ruled that the town's actions, including the town historic commission's refusal to issue a certificate of appropriateness for plaintiff's proposed construction of a single-family home within the historic district, did not amount to a taking during the period leading up to the city's ultimate decision to acquire the property through eminent domain; the appeals court ruled that the trial court erred in finding a physical taking and that there was no basis for finding a regulatory taking because the denial of the certificate of appropriateness did not deny the owner all economically viable use of the property).

18. Pfaff v. Washington, 2008 WL 5142805 (W. Dist. Wash., Dec. 8, 2008) (the federal District Court for the Western District of Washington rejected takings claims by recipients and providers of medical services alleging that the government's redefinition of reimbursable services under the Medicaid program resulted in a taking; as to the service recipients, the Court ruled that the public benefits constituted property but these plaintiffs had not suffered a taking because there was no evidence that they suffered a reduction in benefits; as to the service

providers, the Court rejected the taking claim on the ground that these plaintiffs had no constitutional right to provide any particular level of medical services).

19. Time Out, L.L.C. v. New Buffalo Township 2009 WL 50065 (Mich. App., Jan. 8, 2009) (affirming a trial court ruling, the Michigan Court of Appeals rejected a taking claim based on a township's insistence that an owner remove trash from his property as a condition of receiving a special use permit; the Court ruled that the claim was not ripe because the condition was never implemented and, in any event, the condition would not have risen to the level of a taking; the appeals court also rejected a taking claim based on alleged delays in the processing of a permit application, ruling that mere regulatory delays do not support a valid taking claim).

20. Harbor Lands, L.P. v. City of Blaine, 2008 WL 5130049 (W.D. Wash, Dec. 5, 2008) (the federal District Court for the Western District of Washington ruled that a federal taking claim based on a municipality's alleged taking of a right-of-way and the alleged flooding of plaintiff's property was not ripe because the plaintiff had not sought compensation through the available state procedures; the Court also ruled that the appropriate remedy in these circumstances was for the District Court to remand the taking claim to state court, rather than to dismiss the claim).

21. Collins v. Monroe County, 2008 WL 5412010 (Fl. App., Dec. 31, 2008) (reversing the trial court's dismissal of plaintiffs' takings claims based on the applicable statute of limitations, the Florida Court of Appeals ruled that plaintiffs' claims were not facial claims that accrued upon enactment of the county comprehensive plan but instead represented as applied claims that accrued upon plaintiffs' application for a so-called Beneficial Use Determination under the county plan).

22. Shands v. City of Marathon, 2008 WL 5412069 (Fl. App., Dec. 31, 2008) (in a companion to the Collins case (above), the Florida Court of Appeals reversed a trial court's dismissal of plaintiffs' taking claim based on the applicable statute of limitations; the trial court had construed plaintiffs' suit as presenting a facial claim but the Court of Appeals ruled that the plaintiffs were actually asserting an as applied claim and therefore the suit was not barred by the statute of limitations).

23. Leduc Inc. v. Charter Township of Lyon, 2008 WL 5382922 (Mich. App., Dec. 23, 2008) (unpublished) (affirming the trial court, the Michigan Court of Appeals rejected a taking claim based on a township's refusal to rezone property for higher density residential use, observing, among other things, that (1) "zoning regulations are ubiquitous in nature and all property owners bear some burden and some benefit under these schemes," (2) plaintiff failed to demonstrate serious economic harm that was functionally equivalent to a physical invasion because they merely showed that the current use of the property (as a golf course) had become unprofitable, and (3) the plaintiff was aware of the low-density zoning restrictions when it acquired the property).

24. 9th & 10th Street LLC v. Bloomberg, 2008 WL 5375238 (N.Y. Sp. Ct., Dec. 5, 2008) (the New York Supreme Court trial division dismissed a taking claim based on designation of a Manhattan building as a historic landmark on the ground that the claim was not ripe, given that

the owner had not filed an application with the Landmarks Commission to determine what uses of the property would be prohibited as a result of the designation).

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